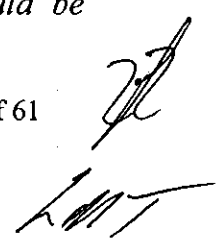


which should render their decision on the complaint without undue delay”.

It is useful, finally, to refer to the decision of the Constitutional Court of South Africa in **Zondi v MEC for Traditional and Local Government Affairs and Others 2005 (3) SA 589 (CC)**. The Court found that certain provisions of the Pound Ordinance of 1947 of KwaZulu-Natal which allowed landowners to bypass the courts and recover damages against the owners of trespassing animals were inconsistent with section 34 of the Constitution which guarantees the right of access to courts.

At paragraph 82 of the judgement, Ngcobo J. made the following pertinent observations:

“The right of access to courts is an aspect of the rule of law. And the rule of law is one of the foundational values on which our constitutional democracy has been established. In a constitutional democracy founded on the rule of law, disputes between the state and its subjects, and amongst its subjects themselves, should be



adjudicated upon in accordance with law. The more potentially divisive the conflict is, the more important that it be adjudicated upon in court. That is why a constitutional democracy assigns the resolution of disputes to "a court or, where appropriate, another independent and impartial tribunal or forum". It is in this context that the right of access to courts guaranteed by section 34 of the Constitution must be understood".

The right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation is another principle well recognized and entrenched in law.

Any existing ouster clause in terms such as "*the decision of the Minister shall not be subject to appeal or review in any court*" prohibits the court from re-examining the decision of the Minister if the decision reached by him was one which he had jurisdiction to make. Any decision affecting the legal rights of individuals arrived at by a procedure which offended against natural justice was outside the jurisdiction of the decision-making authority so that, if the Minister did not comply with the rules of natural justice, his

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decision was *ultra vires* or without jurisdiction and the ouster clause did not prevent the Court from enquiring whether his decision was valid or not

– vide **Attorney-General of the Commonwealth of the Bahamas v Ryan (1980) A.C. 718.**

Lord Diplock for the Board of the Judicial Committee of the Privy Council stated in that case as follows:

“It has long been settled law that a decision affecting the legal rights of an individual which is arrived at by a procedure which offends against the principles of natural justice is outside the jurisdiction of the decision-making authority. As Lord Selborne said as long ago as 1885 in Spackman v Plumstead District Board of Works (1885) 10 App.Cas.229,240: “There would be no decision within the meaning of the statute if there were anything...done contrary to the essence of justice”. See also Ridge v. Baldwin [1964] A.C.40”.

Moreover, in **Jackson v Attorney-General UKHL 56 (2006) 1 A.C. 262,**

Baroness Hale made the following observations at paragraph 159:

“The courts, will, of course, decline to hold that Parliament has interfered with fundamental rights unless it has made its intentions crystal clear. The courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny”.

We turn now to consider the relevant provisions of Amendment 17. It is quite clear that the provisions of section 18 (1) and (9) dealing with the constitutional right to the protection of law and to a fair hearing have been taken away in relation to land acquired under section 16B (2) (a). Indeed,

the Supreme Court of Zimbabwe explicitly acknowledges this in its judgement, cited above, when it stated:

“By the clear and unambiguous language of s 16B (3) of the Constitution, the Legislature, in the proper exercise of its powers, has ousted the jurisdiction of courts of law from any of the cases in which a challenge to the acquisition of agricultural land secured in terms of s 16B (2) (a) of the Constitution could have been sought. The right to protection of law for the enforcement of the right to fair compensation in case of breach by the acquiring authority of the obligation to pay compensation has not been taken away. The ouster provision is limited in effect to providing protection from judicial process to the acquisition of agricultural land identified in a notice published in the Gazette in terms of s 16B (2) (a). An acquisition of the land referred to in s 16B (2) (a) would be a lawful acquisition. By a fundamental law the Legislature has unquestionably said that such an acquisition shall not be challenged in any court of law. There cannot be any clearer language by which the jurisdiction of the courts is excluded”.

Learned Agent for the Respondent seized upon the following statement of

the Supreme Court at page 38 of its judgement to argue that an individual whose property has been acquired can proceed by judicial review:

“Section 16B (3) of the Constitution has not however taken away for the future the right of access to the remedy of judicial review in a case where the expropriation is, on the face of the record, not in terms of s 16B (2) (a). This is because the principle behind s 16B (3) and s 16B (2) (a) is that the acquisition must be on the authority of law. The question whether an expropriation is in terms of s 16B (2) (a) of the Constitution and therefore an acquisition within the meaning of that law is a jurisdictional question to be determined by the exercise of judicial power. The duty of a court of law is to uphold the Constitution and the law of the land. If the purported acquisition is, on the face of the record, not in accordance with the

terms of s 16B (2) (a) of the Constitution a court is under a duty to uphold the Constitution and declare it null and void. By no device can the Legislature withdraw from the determination by a court of justice the question whether the state of facts on the existence of which it provided that the acquisition of agricultural land must depend existed in a particular case as required by the provisions of s 16B (2) (a) of the Constitution”.

No doubt there is a remedy but only in respect of the payment of compensation under section 16B (2) (b) but judicial review does **not** lie at all in respect of land acquired under section 16B (2) (a) (i) and (ii), as correctly submitted by learned counsel for the Applicants. Indeed, the Applicants’ land had been acquired under section 16B (2) (a) (i) and (ii). It is significant that, whereas under section 16B (2) (a) (iii), mention is made of the acquiring authority i.e. a Minister whose decision can admittedly be subject to judicial review, no such mention is made in respect of section 16B (2) (a) (i) and (ii) so that in effect the Applicants cannot proceed by judicial review or otherwise. This is why specific reference is made to the fact that the provisions of section 18 (1) and (9) do not apply in relation to

land acquired under section 16B (2) (a). The Applicants have been expressly denied the opportunity of going to court and seeking redress for the deprivation of their property, giving their version of events and making representations.

We are, therefore, satisfied that the Applicants have established that they have been deprived of their agricultural lands without having had the right of access to the courts and the right to a fair hearing, which are essential elements of the rule of law, and we consequently hold that the Respondent has acted in breach of Article 4 (c) of the Treaty.

VI RACIAL DISCRIMINATION

The other issue raised by the Applicants is that of racial discrimination. They contended that the land reform programme is based on racial discrimination in that it targets white Zimbabwean farmers only. The Applicants further argue that Amendment 17 was intended to facilitate or implement the land reform policy of the Government of Zimbabwe based on racial discrimination. This issue is captured in the Applicants' Heads of Arguments, paragraph 175, in the following terms:

“That the actions of the Government of Zimbabwe in expropriating land for resettlement purposes has been based solely or primarily on consideration of race and ethnic origin... It is being directed at white farmers... In reality it was aimed at persons who owned land because they were white. It mattered not whether they acquired the land during the colonial period or after independence”.

The Applicants further argued at paragraph 128 of the Heads of Argument that:

“The evidence presented to this Tribunal shows as a fact that the decision as to whether or not agricultural raw land in Zimbabwe is to be expropriated is determined by the race or country of origin of the registered owner. In terms of a policy designed to redress the ownership of land created during the colonial period, the GoZ has determined that no person of white colour or European origin was to retain ownership of a farm, and all such farms were to be expropriated. The fact that this could not be done through the normal procedures between 2000 and 2005 led to the enactment of



111

Amendment 17, which was the ultimate legislative tool used by the GoZ to seize all the white owned farms”.

The Applicants went on to argue that, even if Amendment 17 made no reference to the race and colour of the owners of the land acquired, that

does not mean that the legislative aim is not based on considerations of race or colour since only white owned farms were targeted by the Amendment. There is a clear legislative intent directed only at white farmers. According to the Applicants, the Amendment strikes at white farmers only and no other rational categorization is apparent therein. The Applicants further contended that the targeted farms were expropriated and given to certain beneficiaries whom they referred to as “chefs” or a class of politically connected beneficiaries. These were, in the words of the Applicants, *“senior political or judicial, or senior members of the armed services”*.

It is on the basis of those arguments that the Applicants, therefore, submitted in conclusion that the Respondent is in breach of Article 6 (2) of

the Treaty, prohibiting discrimination, by enacting and implementing Amendment 17.

The Respondent, for its part, refuted the allegations by the Applicants that the land reform programme is targeted at white farmers only. It argued

instead that the programme is for the benefit of people who were disadvantaged under colonialism and it is within this context that the Applicants' farms were identified for acquisition by the Respondent. The farms acquired are suitable for agricultural purposes and happen to be largely owned by the white Zimbabweans. In implementing the land reform programme, therefore, it was inevitable that the people who were likely to be affected would be white farmers. Such expropriation of land under the Programme cannot be attributed to racism but circumstances brought about by colonial history. In any case, according to the Respondent, not only lands belonging to white Zimbabweans have been targeted for expropriation but also those of the few black Zimbabweans who possessed large tracts of land. Moreover, some white farmers have been issued with offer letters and 99-year leases in respect of agricultural

11.

lands. The Respondent has, therefore, not discriminated against white Zimbabwean farmers and has not acted in breach of Article 6 (2) of the Treaty.

The Tribunal has to determine whether or not Amendment 17 discriminates against the Applicants and as such violates the obligation that the Respondent has undertaken under the Treaty to prohibit discrimination.

It should first be noted that discrimination of whatever nature is outlawed or prohibited in international law. There are several international instruments and treaties which prohibit discrimination based on race, the most important one being the United Nations Charter, which provides in Article 1 (3) that one of its purposes is:

“To achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human

rights and fundamental freedoms for all without distinction as to race, sex, language or religion". (emphasis supplied).

There is also the Universal Declaration of Human Rights which provides in Article 2 as follows:

"Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". (emphasis supplied).

Moreover, Article 2 (1) of the International Covenant on Civil and Political Rights and Article 2 (2) of the International Covenant on Economic, Social and Cultural Rights prohibit racial discrimination, respectively, as follows:

“Each State party to the present Covenant undertakes to respect and ensure to all individuals within its territory without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

“The States parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religious, political or other opinion, national or social origin, property, birth or other status”. (emphasis supplied).

The above provisions are similar to Article 2 of the African Charter on Human and Peoples’ Rights (African Charter) and Article 14 of the European Convention on Human Rights.

Discrimination on the basis of race is also outlawed by the Convention On the Elimination of All Forms of Racial Discrimination (the Convention). It is worth noting that the Respondent has acceded to both Covenants, the African Charter and the Convention and, by doing so, is under an

obligation to respect, protect and promote the principle of non-discrimination and must, therefore, prohibit and outlaw any discrimination based on the ground of race in its laws, policies and practices.

Apart from all the international human rights instruments and treaties, the Treaty also prohibits discrimination. Article 6 (2) states as follows:

“SADC and Member States shall not discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture, ill health, disability or such other ground as may be determined by the Summit” (emphasis supplied).

This Article, therefore, enjoins SADC and Member States, including the Respondent, not to discriminate against any person on the stated grounds, one of which is race.

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The question then is, what is racial discrimination? It is to be noted that the Treaty does not define racial discrimination or offer any guidelines to that effect. Article 1 of the Convention is as follows:

“Any distinction, exclusion, restriction or preference based on race, colour, descent, or natural or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”. (the emphasis is supplied).

Moreover, the Human Rights Committee in its General Comment No. 18 on non-discrimination has, in paragraph 7, defined discrimination as used in the Covenant on Civil and Political Rights as implying *“any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by*

all persons, on an equal footing, of all rights and freedoms". (the underlining is supplied).

The Committee on Economic, Social and Cultural Rights, for its part, in its General Comment No. 16 on the equal right of men and women to the equality of all economic, social and cultural rights underlined at paragraph 13 that "*guarantees of non-discrimination and equality in international human rights treaties mandate both de facto and de jure equality. De jure*

(or formal) equality and de facto (or substantive) equality are different but interconnected concepts".

The Committee further pointed out that formal equality assumes that equality is achieved if a law or policy treats everyone equal in a neutral manner. Substantive equality is concerned, in addition, with the effects of laws, policies and practices in order to ensure that they do not discriminate against any individual or group of individuals.

The Committee went on to state at paragraphs 12 and 13 respectively that:

“Direct discrimination occurs when a difference in treatment relies directly and explicitly on distinctions based exclusively on sex and characteristics of men or women, which cannot be justified objectively”.

“Indirect discrimination occurs when a law, policy or programme does not appear to be discriminatory but has a discriminatory effect when implemented”. (Emphasis supplied).

It is to be noted that what the Committee is stating about direct and indirect discrimination in the context of sex applies equally in the case of any other prohibited ground under the Covenant such as race.

The question that arises is whether Amendment 17 subjects the Applicants to any racial discrimination, as defined above. It is clear that the Amendment affected all agricultural lands or farms occupied and owned by the Applicants and all the Applicants are white farmers. Can it then be said that, because all the farms affected by the Amendment belong to white

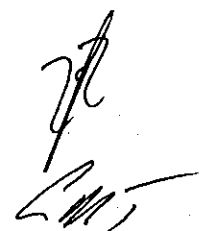
farmers, the Amendment and the land reform programme are racially discriminatory?

We note here that there is no explicit mention of race, ethnicity or people of a particular origin in Amendment 17 as to make it racially discriminatory. If any such reference were made, that would make the provision expressly discriminatory against a particular race or ethnic group. The effect of such reference would be that the Respondent would be in breach of its obligations under the Article 6 (2) of the Treaty.

The question is whether, in the absence of the explicit mention of the word "race" in Amendment 17, that would be the end of the matter. It should be recalled that the Applicants argued that, even if Amendment could be held not to be racially discriminatory in itself, its effects make it discriminatory because the targeted agricultural lands are all owned by white farmers and that the purpose of Amendment 17 was to make it apply to white farmers only, regardless of any other factors such as the proper use of their lands, their citizenship, their length of residence in Zimbabwe or any other factor other than the colour of their skin.

Since the effects of the implementation of Amendment 17 will be felt by the Zimbabwean white farmers only, we consider it, although Amendment 17 does not explicitly refer to white farmers, as we have indicated above, its implementation affects white farmers only and consequently constitutes indirect discrimination or *de facto* or substantive inequality.

In examining the effects of Amendment 17 on the applicants, it is clear to us that those effects have had an unjustifiable and disproportionate impact upon a group of individuals distinguished by race such as the Applicants. We consider that the differentiation of treatment meted out to the Applicants also constitutes discrimination as the criteria for such differentiation are not reasonable and objective but arbitrary and are based primarily on considerations of race. The aim of the Respondent in adopting and implementing a land reform programme might be legitimate if and when all lands under the programme were indeed distributed to poor, landless and other disadvantaged and marginalized individuals or groups.

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We, therefore, hold that, implementing Amendment 17, the Respondent has discriminated against the Applicants on the basis of race and thereby violated its obligation under Article 6 (2) of the Treaty.

We wish to observe here that if: (a) the criteria adopted by the Respondent in relation to the land reform programme had not been arbitrary but reasonable and objective; (b) fair compensation was paid in respect of the expropriated lands, and (c) the lands expropriated were indeed distributed to poor, landless and other disadvantaged and marginalized individuals or groups, rendering the purpose of the programme legitimate, the differential treatment afforded to the Applicants would not constitute racial discrimination.

We can do no better than quote in this regard what the Supreme Court of Zimbabwe stated in **Commercial Farmers Union v Minister of Lands** 2001 (2) SA 925 (ZSC) at paragraph 9 where it dealt with the history of land injustice in Zimbabwe and the need for a land reform programme under the rule of law:

"We are not entirely convinced that the expropriation of white farmers, if it is done lawfully and fair compensation is paid, can be said to be discriminatory. But there can be no doubt that it is unfair discrimination...to award the spoils of expropriation primarily to ruling party adherents".

VII COMPENSATION

The Applicants have also raised the issue of compensation. Learned Counsel for the Applicants contended that expropriation of their lands by the Respondent was not accompanied by compensation and that failure to do so is a breach of the Respondent's obligations under international law and the Treaty. We note that the Respondent does not dispute the fact that

the Applicants are entitled to compensation. It, however, argued that the independence agreement reached in 1978 in London provided that payment of compensation for expropriated land for resettlement purposes would be paid by the former colonial power, Britain.

As regards the question of who should pay compensation, ordinarily in international law it is the expropriating state that should pay compensation. This would mean that, respecting the matter at hand, the Respondent should shoulder the responsibility of paying compensation to the Applicants for their expropriated lands. We note, however, that section 16B (2) (b) of the Amendment provides as follows:

"No compensation shall be payable for land referred to in paragraph (a) except for any improvements effected on such land before it is acquired".

This provision excludes payment of compensation for land referred to in paragraph (a), (i) and (ii) which is agricultural land that has been acquired for resettlement purposes. It is difficult for us to understand the rationale behind excluding compensation for such land, given the clear legal position in international law. It is the right of the Applicants under international law to be paid, and the correlative duty of the Respondent to pay, fair compensation.

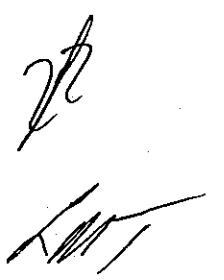
Moreover, the Respondent cannot rely on its national law, its Constitution, to avoid an international law obligation to pay compensation as we have already indicated above.

Similarly, in the present case, the Respondent cannot rely on Amendment 17 to avoid payment of compensation to the Applicants for their expropriated farms. This is regardless of how the farms were acquired in the first place, provided that the Applicants have a clear legal title to them.

We hold, therefore, that fair compensation is due and payable to the Applicants by the Respondent in respect of their expropriated lands.

VIII CONCLUSIONS

For the reasons given, the Tribunal holds and declares that:

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- (a) by unanimity, the Tribunal has jurisdiction to entertain the application;
- (b) by unanimity, the Applicants have been denied access to the courts in Zimbabwe;
- (c) by a majority of four to one, the Applicants have been discriminated against on the ground of race, and
- (d) by unanimity, fair compensation is payable to the Applicants for their lands compulsorily acquired by the Respondent.

The Tribunal further holds and declares that:

- (1) by unanimity, the Respondent is in breach of its obligations under Article 4 (c) and, by a majority of four to one, the Respondent is in breach of its obligations under Article 6 (2) of the Treaty;
- (2) by unanimity, Amendment 17 is in breach of Article 4 (c) and, by a majority of four to one, Amendment 17 is in breach of Article 6 (2) of the Treaty;
- (3) by unanimity, the Respondent is directed to take all necessary measures, through its agents, to protect the possession, occupation and ownership of the lands of the Applicants, except for Christopher

Mellish Jarret, Tengwe Estates (Pvt) Ltd. and France Farm (Pvt) Ltd. that have already been evicted from their lands, and to take all appropriate measures to ensure that no action is taken, pursuant to Amendment 17, directly or indirectly, whether by its agents or by others, to evict from, or interfere with, the peaceful residence on, and of those farms by, the Applicants, and

- (4) by unanimity, the Respondent is directed to pay fair compensation, on or before 30 June 2009, to the three Applicants, namely, Christopher Mellish Jarret, Tengwe Estates (Pvt) Ltd. and France Farm (Pvt) Ltd.

By a majority of four to one, the Tribunal makes no order as to costs in the circumstances.

Delivered in open court thisDay of....., at Windhoek in the Republic of Namibia.

.....

H.E Justice Ariranga Govindasamy Pillay

PRESIDENT

.....

H.E Justice Isaac Jamu Mtambo, SC

MEMBER

.....

H.E Justice Dr Luis Antonio Mondlane

MEMBER





H.E Justice Dr Rigoberto Kambovo

MEMBER



H.E Justice Dr Onkemetse B. Tshosa

MEMBER

D 130

**IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY TRIBUNAL
(HELD AT WINDHOEK)**

Case No. SADC (T)

/2011

WILLIAM MICHAEL CAMPBELL

First applicant

MIKE CAMPBELL (PVT) LTD

Second applicant

LUKE MUNYANDU TEMBANI

Third applicant

and

SUMMIT OF HEADS OF STATE OR GOVERNMENT OF SADC

First respondent

COUNCIL OF MINISTERS OF SADC

Second respondent

REPUBLIC OF ZIMBABWE

Third respondent

APPLICATION

Norman Tjombe Law Firm, The Village, 18 Liliencron Street, Windhoek, Namibia
For the Applicants

Summit of Heads of State or Government of SADC, SADC Headquarters, Plot No 54385, Gaborone, Botswana
First Respondent

Council of Ministers of SADC, SADC Headquarters, Plot No 54385, Gaborone, Botswana
Second Respondent

Republic Of Zimbabwe, Embassy of Zimbabwe, Windhoek, Namibia
Third Respondent

**IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY TRIBUNAL
(HELD AT WINDHOEK)**

Case No. SADC (T)

/2011

WILLIAM MICHAEL CAMPBELL First applicant
MIKE CAMPBELL (PVT) LTD Second applicant
LUKE MUNYANDU TEMBANI Third applicant

and

SUMMIT OF HEADS OF STATE OR GOVERNMENT OF SADC First respondent
COUNCIL OF MINISTERS OF SADC Second respondent
REPUBLIC OF ZIMBABWE Third respondent

INDEX

1. Form 1 (Rule 33)	1 – 5
2. Notice of Motion	6 – 9
3. First Applicant's founding affidavit	10 – 29
4. Annexure "A"	30 – 33
5. Second Applicant's resolution	34 – 36
6. Third Applicant's confirmatory affidavit	37
7. Affidavit of service (Benjamin Freeth)	38

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132



SOUTHERN AFRICAN DEVELOPMENT COMMUNITY TRIBUNAL

**IN THE SADC TRIBUNAL
HELD AT WINDHOEK NAMIBIA**

Form 1

RULE 33

CASE No.SADC(T)...../.....

IN THE MATTER BETWEEN

WILLIAM MICHAEL CAMPBELL

First applicant

MIKE CAMPBELL (PVT) LTD

Second applicant

LUKE MUNYANDU TEMBANI

Third applicant

and

SUMMIT OF HEADS OF STATE OR GOVERNMENT OF SADC First respondent

COUNCIL OF MINISTERS OF SADC

Second respondent

REPUBLIC OF ZIMBABWE

Third respondent

PROCEEDINGS INSTITUTED BY APPLICATION

**TO: THE REGISTRAR
SADC Tribunal
P.O. Box 40624
Ausspannplatz
Windhoek
Republic of Namibia**

PROCEEDING
SADC TRIBUNAL
WINDHOEK

2011
Sunde

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AND TO: **SUMMIT OF HEADS OF STATE OR GOVERNMENT OF SADC**
First Respondent
SADC Headquarters
Plot No. 54385
Gaborone
Botswana

AND TO: **COUNCIL OF MINISTERS OF SADC**
Second Respondent
SADC Headquarters
Plot No. 54385
Gaborone
Botswana

AND TO: **REPUBLIC OF ZIMBABWE**
Third Respondent
Care of the Ambassador of Zimbabwe in Namibia
Embassy of Zimbabwe
Windhoek
Namibia

1. Particulars of the applicant(s)

(a) Name

WILLIAM MICHAEL CAMPBELL

First applicant

MIKE CAMPBELL (PVT) LTD

Second applicant

LUKE MUNYANDU TEMBANI

Third applicant

(b) Description (e.g. individual, legal person or a state):

First applicant

individual

Second applicant

Company incorporated in terms of
the laws of Zimbabwe

Third applicant

individual

3 134

(c) Physical address

Care of:
Norman Tjombe Law Firm
The Village
18 Liliencron Street
Windhoek
Namibia.

(d) Postal address

Care of:
Norman Tjombe Law Firm
P O Box 1148
Windhoek
Namibia.

(e) Telephone No

+264 61 308841

(f) Telefax

+264 88613678

(g) E-mail address

normantjombe@iway.na

(h) Address for service of documents in these proceedings

Norman Tjombe Law Firm
The Village
18 Liliencron Street
Windhoek
Namibia

(i) Particulars of the agent

Norman Tjombe
Norman Tjombe Law Firm
The Village
18 Liliencron Street
Windhoek
Namibia

4/135

2. Particulars of the Respondent(s)

(a) Name

SUMMIT OF HEADS OF STATE OR GOVERNMENT OF SADC	First respondent
COUNCIL OF MINISTERS OF SADC	Second respondent
REPUBLIC OF ZIMBABWE	Third respondent

(b) Description (e.g. individual, legal person, state)

First and Second Respondents	Legal persons
Third Respondent	State

(c) Physical and postal address, telephone and e-mail address

SUMMIT OF HEADS OF STATE OR GOVERNMENT OF SADC
 First Respondent
 SADC Headquarters
 Plot No. 54385
 Private Bag 0095
 Gaborone
 Botswana
 Tel: +267 395 1863
 Fax: +267 397 2848 / 318 1070
 E-mail: registry@sadc.int

COUNCIL OF MINISTERS OF SADC
 Second Respondent
 SADC Headquarters
 Plot No. 54385
 Private Bag 0095
 Gaborone
 Botswana
 Tel: +267 395 1863
 Fax: +267 397 2848 / 318 1070
 E-mail: registry@sadc.int

REPUBLIC OF ZIMBABWE
 Third Respondent
 Care of the Ambassador of Zimbabwe in Namibia
 Embassy of Zimbabwe
 P O Box 23056
 Windhoek
 Namibia
 Tel: +264 61 227738
 Fax: +264 61 226859
 Email: zimbabwe@mweb.com.na

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LMT

5 136

3. Nature of claim

Declaratory orders

4. Particulars of relief sought:

See the prayers in terms of the Notice of Motion.

5. Disclosure of books documents and other material relevant to this matter which is in the applicant's possession or under his control:

All necessary documents and other relevant material are contained in the founding affidavit of the first applicant.

6. Notice to the Respondent(s)

(a) If the respondent(s) intends to oppose this application (s)he/it is required within 30 Days after service thereof upon him her it of the applicant's statement of claim to deliver in terms of Rule 36 of the Rules of Procedure of the Tribunal his/her/it's Statement of defence as near as may be in accordance with SADC(T) FORM 1.

(b) If the Respondent(s) fails to deliver a statement of defence a determination including an order for costs may be granted in his/her/its absence.

DATED AT WINDHOEK ON THIS THE 28th DAY OF MARCH 2011.

Norman Jombe
.....
Legal practitioner and agent of the Applicants

NOTE: If the Respondent(s) intends to counterclaim he/she/it must deliver simultaneously with his/her/its statement of defense.

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6 137

**IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY TRIBUNAL
(HELD AT WINDHOEK)**

Case No. SADC (T) /2011

WILLIAM MICHAEL CAMPBELL	First applicant
MIKE CAMPBELL (PVT) LTD	Second applicant
LUKE MUNYANDU TEMBANI	Third applicant

and

SUMMIT OF HEADS OF STATE OR GOVERNMENT OF SADC	First respondent
COUNCIL OF MINISTERS OF SADC	Second respondent
REPUBLIC OF ZIMBABWE	Third respondent

NOTICE OF MOTION

TAKE NOTICE THAT on a date to be determined by the President in terms of Rule 20 of the Rules of Procedure of the SADC Tribunal, made in terms of Article 23 of the Protocol on the Tribunal, the above-named applicants shall apply as a matter of urgency for an order that:

- (a) this application may be heard as a matter of urgency, for the reasons and on the grounds set out in the founding affidavit of William Michael Campbell attached hereto, and that any non-compliance with the Rules be condoned;
- (b) the Tribunal continues to function in all respects as established by Article 16 of the Treaty;

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- (c) the decision of 17 August 2010 does not in law have the effect of suspending its operations and functioning;
- (d) the Summit is bound by the provisions of Articles 6(1) and (6) read with Article 9(1)(g) read with Article 4(c) and (e) Article 16(1), Article 32, Article 36 of the Treaty to support and facilitate the functioning of the Tribunal;
- (e) the Council is bound by Articles 3, 4 and 6 of the Protocol on the Tribunal to ensure that the Tribunal consist of not less than ten members and to designate five of such members as regular members, failing which it is declared that the Tribunal continues to be constituted as it was as of 16 August 2010;
- (f) Justices Pillay, Kambovo, Chomba and Tshosa continue as members of the Tribunal, on the terms and conditions of service, salaries and service as previously determined by the second respondent pursuant to Article 11 on the Protocol on the Tribunal, with effect from the date of the decision of 17 August 2010;
- (g) the second and third respondents shall, pursuant to the provisions of Article 6(1) and (6) of the Treaty, co-operate with and assist the Tribunal in the performance of its duties;
- (h) the respondents jointly and severally pay the applicants' reasonable costs in respect of this application, including the costs of the applicants' agents in Zimbabwe and in Windhoek, the costs of two instructed counsel (including



senior counsel), and their reasonable travel and accommodation costs, together with those of the applicants and the applicants' Zimbabwean agents; and

(i) the applicants are entitled to further and or alternative relief.

TAKE NOTICE FURTHER that the applicants' further particulars as required by the Rules are set forth in terms of their Form 1 notice filed herewith.

KINDLY ENROLL the matter for hearing accordingly as a matter of urgency.

DATED AT WINDHOEK ON THIS THE 28th DAY OF MARCH 2011.

NORMAN TJOMBE LAW FIRM

per *Norman Tjombe*
NORMAN TJOMBE
The Village
18 Liliencron Street
Windhoek
Namibia
Tel: +264 61 308841
Fax: +264 8813678
(Ref: Norman Tjombe)

TO: THE REGISTRAR
SADC Tribunal
Windhoek
Namibia

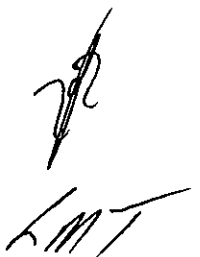
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AND TO: SUMMIT OF HEADS OF STATE OR GOVERNMENT OF SADC
First Respondent
SADC Headquarters
Plot No. 54385
Gaborone
Botswana

AND TO: COUNCIL OF MINISTERS OF SADC
Second Respondent
SADC Headquarters
Plot No. 54385
Gaborone
Botswana

AND TO: REPUBLIC OF ZIMBABWE
Third Respondent
Care of the Ambassador of Zimbabwe in Namibia
Embassy of Zimbabwe
Windhoek
Namibia



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10/14/11

IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY TRIBUNAL
(HELD AT WINDHOEK)

Case No. SADC (T) /2011

WILLIAM MICHAEL CAMPBELL	First applicant
MIKE CAMPBELL (PVT) LTD	Second applicant
LUKE MUNYANDU TEMBANI	Third applicant

and

SUMMIT OF HEADS OF STATE OR GOVERNMENT OF SADC	First respondent
COUNCIL OF MINISTERS OF SADC	Second respondent
REPUBLIC OF ZIMBABWE	Third respondent

FOUNDING AFFIDAVIT

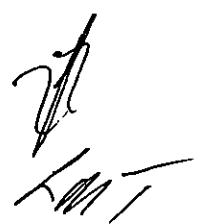
I, the undersigned

WILLIAM MICHAEL CAMPBELL

do hereby make oath and state:

A. Introduction

1. I am a citizen of Zimbabwe, previously resident at Mount Carmel Farm, Chegutu, Zimbabwe, and now in Harare, and a director of the second applicant (and duly authorised to act herein on its behalf). I and the second applicant were applicants (with some 75 others) in the proceedings before this

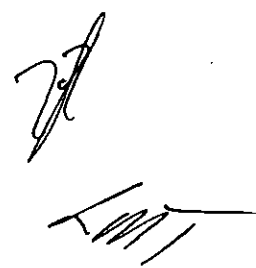


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Tribunal culminating in its main award of 28 November 2008 against the third respondent. We have also been applicants in a prior proceeding for interim injunctive relief against the third respondent pursuant to Article 16(1) of the Protocol on the Tribunal (in June 2008), and two subsequent proceedings resulting in orders, including punitive costs orders (on 5 June 2009 and 16 July 2010), against the third respondent by the Tribunal in terms of Article 32(2), (4) and (5) of the Protocol on the Tribunal. As these awards are in the possession of all the parties to the present application, and in order to avoid burdening the present record and adding to its cost, I do not attach copies.

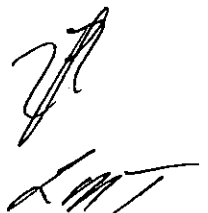
2. I refer to the confirmatory affidavit of the third applicant, filed herewith. Like me, the third applicant has successfully obtained a final award from this Tribunal, but has equally faced a failure by the third respondent and its agents to honour the award. He would be entitled to procure, as I and others have done, a further award by this Tribunal in terms of Article 32 of the Protocol on the Tribunal referring a failure by Zimbabwe as a member State to the Summit for "appropriate action". As appears below, the third applicant, like me and the other parties to the main "Campbell award", is now deprived of full access to the Tribunal in the circumstances I shall describe.

3. In the urgent circumstances in which I am forced to bring this application, it has not been possible to list as co-applicants the further 75 persons and entities who joined with the second applicant and me in the original main Campbell proceedings (and in certain instances, the Article 32 enforcement proceedings too). Many have been forced from their farms and are scattered



around Zimbabwe in circumstances which make communication very difficult. On a legal basis which I am advised will be elucidated in argument, I bring this application also on their behalf and also on behalf of the employees, former employees and their families, who have lived and worked with us, in some cases for many years. With us they have suffered evictions, destruction of their homes and possessions, assaults, torture, and other gross human right violations. In the circumstances to which I have referred, it is not possible either to join hundreds of thousands of such affected farmworkers, or to obtain separate affidavits from them. They live in daily fear of further attacks and dispossession, and of reprisals. Many now live hand-to-mouth, scattered near relief centres and across the country. I accordingly bring this application not only on their behalf but given the issues raised below and their impact on the entire region also in the public interest.

4. The facts to which I depose are within my own knowledge; they are true and correct.
5. The third applicant is Mr Luke Munyandu Tembani (who was himself a successful applicant before the Tribunal in Case No. SADC (T) 07/2008 against the first respondent, also relating to the deprivation of his title to land in Zimbabwe).
6. The first respondent is the Summit of Heads of State or Government ("the Summit"), established as an institution of SADC in terms of Article 9(1)(a) of the SADC Treaty ("the Treaty"), of care of the Secretariat of SADC, pursuant

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to the provisions of Article 14(1)(e) of the Treaty, of SADC Headquarters, Plot No. 54385, Gaborone, Botswana.

7. The second respondent is the Council of Ministers of SADC established by Article 9(1)(c) read with Article 11 of the Treaty, of care of the Secretariat of SADC, pursuant to the provisions of Article 14(1)(e) of the Treaty, of SADC Headquarters, Plot No. 54385, Gaborone, Botswana.

8. The third respondent is the Republic of Zimbabwe, of care of the High Commissioner for Zimbabwe, Windhoek, and the Attorney-General of Zimbabwe, Harare, represented herein by its government. Its status both as a member of SADC under the Treaty and as a party bound by the jurisdiction of this Tribunal has been established in the prior awards aforesaid. In addition the jurisdiction of the Tribunal in respect of the third respondent has been formally conceded both by the statements of its legal representatives before the Tribunal (including the Deputy Attorney-General (Civil) of Zimbabwe) and by admissions in the affidavits filed on its behalf. It may moreover be noted that, in separate applications in both Zimbabwe and South Africa for the registration of the aforesaid awards pursuant to Article 32 of the Protocol on the Tribunal the High Courts of both countries held that the Tribunal had such jurisdiction (in the case of the Zimbabwe proceedings expressly rejecting the third respondent's contrary contentions).

B. This application in outline

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9. On 17 August 2010 a decision ("the decision") was made by the Summit purporting to suspend the Tribunal's jurisdiction to adjudicate new cases, to allow the appointment of no less than four of the ten members of the Tribunal (all four of whom had been party to adverse rulings against the third respondent) to expire without renewal or replacement, and to subject the Tribunal to "review". I attach a copy, marked "A". For the reasons and on the grounds which follow, and I am advised will be more fully developed in argument, the decision is unauthorised by and in violation of the Treaty, the Protocol on the Tribunal, its Rules and international law.
10. This is an application for an order by the Tribunal in terms of Article 16(1) read with Article 32 of the Treaty, and Articles 14, 15 and 18 (as amended) of the Protocol on the Tribunal, declaring that:
- (a) the Tribunal continues to function in all respects as established by Article 16 of the Treaty;
 - (b) the decision of 17 August 2010 does not in law have the effect of suspending its operations and functioning;
 - (c) the Summit is bound by the provisions of Articles 6(1) and (6) read with Article 9(1)(g) read with Article 4(c) and (e) Article 16(1), Article 32, Article 36 of the Treaty to support and facilitate the functioning of the Tribunal;
 - (d) the Council is bound by Articles 3, 4 and 6 of the Protocol on the Tribunal to ensure that the Tribunal consist of not less than ten members and to designate five of such members as regular members,



failing which it is declared that the Tribunal continues to be constituted as it was as of 16 August 2010; and

- (e) Justices Pillay, Kambovo, Chomba and Tshosa continue as members of the Tribunal.

C. Background

11. The applicants and the further 75 applicants to the original Campbell proceedings have been deprived of their title to land by the third respondent in breach, the Tribunal has found, of its Treaty obligations in terms of Articles 4 and 6 of the Treaty. The third respondent has continued to repudiate and otherwise defy the aforesaid awards by the Tribunal, as fully documented in the prior proceedings referred to above and found as facts by the Tribunal itself in its awards. Since the last of these, on 16 July 2010, the third respondent, through its government and its agents, has continued in its course of systematic disregard for the human rights and international and other law obligations protected under the Treaty in relation to the applicants specifically and to untold numbers of other Zimbabwean citizens and residents. Despite the explicit terms of the awards of 28 November 2008, 6 June 2009 and 16 July 2010 (and in the case of Mr Tembani on 14 August 2009) prosecutions have continued of the applicants for the supposed statutory offence (pursuant to the purported constitutional amendment, to the protection of property rights under the Constitution of Zimbabwe, 1980) created by the parliament of Zimbabwe of continuing to live on their farms and to work their lands; several have been assaulted, otherwise harassed and



threatened with death; nearly all the farmers listed in the gazette with which the award of 28 November 2008 have been concerned have been driven off their farms by force. In my own case both my own home on Mount Carmel was burnt to the ground as was that of my daughter and son in law (with their domestic animals inside). As recently as 21 March 2011, my son, Bruce, has continued to occupy a house in the vicinity, without being permitted to farm, has been surrounded by invaders at the instigation of a local political leader now set on taking the house for herself.

12. Like my son, a number of the original applicants, their workers and families continue at serious risk to their lives and what remains of their property. The urgency in these circumstances of an early hearing by the Tribunal and a prompt award is self-evident. We are now deprived of our incomes and our capital assets and in most instances dependent on benefactors. Thus our need to be able to proceed urgently for the assessment of compensation by the Tribunal in respect of our losses is acute.
 13. In this regard a number of the original applicants have pending claims for compensation instituted before the Tribunal under Case No. 02/2010 while others (including myself) are still in the process of assembling the necessary proof of loss. As regards the former, again (so as not to burden the record) I do not attach such application, but beg leave to refer to it as if incorporated herein.
- D. The invalidity of the decision



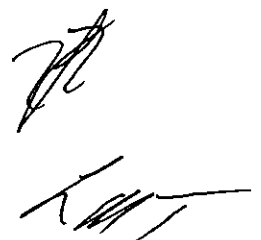
14. The effect of the decision – indeed, I shall show, its purpose – is to interfere with and limit the proper working of the Tribunal as authorised and indeed required by the Treaty, the Protocol on the Tribunal and its Rules.

(1) Ultra vires

15. This is in the first place evidenced by the purported directive that the Tribunal might only continue during the period of the "review" to deal with pending matters. There is (I am advised will be more fully demonstrated in argument) no legal authority in either the Summit or the Council to achieve an effective suspension of the Tribunal's capacity to address new matters. Significantly no such authority is reflected in the decision itself.

16. In the second place, it is wholly unclear from the terms of the decision reflected in annexure A what purports to be a "pending matter". While I contend that claims for compensation, such as my own, not already lodged by 17 August 2010 should so qualify by virtue of the fact that the main and Article 32 of the Protocol on the Tribunal proceedings had been instituted before then, the decision itself is wholly vague and uncertain in its terms in this respect. I am advised that the rule of law, as protected by Article 4(c) of the Treaty, does not permit vague or uncertain or arbitrary distinctions.

17. In the third place, the decision is not only unauthorised by the Treaty, but in direct conflict with several of its provisions, the Protocol on the Tribunal and



its Rules and international law generally. Article 2 read with Articles 14 and 15(1) of the Protocol on the Tribunal state, in peremptory terms, that the Tribunal *shall* function "in accordance with the provisions of the Treaty and this Protocol". Article 16(1) of the Treaty itself states, again in peremptory terms, that the Tribunal "*shall* be constituted to ensure adherence to and the proper interpretation of the Treaty . . . and subsidiary instruments and to adjudicate upon *such disputes as may be referred to it.*" (my emphasis). Similarly Article 32 of the Treaty states, again in imperative language that "*any* dispute arising from the interpretation or application of this Treaty, the interpretation, application or validity of Protocols or other subsidiary instruments made under this Treaty, which cannot be settled amicably, *shall* be referred to the Tribunal" (my emphasis). These cornerstones of the Tribunal's functioning are directly undermined by the decision.

18. The role of the Summit itself is clear. In terms of Article 10(1) of the Treaty it is "the supreme *policy-making* Institution of SADC" (my emphasis). In terms of Article 10(2) it is "responsible for the overall *policy* direction and control of the functions of SADC" (my emphasis). Concomitantly, the Council has the responsibility to "oversee and advise" in respect of the general matters specified in Article 11(2) of the Treaty. Neither institution has the power to determine the functioning of the Tribunal, and is as little able to confine its activities to new matters, or refrain from making appointments essential to its functioning, as it could make any such determination in relation to any of the other institutions listed in Article 9 of the Treaty. In the case of the Tribunal, the case is an *a fortiori* one.



19. Viewed from a related perspective, the division of powers between the Tribunal (as the adjudicative arm of SADC), with specifically "final and binding decision-making powers" (Article 16(5) of the Treaty) cannot be interfered with or traduced.
20. Fourthly, the Summit is bound by the provisions of Articles 6(1) and (6) read with Article 9(1)(g) read with Article 4(c) and (e) Article 16(1), Article 32, Article 36 of the Treaty to support and facilitate the functioning of the Tribunal; and the Council is bound by Articles 3, 4 and 6 of the Protocol on the Tribunal to ensure that the Tribunal consist of not less than ten members and to designate five of such members as regular members. The decision reflects a deliberate failure to carry out these obligations. The effect of the decision was to reduce the number of appointed members of the Tribunal by four (given the third respondent's belated decision to withdraw its nominee) and, I shall show, by failing to ensure that the Tribunal exists in the plenary, stipulated, number of ten – given the loss of these four members, Zimbabwe's withdrawal of its nominee, and the recent resignation as a judge of Justice Mondlane – only four members now remain as members of the Tribunal. It is now impossible for a full bench to sit (as contemplated by Article 3(3) and (4) of the Protocol on the Tribunal), whenever the Tribunal itself decides that it should (Article 3(3)). Moreover, there is no margin of safety: the retirement, resignation, ill-health or other unavailability of just two more members will prevent the Tribunal from even convening.



21. Fifthly, the powers of the President of the Tribunal himself to determine listing before the Tribunal and its sessions (including the determination of what "business [is to be] before the Tribunal") is contraverted, in conflict of the provisions of Rules 20 and 22.
22. For these and related reasons, which I am advised are more properly a matter for legal argument, the purported decision disclosed on 17 August 2010 is *ultra vires*, unauthorised by law, in conflict with the Treaty, the Protocol on the Treaty and the Rules, and is in law invalid.
23. I should add that I do not accept that a "review" of the Tribunal's role and function is itself authorised in law where its ambit and purpose is palpably to undermine the final and binding nature of Tribunal decisions (as stated by Article 16(5) of the Treaty itself). Given the scale and gravity, however, of the *ultra vires* aspects already specified, I am advised that it is not necessary to state more in this regard at this stage.

(2) Improper purpose

24. The decision is void *ab initio* for a separate reason. This is that no proper purpose attended the effective suspension of the Tribunal's jurisdiction in relation to non-pending matters. If either the Summit or Council wished to review the functioning of the Tribunal, with a view to this being altered in accordance with the Treaty and international law generally, there was no good purpose in the meanwhile to interfere with its daily functioning.


Consequentially by achieving the latter the Summit has acted with an improper purpose.

(3) Bad faith

25. The decision is not only improper, by coupling a *pro tanto* suspension with the purported "review". It is also in bad faith.

26. As already described, the third respondent has waged a campaign of open defiance against the Tribunal's awards. The result has been not one, but two, referrals by the Tribunal to the Summit in terms of Article 32(5) of the Protocol on the Tribunal. Instead of responding promptly to these direct referrals by SADC's highest adjudicative body, and treating its decisions as indeed "final and binding" (the wording of Article 16(5) of the Treaty) the Summit has procrastinated and now (in its decision) prevaricated. Although the matter was on its mid-2009 agenda at Kinshasa, the Summit postponed it. No special Summit was thereafter convened to deal with it in 2009. Nor was any special Summit convened in 2010. Instead the Windhoek Summit of July 2010 contrived the decision precisely to avoid acting (in terms of its Treaty and wider international law obligations) by considering measures including Article 33 of the Treaty. Its conduct in this regard has been inconsistent: it is strikingly at odds with its swift action against Madagascar as a member State following the outcome of an election there as dubious as those in Zimbabwe in 2002 and 2008.

27. The only proceedings before the Tribunal which could have prompted the decision to "review", coupled with *pro tanto* suspension of the Tribunal's jurisdiction are those by the applicants. There has been no professional or academic call of which I or my legal advisers are aware for this measure. The only public assaults presaging the decision have been by: the Minister of Lands of Zimbabwe, Mr Didimus Mutasa MP following the main award (stating that the Tribunal was "day-dreaming"); a similar public statement by the President of Zimbabwe, Mr Robert Mugabe; a supportive attack by the Deputy Chief Justice of Zimbabwe, Justice Malaba, at a ceremony to open the Court in January 2009; and the Minister of Justice of Zimbabwe, Mr Patrick Chinamasa in a purported legal opinion issues under his name and placed by way of advertisement in *The Herald* newspaper, Harare (a government-controlled organ) in early 2009. In short, the third respondent procured the making of the decision by the Summit as a stratagem to win time, to subvert the Tribunal's award and to prevent new proceedings against it.
28. If further confirmation of the arrant bad faith entailed in the decision was required, it is supplied by the fact that the decision includes a determination not to renew the periods of office of four of the five members of the Tribunal who had delivered a series of adverse rulings against the third respondent.
29. As noted, the decision was only disclosed some time after it was taken. I challenge the Summit and the Council, in the interests of truth and transparency, to disclose their reasons for not transparently publishing the decision earlier. Worse, as noted more fully below, in dealing with procedural

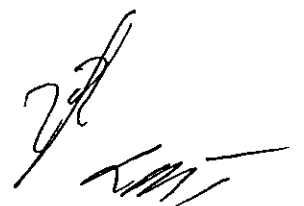


irregularities related to the decision, the Summit gave no prior notice or an opportunity to be heard to affected parties such as the applicants. (This was despite the fact that the applicants have repeatedly – through the Secretariat – sought an opportunity to address the Summit as regards the referral, twice, by the Tribunal in terms of Article 32 of the Protocol on the Tribunal (as aforesaid), with a view *inter alia* to the implementation of appropriate measures by the Summit against the third respondent in terms of Article 33 of the Treaty.)

30. In all the circumstances, the device of not merely initiating a "review" of an international-law Tribunal whose decisions are explicitly final and binding, but coupling this with the interim curtailing of its jurisdiction is in bad faith. The rule of law itself has thereby been suspended in the region as regards the reach of international law, both explicitly in terms of Article 4(c) of the Treaty and international law. In effect, by cynical contrivance the third respondent has compounded the infringement of the rule of law to which the applicants were subjected (the Tribunal has already found) in Zimbabwe by a second infringement now in international law itself.

(4) Arbitrary and irrational

31. By parity of reasoning, the two-pronged decision to prevent the Tribunal receiving new cases while the reviewing process is under way is arbitrary and not rationally related to a true reappraisal in good faith of the functioning of the Tribunal.



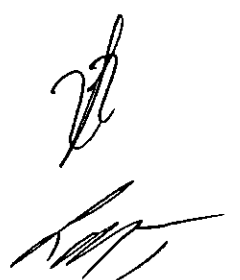
32. Moreover, Article 6(4) of the Treaty has itself been traduced by the decision: the mandatory obligation on member States to "take all steps necessary to ensure the uniform application of this Treaty" has been subverted. There is no basis in law to differentiate, as the Summit has purported to do, in the treatment of old (or "pending") and new cases.

(5) Access to justice

33. The decision is also in violation of the Treaty's guarantee (through Article 4(e)) of the peaceful settlement of disputes. It is to be emphasised that the Tribunal has been disabled from determining disputes between

- (a) member States (in breach of Article 15(1) of the Protocol on the Tribunal);
- (b) natural or legal persons and member States (also in breach of Article 15(1) of the Protocol on the Tribunal);
- (c) member States and the Community (in breach of Article 17(1) of the Protocol on the Tribunal);
- (d) natural or legal persons and the Community (in breach of Article 18(1) of the Protocol on the Tribunal);
- (e) the community and its staff (in breach of Article 15(1) of the Protocol on the Tribunal).

34. The seriousness of the situation cannot be overemphasised. At any time a peace-threatening conflict may emerge between member States. Gross



violations of individuals' rights may emerge (and this in circumstances where the domestic law and domestic courts afford, as exemplified by the experience of the applicants, no adequate access to justice). The Community and a member State may be deadlocked in conflict. Employees may find themselves deprived of basic rights related to their employment by the Community, with no other body of competent jurisdiction. In all these respects, access to adjudication – itself a fundamental facet of the rule of law – has been violated by the decision.

35. There is an inroad on access to justice in a further respect. This is that parties face the prospect that they will not have access to a full bench composed of five members of the Tribunal sit in their matters, as contemplated by Article 3(3) of the Protocol on the Tribunal particularly where this is indicated by the complexity or importance of matters, given the fact that the membership of the Tribunal has been reduced from ten to five members, despite the provisions of the Protocol on the Tribunal. Concomitantly, the President of the Tribunal has been deprived of his independent entitlement not only to empanel a full panel of *his* selection as Article 3(3) contemplates, but also of his express responsibility "for selecting the members who shall constitute the Tribunal for the purpose of hearing any case brought before it" (Article 3(4) of the Protocol on the Tribunal).
36. This concern operates not merely at the level of high principle, but also as a matter of the most basic practicality. The members of the Tribunal are all part-time members: they all discharge other national judicial functions. It is

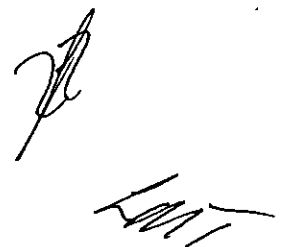


not merely, as I have indicated, intervening resignations (such as that of Justice Mondlane) withdrawals (such as the Zimbabwean nominee) or indisposition which may paralyse the Tribunal. Extended national court commitments may negate the availability of one or more of the surviving members. Certainly the capacity of the Tribunal to convene urgently has now been greatly weakened. Over and above these considerations is the further fact that a particular member of the Tribunal must be recused from sitting in any case with which he or she has any personal connection or in relation to which his or her State is a party (Article 9(2) of the Protocol on the Tribunal).

37. Thus not only has the Summit substantially incapacitated the Tribunal. It has also arrogated to itself the independent judicial task of constituting a full bench of the Tribunal appropriate to the particular circumstances of particular cases.
38. In all these circumstances, the guarantee of access to justice under the Treaty has been abrogated, and the Summit has unlawfully claimed the power to determine the composition of the Tribunal henceforth.

(6) Procedure

39. Even had there been a valid substantive basis for the decision, it is vitiated by patent procedural irregularity. Firstly, in terms of the Treaty itself (Article 23) and on elementary legal principle, the decision could not lawfully be taken without prior notice and a good-faith consultation with affected parties such as the Tribunal itself and the present applicants. Secondly, the Treaty

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makes proper and exclusive provision for amendment of the Treaty, in terms of Article 36; thus if a valid substantive basis existed to seek to curtail the jurisdiction of the Tribunal and to alter its functioning, as regards new cases, this had to be achieved in compliance with the procedural requirements of the Treaty itself. Instead these have been circumvented and undermined.

E. Continuation in office of Tribunal members

40. As already noted, a key element of the decision entails the Tribunal deliberately failing to renew the appointment of four members of the Tribunal (those who were parties to the adverse awards against the third respondent) for further terms of office, in terms of Article 6(1) of the Protocol on the Tribunal. In terms of Article 6(2), their term of office "shall be deemed to be extended for a period that would have elapsed between the date of first appointment and the date of making the draw" (in terms of Article 6(1)).
41. In any event, pursuant to the provisions of Article 3(1) of the Protocol on the Tribunal (read with Article 2), and also read with Articles 4(c), 6(6), 16(1) of the Treaty, the terms of office of members of the Tribunal in law are extended by necessity in the circumstances of this matter.
42. I would point out that, further and in any event, by virtue of the provisions of Article 8(4) of the Protocol on the Tribunal, "[n]otwithstanding the expiration of his or her terms of office, a Member shall continue to hear and to complete those cases partly heard by him or her." The relief sought in this matter,



159
27

together with the assessment of compensation already pending before the Tribunal, constitutes an integral part of "those cases partly heard" by the four Tribunal members.

43. In these circumstances, I submit that the applicants are entitled to the declaratory order that Justices Pillay, Kambovo, Chomba and Tshosa continue as members of the Tribunal until their positions are otherwise lawfully filled in proper compliance with the Treaty and the Protocol on the Tribunal.

F. Urgency

44. In the light of the facts already set out above, I submit that this application requires to be heard as a matter of great urgency. It is now nearly two and a half years since the applicants obtained what, in its terms, was a final award. It is some three and a half years since the main case was instituted. The third respondent persists in what the awards of the Tribunal has established is international lawlessness and the violation of human rights. Our lives and livelihoods, as are those of the hundreds of thousands of farm workers and their families, have been damaged and are at grave risk.
45. In any event, the matter is inherently urgent because the highest international law adjudicative body in the region has been gravely incapacitated. Issues involving peace in the region, conflicts between member States and gross violations of human rights may arise at any time. Moreover, the issues of



international law in general and compliance with the Treaty and Protocol on the Tribunal in particular are of the gravest public importance to potentially millions of affected people in the region. Also, as already indicated, the Tribunal is the only adjudicative body with jurisdiction as regards employment disputes concerning SADC employees. In law they have no other forum to which they may turn.

G. Conclusion

46. I accordingly ask that the President of the Tribunal direct an urgent date for a sitting of the Tribunal (in terms of Rule 20(1)), and I ask for an order in terms of the notice to which this affidavit is attached.
47. As regards the costs order sought, I submit that circumstances within the contemplation of Article 29 of the Protocol on the Tribunal exist such as to warrant such an order. This is the fifth proceeding that I (and certain of the applicants) have been obliged to institute before the Tribunal to vindicate rights under the Treaty. The third respondent has been the architect of a campaign of contempt and defiance towards the Tribunal on its own international-law obligations. It has compounded its conduct by the gross violations I have documented and which the Tribunal in its previous awards have found to have occurred. The Summit itself has acted in arrant breach of the Treaty and the Protocol on the Treaty in the respects specified. I and my co-applicants, deprived as we have been, of assets and our income have once again been put to needless legal expense we cannot afford. Any failure




161
29

to award us a costs order will itself ensure that our access to justice is inhibited. I submit that the circumstances which the Tribunal previously considered such as to warrant a costs order are now, if anything, compounded.





WILLIAM MICHAEL CAMPBELL

THIS IS TO CERTIFY THAT THE ABOVENAMED DEPONENT HAS ACKNOWLEDGED THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT WHICH WAS SIGNED AND SWORN TO BEFORE ME AT *Paris* ON THIS THE *23* DAY OF *March* 2011.



COMMISSIONER OF OATHS

L. E. O'Connell
Commissioner of Oaths

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**SOUTHERN AFRICAN DEVELOPMENT
COMMUNITY (SADC)**

RECORD OF THE SUMMIT

HELD IN

WINDHOEK, NAMIBIA

16 - 17 AUGUST 2010

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31/63

9. REPORT OF THE TRIBUNAL

9.1 Non Compliance with Decisions of the Tribunal

9.1.1 Summit recalled that at its meeting held in Kinshasa, DRC, in September 2009, on the subject of the Republic of Zimbabwe's failure to comply with the SADC Tribunal's earlier decisions, and with a view to take informed action, Summit instructed the SADC Committee of Ministers of Justice/Attorneys-General to:

- (i) expeditiously hold a meeting on the legal issues regarding Zimbabwe and advise Summit accordingly; and
- (ii) review the roles, responsibilities and Terms of Reference of the Tribunal.

9.1.2 Summit considered the Report of the Tribunal (SADC/SM/1/2010/9) in particular that:

- (i) in *Fick:L.K. and Others vs the Republic of Zimbabwe* (case number SADC (T) 01/2010), the SADC Tribunal made a Ruling dated 16 July 2010, and established the existence of further acts of non-compliance by the Republic of Zimbabwe with regard to the Tribunal's earlier decisions, and
- (ii) Article 32 (5) of the SADC Protocol on Tribunal enjoins the Summit to take appropriate action to address the content of the Tribunal's Report.

9.1.3 Summit, in considering the issues pertaining to non compliance by the Republic of Zimbabwe, took into account the deliberations and advice formulated by the SADC Committee of Ministers of Justice/Attorneys-General at their meeting held in Kinshasa, DRC, in April 2010.

9.2 Re-appointment of Members of the SADC Tribunal

9.2.1 Summit recalled that, at its meeting held in Gaborone, Botswana, in 2005, it appointed Members of the Tribunal in accordance with the provisions of Article 6(1) of the Protocol on the Tribunal.

9.2.2 Summit noted that:

- (i) as required by Article 6(1) of the Protocol, the term of office for those Members appointed in August 2005 would expire in August 2010. The Article further provides that Members may be reappointed for another five (5) year term; and

- (ii) in terms of Article 4(4) of the Protocol, the Members are appointed by the Summit upon recommendation by Council.

9.2.3 Summit noted that Council, at its meeting held in Windhoek, Namibia in August 2010, recommended to Summit not to reappoint the following Members of Tribunal whose term of office expires in August 2010, for another five (5) year term, pending the Report on the Tribunal from Ministers of Justice/Attorneys-General:

- (i) Justice A. Pillay from Mauritius;
- (ii) Dr R. Kambovo, from Angola;
- (iii) Justice F.M. Chomba from Zambia; and
- (iv) Justice O.B Tshosa from Botswana.

Decision 19

9.3 Summit noted that Council, at its meeting held in Windhoek, Namibia in August 2010, recommended to Summit not to reappoint the following Members of Tribunal whose term of office expires in August 2010, for another five (5) year term, pending the Report on the Tribunal from Ministers of Justice/Attorneys-General:

9.4 Summit noted that Council, at its meeting held in Windhoek, Namibia in August 2010, recommended to Summit not to reappoint the following Members of Tribunal whose term of office expires in August 2010, for another five (5) year term, pending the Report on the Tribunal from Ministers of Justice/Attorneys-General:

9.5 Summit noted that Council, at its meeting held in Windhoek, Namibia in August 2010, recommended to Summit not to reappoint the following Members of Tribunal whose term of office expires in August 2010, for another five (5) year term, pending the Report on the Tribunal from Ministers of Justice/Attorneys-General:

10. REPORT OF THE SADC COMMITTEE OF MINISTERS OF JUSTICE/ATTORNEYS-GENERAL

10.1 Summit considered the Report (SADC/SM/1/2010/10), presented by the Chairperson of the SADC Committee of Ministers of Justice/Attorneys-General in particular the following:

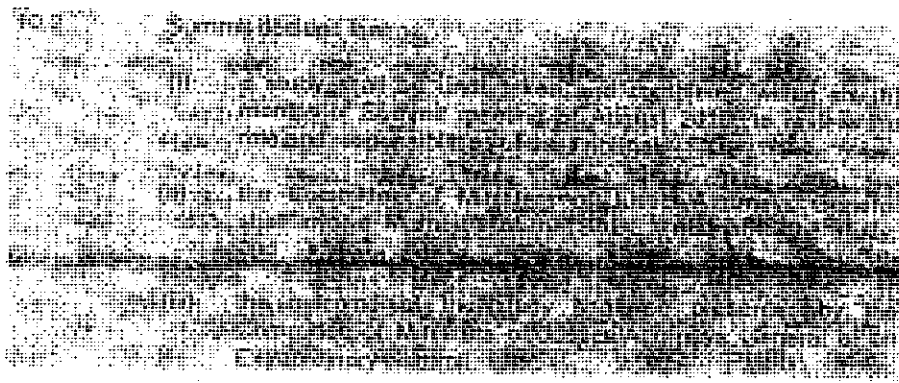
- (i) the SADC Committee of Ministers of Justice/Attorneys-General met in Kinshasa, DRC, in April 2010, and considered both the legal issues regarding Zimbabwe and the roles and responsibilities and Terms of Reference of the SADC Tribunal;

165

33

- (ii) with regard to the legal issues on Zimbabwe, the Ministers of Justice/Attorneys-General observed that the:
 - (a) legal opinions alone do not provide a comprehensive solution to the matter;
 - (b) matter is of a complex nature because it raises both legal and political issues. Some of the pertinent issues include:
 - (i) entry into force of the Protocol on the Tribunal; and
 - (ii) Rulings of the Tribunal on the land issue in Zimbabwe and issues emanating therefrom.
 - (c) matter would thus benefit from a comprehensive review that would take into account both its legal and political dimensions; and
 - (d) comprehensive review should be part of a study that should also address the role, responsibilities and Terms of Reference of the SADC Tribunal;
- (iii) as a result of the preceding observations, the Ministers of Justice/Attorneys-General recommended that Summit defers consideration of the matter on Zimbabwe's failure to comply with the SADC Tribunal's Rulings, pending the commissioning and completion of a study on the role, responsibilities and Terms of Reference of the SADC Tribunal. The findings of the study would inform the Committee of Ministers of Justice/Attorneys-General's subsequent advice to Summit in August 2011.

Decision 20



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EXTRACT FROM THE MINUTES OF THE MEETING OF THE DIRECTORS OF MIKE CAMPBELL (PVT) LTD ON 27 MARCH 2011 HELD AT HARARE, ZIMBABWE.


It is resolved that:

1. **MIKE CAMPBELL (PVT) LTD** "(the Company)" hereby institute proceedings in the SADC Tribunal against the Summit of Heads of State or Government of SADC, the Council of Ministers of SADC and the Republic of Zimbabwe, wherein the following relief is claimed:
 - (a) this application may be heard as a matter of urgency, for the reasons and on the grounds set out in the founding affidavit of William Michael Campbell attached hereto, and that any non-compliance with the Rules be condoned;
 - (b) the Tribunal continues to function in all respects as established by Article 16 of the Treaty;
 - (c) the decision of 17 August 2010 does not in law have the effect of suspending its operations and functioning;
 - (d) the Summit is bound by the provisions of Articles 6(1) and (6) read with Article 9(1)(g) read with Article 4(c) and (e) Article 16(1), Article 32, Article 36 of the Treaty to support and facilitate the functioning of the Tribunal;
 - (e) the Council is bound by Articles 3, 4 and 6 of the Protocol on the Tribunal to ensure that the Tribunal consist of not less than ten members and to

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designate five of such members as regular members, failing which it is declared that the Tribunal continues to be constituted as it was as of 16 August 2010;

- (f) Justices Pillay, Kambovo, Chomba and Tshosa continue as members of the Tribunal, on the terms and conditions of service, salaries and service as previously determined by the second respondent pursuant to Article 11 on the Protocol on the Tribunal, with effect from the date of the decision of 17 August 2010;
 - (g) the second and third respondents shall, pursuant to the provisions of Article 6(1) and (6) of the Treaty, co-operate with and assist the Tribunal in the performance of its duties;
 - (h) the respondents jointly and severally pay the applicants' reasonable costs in respect of this application, including the costs of the applicants' agents in Zimbabwe and in Windhoek, the costs of two instructed counsel (including senior counsel), and their reasonable travel and accommodation costs, together with those of the applicants and the applicants' Zimbabwean agents; and
 - (i) the applicants are entitled to further and or alternative relief.
2. to appoint Norman Tjombe of Norman Tjombe Law Firm, Windhoek, Namibia as its legal practitioner and representative in these proceedings before the SADC Tribunal;



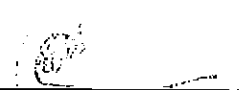
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3. **NORMAN TJOMBE** of Norman Tjombe Law Firm of Windhoek be instructed and is hereby authorised to act on behalf of the Company in such action.

4. **WILLIAM MICHAEL CAMPBELL**, in his capacity as the director of the Company, be and is hereby authorised to sign all and any documents necessary or required for the due appointment of Norman Tjombe of Norman Tjombe Law Firm and for the purpose of giving effect to the foregoing resolution.

Certified to be a true copy an extract of the minutes:

Dated and signed on 27 March 2011 at Harare, Zimbabwe.



WILLIAM MICHAEL CAMPBELL
DIRECTOR
MIKE CAMPBELL (PVT) LTD




169
37

IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY TRIBUNAL
(HELD AT WINDHOEK)

Case No. SADC (T) /2011

WILLIAM MICHAEL CAMPBELL	First applicant
MIKE CAMPBELL (PVT) LTD	Second applicant
LUKE MUNYANDU TEMBANI	Third applicant

and

SUMMIT OF HEADS OF STATE OR GOVERNMENT OF SADC	First respondent
COUNCIL OF MINISTERS OF SADC	Second respondent
REPUBLIC OF ZIMBABWE	Third respondent

CONFIRMATORY AFFIDAVIT

I, the undersigned, **LUKE MUNYANDU THEMBANI**, do hereby make oath and state:

1. I am the ^{third} ~~second~~ applicant in this matter, duly authorised to depose to this affidavit and to institute the application. The facts to which I depose are within my own knowledge, and are true and correct.
2. I have read the notice and founding affidavit of William Michael Campbell and confirm same in all respects in relation to me. I accordingly ask that the application be heard as a matter of urgency, and for an award in terms of the notice of motion.



LUKE MUNYANDU THEMBANI

THIS IS TO CERTIFY THAT THE ABOVENAMED DEPONENT HAS ACKNOWLEDGED THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT WHICH WAS SIGNED AND SWORN TO BEFORE ME AT ^{Windhoek} ~~Harare~~ ON THIS THE ~~28~~ ²⁹ DAY OF ^{March} 2011.



COMMISSIONER OF OATHS

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**COMMUNIQUÉ
EXTRAORDINARY SUMMIT HEADS OF STATE AND GOVERNMENT
OF THE SOUTHERN AFRICA DEVELOPMENT COMMUNITY
WINDHOEK, REPUBLIC OF NAMIBIA
20 MAY 2011**

1. The Summit of Heads of State and Government of the Southern African Development Community (SADC) was held in Windhoek, Republic of Namibia on May 20, 2011.
2. The Summit was officially opened by His Excellency Hifikepunye Pohamba, President of the Republic of Namibia and SADC Chairperson.
3. The Summit was attended by the following Heads of State and Government or their representatives:

Botswana	:	H.E. Lt. Gen. Seretse Khama Ian Khama,
DRC	:	H.E. Joseph Kabila Kabange
Mauritius	:	Dr. the Hon. Navinchandra Ramgoolam, GCSK
Mozambique	:	H.E. Armando Emilio Guebuza
Namibia	:	H.E. Hifikepunye Pohamba
Tanzania	:	H.E. Jakaya Mrisho Kikwete
Zambia	:	H.E. Rupiah Bwezani Banda
Zimbabwe	:	H.E. Robert Gabriel Mugabe
Lesotho	:	The Hon. Mr. Lesao A Lehohla, Deputy Prime Minister
Angola	:	Hon. George Chicotty, Minister of External Relations
Malawi	:	Hon. Eta E Banda, MP, Minister of Foreign Affairs

South Africa : H.E. YLM Myakayaka-Manzini, South African High
Commissioner to Namibia

Swaziland : Hon. Rev. David Mathse, Minister for Justice and
Constitutional Affairs

4. The Summit was also attended by SADC Executive Secretary Dr. Tomaz A. Salomão.
5. In attendance at the Summit was also H.E. Joaquim A. Chissano, former President of the Republic of Mozambique, and SADC Mediator on Madagascar.
6. Summit received and considered the Report of the Committee of Ministers of Justice and Attorneys General on the review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal in accordance with Summit Decision 20 of August 2010 taken in Windhoek, Namibia.
7. Summit decided as follows:
 - mandated the Ministers of Justice/Attorneys General to initiate the process aimed at amending the relevant SADC legal instruments and submit a progress report at the Summit in August 2011 and the final report to Summit in August 2012;
 - not to reappoint members of the Tribunal whose term of office expired on August 31, 2010; and
 - not to replace members of the Tribunal whose term of office will expire on October 31, 2011.

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8. Summit further reiterated the moratorium on receiving any new cases or hearings of any cases by the Tribunal until the SADC Protocol on the Tribunal has been reviewed and approved.
9. Summit also received a report on preparations for the 2nd Tripartite Council and Summit to be held on June 12, 2011 at Sandton, South Africa, noting, amongst other, progress made towards the launching of negotiations for the COMESA-EAC-SADC Tripartite Free Trade Area.
10. Summit endorsed the pillars of the Tripartite integration process as market integration, infrastructure development and industrial development.
11. Summit considered the report of the SADC Mediator on Madagascar, His Excellency Joaquim A. Chissano, former President of the Republic of Mozambique, noting the development of the roadmap for returning that country to constitutional normalcy.
12. The Summit commended His Excellency Joaquim A. Chissano, former President of the Republic of Mozambique, and SADC Mediator on Madagascar for his efforts in bringing together the Malagasy stakeholders in the process of reconciliation and finding a lasting solution for that country.
13. Summit reiterated the need for an all inclusive political process towards finding a lasting solution of the challenges facing the country. In this regard, Summit mandated the SADC Chairperson, Chairperson of the SADC Organ on Politics, Defence and Security Cooperation and SADC Mediator on Madagascar to, as soon as possible, convene a meeting with all Malagasy stakeholders to be held at SADC Headquarters in Gaborone Botswana.
14. Summit expressed sympathy and solidarity with the members of the Angolan and Namibian populations who have been adversely affected by the recent floods.




15. The Summit expressed its appreciation to the Government and People of the Republic of Namibia for the warm hospitality extended to all delegates and facilities placed at their disposal that made this Summit a success

WINDHOEK, REPUBLIC OF NAMIBIA

MAY 20, 2011



175
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Review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal

Final Report

Dr Lorand Bartels
Faculty of Law, University of Cambridge
United Kingdom

6 March 2011

Contents

- 1. Introduction..... 6
- 2. SADC law and national laws 7
 - 2.1 The nature of SADC law..... 7
 - 2.2 The role of national courts..... 8
 - 2.3 Human rights in SADC law..... 9
 - i. Article 4(c) of the SADC Treaty..... 9
 - ii. Article 6(2) of the SADC Treaty..... 12
 - iii. Article 6(1) of the SADC Treaty..... 12
 - iv. Other SADC Protocols and instruments 13
 - v. Implications of a specific reference to a human rights instrument..... 13
 - 2.4 SADC law as national law 15
 - i. Norms capable of being enforced at the domestic level 15
 - ii. Norms in the SADC 'Treaty' 15
 - iii. Means of implementing Article 6(5) 16
- 3. The law applied by the SADC Tribunal 19
 - 3.1 Introduction..... 19
 - 3.2 Jurisdiction and applicable law clauses..... 19
 - 3.3 The SADC Tribunal: jurisdiction clauses 19
 - i. Articles 14 and 15 of the Tribunal Protocol 20
 - ii. Other jurisdiction clauses..... 20
 - 3.4 The SADC Tribunal: the applicable law clause 21
 - 3.5 Tribunal decisions affecting national laws and courts..... 22

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- 4. Specific jurisdictional issues 24
 - 4.1 Basis of jurisdiction (Article 16(1) and Article 32 of the SADC Treaty; Article 14 of the SADC Tribunal Protocol) 24
 - 4.2 Jurisdiction over SADC Protocols and subsidiary instruments (Article 32 of the SADC Treaty and Article 14 of the SADC Tribunal Protocol)..... 25
 - 4.3 Scope of jurisdiction (Article 15 of the SADC Tribunal Protocol)..... 27
 - 4.4 Preliminary rulings (Article 16 of the SADC Tribunal Protocol) 30
 - i. Questions which may be referred 30
 - ii. The duty of a national court to make a reference 31
 - iii. The power of a national court to make a reference 31
 - iv. Other issues 32
 - 4.5 Disputes between Member States and the Community (Article 17) and between persons and the Community (Article 18) 34
 - 4.6 Staff cases (Article 19 of the SADC Tribunal Protocol)..... 34
 - 4.7 Advisory jurisdiction (Article 16(4) of the SADC Treaty and Article 20 of the SADC Tribunal Protocol)..... 34
 - i. Applicable law 34
 - ii. Intervention..... 35
 - 4.8 Appellate jurisdiction (Article 20A of the SADC Tribunal Protocol)..... 35
 - 4.9 Revisions of decisions (Article 26)..... 36
 - 4.10 Interpretation of decisions (Rule 73) 36
 - 4.11 Intervention (Article 30 and Rule 70)..... 37
 - i. Cases in which intervention is possible 37
 - ii. The requirement of an 'interest of a legal nature' 37
- 5. Instruments governing the powers of the SADC Tribunal 40
 - 5.1 Power to make rules of procedure 40
 - 5.2 Structure of the SADC Tribunal Protocol and Rules of Procedure 40

- 6. SADC Tribunal decisions: compliance and enforcement 42
 - 6.1 Nature of SADC Tribunal decisions 42
 - i. Decisions on the law..... 42
 - ii. Remedies 42
 - 6.2 Compliance with Tribunal decisions 42
 - i. Obligation to comply 42
 - ii. Non-compliance as a violation of Article 32(2) of the SADC Tribunal Protocol..... 43
 - iii. Non-compliance and ‘actions’ and ‘sanctions’ adopted by Summit..... 43
 - iv. Improving compliance..... 47
 - 6.3 Domestic enforceability of SADC Tribunal decisions 49
 - i. Obligations concerning domestic enforceability of decisions 49
 - ii. Relationship to the obligation to comply with SADC Tribunal decisions..... 50
 - iii. Enforcement of SADC Tribunal decisions as foreign judgments..... 52
 - iv. Domestic enforcement in other SADC Member States 54
- 7. Qualifications and appointment of SADC Tribunal Members..... 56
 - 7.1 Qualifications..... 56
 - i. Eligibility for domestic judicial office: the question of age limits 57
 - ii. Jurists of recognized competence 57
 - iii. Personal criteria 59
 - iv. Independence and impartiality..... 59
 - v. Representativeness 59
 - 7.2 Appointment process..... 60
 - i. Nomination..... 61
 - ii. Selection 63
 - iii. An alternative: an independent appointment process..... 64

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- 8. Impartiality and independence of the SADC Tribunal and its Members 67
 - 8.1 Independence..... 67
 - i. Tribunal budget 67
 - ii. Tribunal Members' terms and conditions of service, salaries and benefits 68
 - iii. Immunity of Tribunal Members 69
 - iv. Tenure and reappointment 69
 - v. Removal of Tribunal Members 70
 - 8.2 Impartiality..... 71
 - i. General rule..... 71
 - ii. Nationality of Members hearing cases..... 72
- 9. Legal status of the SADC Tribunal Protocol..... 73
 - 9.1 The Summit decision to adopt the 2001 Agreement 73
 - i. Article 36 of the SADC Treaty 73
 - ii. Legality of the decision to adopt the 2001 Agreement under Article 36 75
 - 9.2 The 2001 Agreement as an amending treaty under international law 76
 - 9.3 Subsequent conduct..... 77
 - 9.4 Changes brought about by the 2001 Agreement 79
 - 9.5 Consent to jurisdiction 81
- Annex 1: Recommendations 82
- Annex 2: Observations 88

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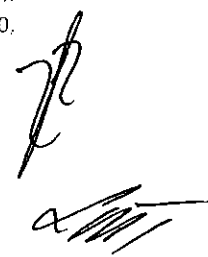
1. Introduction

This report on the role, responsibilities and terms of reference of the SADC Tribunal was commissioned by SADC in November 2010. A draft report was presented at the SADC Member State Senior Officials Meeting in Swakopmund on 21 February 2011, and discussed by the Senior Officials on 22 February 2011. This report, which takes into account the responses of the Senior Officials, is presented to the SADC Member State Ministers of Justice and Attorneys-General Meeting in Swakopmund on 14 and 15 April 2011.

This report is concerned with the legal framework of the SADC Tribunal, including the nature of SADC law and its relationship with national law. Its object is twofold: to provide an analysis of the SADC legal system and of the role of the SADC Tribunal and the national courts of the SADC Member States, and to make concrete recommendations directed at improving the functioning and operation of the SADC Tribunal within this legal framework. To this end, the report analyzes the legal instruments governing the SADC Tribunal, especially the SADC Treaty, the SADC Tribunal Protocol and Rules of Procedure, and other related instruments, as well as relevant national laws of the SADC Member States. This analysis is based on primary and secondary legal sources as well as on an empirical exercise involving questionnaires and interviews with government officials, Tribunal Members, and key stakeholders. Insofar as the report seeks to identify best practice, it also takes into account the law and practice of other international tribunals, especially those in the region.

There are a number of matters concerning the practical functioning of the Tribunal which are critical to the practical effectiveness of the Tribunal, but which are not addressed here, such as outreach and accessibility, infrastructure, case management and training. These issues are largely outside the scope of this study, and have in any case been comprehensively addressed in various recent projects. The SADC Tribunal Secretariat adopted a Strategic Plan in December 2010, based on own initiative studies on the practical functioning of the Tribunal, and on a study conducted by GTZ on the institutional and practical needs of the Tribunal; and the consultancy AGORA 2000 concluded a study on the institutional capacity of the SADC Tribunal in December 2010.¹ There is no need to replicate the comprehensive work in these studies, and this report does not deal with these issues, except in one respect: to recommend the Tribunal be given specific power to establish its own rules of procedure.

¹ SADC Tribunal, *Strategic Plan*, December 2010; Ulrik Spliid and Marian Nell, *Study on the Southern African Development Community (SADC) Tribunal Capacity Needs Assessment* (GTZ, October 2009); AGORA 2000, *Developing the Institutional Capacity of the SADC Tribunal – Final Report and Annexes*, December 2010.



2. SADC law and national laws

2.1 The nature of SADC law

In concluding the SADC Treaty, the SADC Member States established a 'Community' under international law, and a number of Community institutions with general and specific powers. The norms set out in the SADC Treaty, in Protocols to the Treaty, in other instruments concluded by SADC Member States in the framework of the Community, and in instruments and other 'acts' adopted by SADC institutions in the exercise of their powers, have the status of international law.² In short, SADC is an international organization, which is both governed by international law and, within its powers, generates norms with the status of international law. This basic fact is the starting point for a consideration of the relationship between SADC law and the national laws of the SADC Member States.

The most important consequence of this is as follows: under international law, a State may not rely on its national laws (including norms of constitutional status) as a defence to a violation of an international obligation.³ This means that, if a SADC Member State's national law violates a SADC norm, that law must be brought into line with the SADC norm. In *Gondo*, the SADC Tribunal held that section 5(2) of the State Liability Act of Zimbabwe was in breach of the SADC Treaty in so far as it provided that State-owned property was immune from execution, attachment or process to satisfy a judgment debt.⁴ Zimbabwe then came under an obligation to revoke the SADC-inconsistent elements of this legislation. It may be noted that, in this respect, the status of the national law is irrelevant. Parties to treaties may need to amend even their constitutions to comply with their international obligations: thus Ireland, France and Germany each amended their constitutions to comply with their EU obligations.⁵

Two final points need to be made. First, simply because SADC law is, as a matter of international law, capable of requiring changes to national laws, including constitutions, does not mean that SADC law necessarily requires any change to national laws. This all depends on the nature of the SADC laws at issue. Second, the position expressed here is the default rule under international law. This default rule could be changed by SADC Member

² Wilfred Jenks, *The Proper Law of International Organisations* (Dobbs Ferry, New York: Oceana Publications, 1962) at 3-4; C F Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd ed (Cambridge: CUP, 2009), 14-15. There are rare circumstances in which legal relations between SADC and individuals might be governed by national laws on contract, tort and property: cf Finn Seyersted 'Applicable Law in Relations Between Intergovernmental Organizations and Private Parties' (1967-III) 122 *Receuil des Cours* 427.

³ Article 27 of the Vienna Convention of the Law of Treaties; cf also Article 3 of the International Law Commission's Articles on State Responsibility. In *Pulp Mills (Argentina/Uruguay)* [2010] ICJ Rep (not yet reported), 20 Apr 2010, para 121, the International Court described Article 27 as reflecting a 'well-established customary rule'. See also *Gramara* (HC 33/09) [2010] ZWHHC 1, in the context of Zimbabwe's obligations under the SADC Treaty.

⁴ *Gondo*, Case No SADC (T) 05/2008, 9 Dec 2010.

⁵ T C Hartley. *The Foundations of European Law*, 7th ed (Oxford: OUP, 2010), 259.

States to provide that SADC law is subject to the constitutions of the Member States. But this has not so far been done.

Observation 1

All of SADC law is international law, and consequently binds SADC Member States regardless of their national laws, including their constitutions.

2.2 The role of national courts

The foregoing considerations do not take into account the fact that, under national law, a national court may not have the power to reach any other decision under the law by which it is bound. In *Ex parte CFU* the Zimbabwean Supreme Court said this, in relation to the SADC Tribunal:

The decisions of the Supreme Court are final. No appeal lies from the Supreme Court to any other Court. No appeal lies to the SADC Tribunal from the Supreme Court. The decisions of the SADC Tribunal are at best persuasive but certainly not binding.

The SADC Tribunal has not been domesticated by any municipal law and therefore enjoys no legal status in Zimbabwe. I believe the same obtains in all SADC States, that is, that there is no right of appeal from the South African Constitutional Court, the Namibian Supreme Court, the Lesotho Supreme Court, the Swaziland Supreme Court, the Zambian Supreme Court and the Supreme Courts of other SADC countries to the SADC Tribunal.⁶

This is most likely a correct statement of the position of domestic courts, at least in the context of dualist legal systems.⁷ But it is also irrelevant to a State's obligations under international law.⁸

Indeed, by issuing a decision contrary to State's international obligations, a national court may itself, by that act, violate that State's international obligations.⁹ This is because, under international law, a national court is considered to be an organ of the State,¹⁰ just like the

⁶ *Ex parte Commercial Farmers Union*, Judgment No SC 31/10 (Supreme Court of Zimbabwe, 26 Nov 2010, unreported), per Chidyausiku CJ, 14. A similar statement was made in *Etheredge* [2009] ZWHHC 1, although on the confusing grounds (in part) that the SADC Tribunal Protocol did not have the intention of creating a tribunal which would be superior to the courts in the subscribing countries. This is both irrelevant and, at least in terms of preliminary rulings, inaccurate: see below at 30.

⁷ See below at 16.

⁸ See also below at 22.

⁹ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* [1999] ICJ Rep 62, para 62; this is also a commonplace in WTO law. In the EU, a Member State is liable to pay damages to an individual as a result of a final court ruling that manifestly violates EU law: Case C-224/01, *Köbler* [2003] ECR I-10239. The European Court of Human Rights has sanctioned States for the acts of their courts that violate human rights: ECtHR, *Zullo*, 29 March 2006 (delay).

¹⁰ Article 4 of the ILC Articles on State Responsibility, reflecting customary international law, states that: '[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ

legislature and executive. Of course, a national court may be helpless, under national law, to avoid this situation. But the solution is for the State to ensure, if necessary by constitutional amendment, that its national laws are consistent with its international obligations. This is a perhaps radical consequence from a domestic perspective, but it is entirely normal in international law – it is, in fact, the usual consequence of entering into international legal obligations.

Observation 2

SADC Member State national courts are organs of the State. Consequently, if a SADC Member State national court makes a decision under national law that is inconsistent with SADC law, the SADC Member State violates SADC law. Furthermore, it follows from Observation 1 that, if the national court is unable, under national law, to come to an alternative decision, it is for the SADC Member State to bring national law, including, if necessary, its constitution, into line with SADC law.

2.3 Human rights in SADC law

In *Campbell* the SADC Tribunal determined that Article 4(c) and Article 6(2) of the SADC Treaty required SADC Member States to comply with human rights, democracy and the rule of law,¹¹ and in *Gondo* the Tribunal added that Article 6(1) of the SADC Treaty was to the same effect.¹² This section discusses these provisions, and considers the proposition that a specific human rights instrument be incorporated, either expressly or by reference, into the SADC Treaty.

i. Article 4(c) of the SADC Treaty

Article 4(c) of the SADC Treaty states that 'SADC and its Member States shall act in accordance with the following principles: ... human rights, democracy and the rule of law'. The verbal phrase ('shall act') is in the usual language of obligations, and the object of the sentence ('in accordance with the following principles ...') is clearly defined. On its face, Article 4(c) therefore constitutes a binding obligation.

Human rights as 'principles'

A number of objections have been raised against this view. The first is that the norms referred to are described as 'principles', and are therefore of non-binding effect. It is doubtful whether such a distinction between 'principles' and 'rules' can be drawn, even as a

exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.'

¹¹ *Campbell*, SADC (T) Case No 2/2007 [2007] SADCT 1, 13 Dec 2007.

¹² *Gondo*, above at n 4. In *Campbell*, *ibid*, the Court also found a violation of Article 6(1) of the SADC Treaty (at 26-27) but did not repeat this finding in the operative part of the decision

matter of legal theory,¹³ let alone in the more precise context of legal instruments. In any case, this objection ignores the longstanding usage in international law of the term 'principles' to refer to binding obligations. For example, Article 38(1)(c) of the ICJ Statute mandates the International Court to apply 'the general principles of law recognized by civilized nations'. For the same reason, it is irrelevant that the title of Article 4 is also 'Principles'.

A related objection is to the effect that the 'principles' referred to here ('the ... principles of human rights, democracy and the rule of law') are not susceptible of objective determination, and are consequently non-justiciable. This is not tenable, as can be seen from the judgment of the Grand Chamber of the European Court of Justice in *Kadi*. Article 6(1) of the EU Treaty, as in force at the relevant time, stated that 'the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States'. The Court referred to other treaty provisions authorizing certain measures and continued as follows: '[t]hose provisions cannot, however, be understood to authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union.'¹⁴ The measures were held to be invalid.

It goes without saying that a simple reference to the principles of 'human rights' is sufficiently clear to be interpreted and applied by any tribunal, especially when read in the light of more detailed applicable human rights norms.¹⁵ But the same can be said of the principles of 'democracy' and 'the rule of law'. The principle of 'democracy' has been applied by the EU Court of First Instance:¹⁶ at its most fundamental, it can be seen as an expression of Article 3 of Protocol 1 of the European Convention of Human Rights, which states that the parties 'undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature'.¹⁷ As to the 'the rule of law', in *Katabazi* the EAC Court held that 'the intervention by the armed security agents of Uganda to prevent the execution of a lawful Court order violated the principle of the rule of law and consequently contravened the Treaty'.¹⁸ In sum, each of the principles mentioned in Article 4(c) has been interpreted and applied by tribunals in specific cases, and the jurisprudence of the SADC Tribunal on these matters cannot be seen as anything other than routine.

¹³ Ronald Dworkin used the example of *Riggs v Palmer* 115 NY 506 (1889) to demonstrate that a principle could override a rule: *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), 20.

¹⁴ Joined Cases C-402/05P and C-415/05P, *Kadi* [2008] I-6351, para 303.

¹⁵ On this, see below at Section 3.4.

¹⁶ Case T-222/99, *Martinez* [1999] ECR II-3397. The Court held against the applicant, but this was on the facts of the case, not because the principle of democracy was not capable of objective determination.

¹⁷ See *Matthews* (1999) 28 EHRR 361.

¹⁸ *Katabazi* [2007] EACJ 3.

Indeterminacy of 'principles' in Article 4 of the SADC Treaty

A somewhat different objection is that, whatever the 'principles of human rights, democracy and the rule of law' might be capable of meaning in other instruments, the context of Article 4(c) shows that these principles were not, in this case, intended to have legal effect. It is important to point out that this argument is not based on the 'bindingness' of the language used to indicate whether there is an obligation: as mentioned, this language is entirely binding. Rather, the argument is that the other 'principles' referenced in Article 4 are not capable of objective determination, and therefore neither are the principles in Article 4(c). These are the principles of 'sovereign equality of all Member States; solidarity, peace and security; equity, balance and mutual benefit; and peaceful settlement of disputes'.

There are two responses to this objection. The first is that the argument suffers from a *non sequitur*: even if it were true that the other principles were not capable of objective determination, it does not follow that the principles in Article 4(c) are not capable of objective determination. Indeed, one might even make the opposite claim, that if the principles in Article 4(c) are determinate norms, so too must be the other norms in Article 4. But aside from this, it bears noting that, in international law as in national law, courts and tribunals never fail to apply norms simply because they are expressed at a level of generality. Indeed, in the *South West Africa Cases*, the International Court of Justice had no difficulty in deciding that a case could be heard involving the question whether various laws and regulations promoted the 'material and moral well-being and the social progress of the inhabitants' of a mandated territory.¹⁹ More generally, it is well established that an international court or tribunal will not refuse to adjudicate by declaring a *non liquet* ('the law is unclear').²⁰

Thus, while it is not necessarily possible to state what 'human rights', 'democracy' or 'the rule of law' might mean in the abstract, this does not mean that these norms cannot be interpreted and applied in any given case. In sum, there is no reason to doubt the correctness of the rulings in *Campbell* and *Gondo* that Article 4(c) of the SADC Treaty constitutes an obligation binding on the SADC Member States.

Relevance of *Kéïta* and *Katabazi*

It has been suggested that the foregoing conclusions are contradicted by the cases of *Kéïta* in the ECOWAS Court and *Katabazi* in the EAC Court. However, for different reasons, this is not the case. In *Kéïta*, the ECOWAS Court declined to exercise jurisdiction over a matter because the matter had already come before a national court.²¹ This ruling, which is in any case of dubious merit,²² is inapplicable to the SADC Tribunal, where it is clear, *inter alia*, from

¹⁹ *South West Africa Cases (Ethiopia/South Africa; Liberia/South Africa) (Preliminary Objections)* [1962] ICJ Rep 319. See also Judge Jessup (Sep Op), 428-9; but *contra* Judges Spender and Fitzmaurice (Joint Diss Op), 466-7.

²⁰ H Lauterpacht, 'Some Observations on the Prohibition of "Non Liquet" and the Completeness of the Law' in FM van Asbeck et al (eds), *Symbolae Verzijl* (The Hague: Nijhoff, 1958), 196-221.

²¹ *Kéïta*, ECOWAS Case No ECW/CCJ/APP/05/06, unreported, 22 Mar 2007, para 30.

²² For criticism, see Solomon Ebobrah, 'Litigating Human Rights Before Sub-Regional Courts in Africa: Prospects and Challenges' (2009) 17 *African Journal of International and Comparative Law* 79, 99-100 and 'Critical Issues

196

the rule on exhaustion of local remedies, that jurisdiction exists in these cases. *Kéita* is therefore irrelevant to the question at issue. *Katabazi*, by contrast, is relevant, but its meaning is not what has been claimed.²³ This case concerned two articles concerning the jurisdiction of the EAC Court. Article 27(1) stated that '[t]he Court shall initially have jurisdiction over the interpretation and application of this Treaty', while Article 27(2), which has no counterpart in the SADC Treaty or SADC Tribunal Protocol, stated that '[t]he Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, the Partner States shall conclude a protocol to operationalise the extended jurisdiction.' The EAC Court held that despite its plenary grant of jurisdiction in Article 27(1), the effect of Article 27(2) was that it lacked jurisdiction with respect to human rights until the conclusion of the protocol foreseen in that provision.²⁴ However, the Court also held that it had jurisdiction with respect to the principle of the rule of law, referred to in the Treaty, and *not* covered by the exclusion in Article 27(2) of the EAC Treaty.²⁵ In other words, *Katabazi* does not undermine *Campbell*; to the contrary, it supports it.

ii. Article 6(2) of the SADC Treaty

Article 6(2) of the SADC Treaty is another provision on human rights. It states:

SADC and Member States shall not discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture or disability.

There is simply no plausible way of reading this as anything but as a fully effective obligation in its own express and – after decades of international jurisprudence on the point – well understood terms. The ruling of the SADC Tribunal to this effect in *Campbell* cannot be faulted.

iii. Article 6(1) of the SADC Treaty

The case of Article 6(1) of the SADC Treaty, applied by the SADC Tribunal in *Gondo*, is more complicated.²⁶ This provision states:

Member States undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and shall refrain from taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty.

As with Article 4(c), the language used in this provision is that of binding obligations: Member States *inter alia* 'shall refrain' from taking certain measures. However, the difficulty

in the Human Rights Mandate of the ECOWAS Court of Justice' (2010) 54 Journal of African Law 1, 14-15 (referring to this as an 'ostrich approach').

²³ *Katabazi*, above at n 18.

²⁴ *ibid*, at 15.

²⁵ *ibid*, at 16 ff.

²⁶ *Gondo*, above at n 4.

is determining whether these measures are sufficiently well defined to be capable of objective determination, and therefore justiciable. The prohibited measures are, firstly, those that are 'likely to jeopardise the sustenance of [SADC's] principles'; second, those that are likely to jeopardise the achievement of [SADC's] objectives, and thirdly those that are likely to jeopardise the implementation of the provisions of [the SADC] Treaty'.

As mentioned, courts will not decline to hear a case on the basis that norms are expressed at a level of generality. At the same time, it may be difficult for a plaintiff to demonstrate that a measure is jeopardising the achievement of some of SADC's objectives, such as, for example, 'promot[ing] self-sustaining development on the basis of collective self-reliance, and the interdependence of Member States' (Article 5(1)(d)). More specifically, insofar as Article 6(1) references the principles in Article 4(c), this provision establishes a clear benchmark capable of objective determination. Whether it can be demonstrated that any given measure 'is likely to jeopardize the sustenance' of these principles is another matter, but it is certainly possible, and the finding on this point in *Gondo* appears beyond reproach.

iv. Other SADC Protocols and instruments

A number of the SADC instruments deal with human rights, most obviously the Protocol on Gender and Development (not yet in force), the Protocol on Health, and the Charter of Fundamental Social Rights in SADC, but also others. These may not all be applicable to all SADC Member States, nor of the same legal status. However, to the extent that they are applicable (on which see the next section), they constitute relevant context for the interpretation of the core references to human rights in Article 4(c), Article 6(1) and Article 6(2) of the SADC Treaty.

v. Implications of a specific reference to a human rights instrument

Respondents to this study have differed on whether it would be desirable for a specific reference to be made to a human rights instrument, so that more definition can be given to the human rights provisions of the SADC Treaty. Some argue in favour, on the grounds of precision, while others consider this unnecessary, on the grounds that the interpretation of a treaty norm is a judicial and not an executive function.

It may be observed that, if the proposal is to make a reference to instruments that are already binding on all SADC Member States, such as the International Covenant on Civil and Political Rights or the African Charter on Human and Peoples' Rights (ACHPR),²⁷ there is nothing to be gained by including such a reference, insofar as cases involving the Member States are concerned. Such instruments are already relevant context for the interpretation

²⁷ ICCPR; ACHPR: Angola (10 Jan 1992; 9 Oct 1990); Botswana (8 Sep 2000; 22 Jul 1986); DRC (1 Nov 1976; 28 Jul 1987); Lesotho (9 Sep 1992; 27 Feb 1992); Madagascar (21 Jun 1971; 19 Mar 1992); Malawi (22 Dec 1993; 23 Feb 1990); Mauritius (12 Dec 1973; 1 Jul 1992); Mozambique (21 Jul 1993; 7 Mar 1990); Namibia (28 Nov 1994; 16 Sep 1992); Seychelles (5 May 1992; 30 Apr 1992); South Africa (10 Dec 1998; 9 Jul 1996); Swaziland (26 Mar 2004; 9 Oct 1995); Tanzania (11 Jun 1976; 9 Mar 1984); Zambia (10 Apr 1994; 2 Feb 1984); Zimbabwe (13 May 1991; 12 Jun 1986): <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf> and http://www.achpr.org/english/ratifications/ratification_african%20charter.pdf.

of the norms set out in the SADC Treaty. This follows from the customary rule reflected in Article 31 of the Vienna Convention on the Law of Treaties, according to which a tribunal is required to interpret treaty norms in light of their ordinary meaning and context, taking into account 'relevant rules of international law applicable in the relations between the parties'.²⁸ In addition, as will be discussed further below, the SADC Tribunal has the power under Article 21(b) of the SADC Tribunal Protocol, to 'develop its own Community jurisprudence having regard to applicable treaties, general principles and rules of public international law and any rules and principles of the law of Member States'. In sum, these human rights instruments, and no doubt others as well, are in this way already *de facto* incorporated into the SADC Treaty.

It is of course true that there may be some legal effect to the addition of a reference to an instrument, or to specific norms, which are *not* binding on all SADC Member States. There is no legal obstacle to doing so. The problem in this respect is different: it seems inappropriate that a SADC Member State that is not already bound by such norms *directly* should agree to be bound by these norms *indirectly* by incorporating them into the SADC Treaty.

Observation 3

The SADC Tribunal has the power to interpret the SADC Treaty in light of human rights treaties binding on the SADC Member States, and to this extent there is nothing to be gained by amending the SADC Treaty to include a reference to any such human rights treaties.

²⁸ The 'parties', for this purpose, may be taken to mean the parties to the SADC Treaty.



2.4 SADC law as national law

Article 6(5) of the SADC Treaty imposes a particular obligation on SADC Member States. It provides that:

Member States shall take all necessary steps to accord this Treaty the force of national law.

This amounts to an obligation on Member States to ensure that the norms in the SADC Treaty are enforceable in the domestic legal order in the same way as national norms. Nonetheless, it raises a number of further issues.

i. Norms capable of being enforced at the domestic level

In the first place, it must be noted that, necessarily, this obligation applies only to norms capable of being enforced in a domestic legal system. Taking as a guide EU law, where this issue has been the subject of a decades-long jurisprudence, it may be said that these norms are those that are unconditional and precise, and not requiring any further legislative or administrative implementation.²⁹

ii. Norms in the SADC 'Treaty'

A further question concerns the meaning of the SADC 'Treaty' which must be given the force of national law under Article 6(5). Article 1 of the SADC Treaty defines the 'Treaty' as 'this Treaty establishing SADC and includes any amendment hereto'. It is open to question whether the other SADC norms over which the Tribunal exercises jurisdiction under Article 14(b) of the SADC Tribunal Protocol (which includes Protocols, other instruments adopted by SADC, and the acts of SADC institutions) are also to be given the force of national law.

However, there is an answer in Rule 75 of the Rules of Procedure, which expands on the preliminary rulings procedure, and which is an integral part of the SADC Treaty.³⁰ By definition, the preliminary rulings procedure is restricted to SADC norms that have the force of national law, which is to say, those referred to in Article 6(5) of the SADC Treaty. It is in this respect relevant that Rule 75 states that the preliminary rulings procedure applies to 'question[s] concerning the application or interpretation of the Treaty or its Protocols, directives and decisions of the Community or its Institutions'. To read the reference in Article 6(5) of the SADC Treaty in a more limited way would be to render Rule 75 largely redundant: such an interpretation must be rejected.

²⁹ The leading case is Case C-26/62, *Von Gend en Loos* [1963] ECR 1.

³⁰ The SADC Tribunal Rules of Procedure are an integral part of the SADC Tribunal Protocol (by Article 23 of the Protocol), and therefore also an integral part of the SADC Treaty (by Article 16(2) of the SADC Treaty).

Observation 4

Article 6(5) of the SADC Treaty should be understood to mean ‘SADC Treaty, its Protocols and subsidiary instruments, and the acts of its institutions intended to have legal effect’.

iii. Means of implementing Article 6(5)

The means of implementing the obligation in Article 6(5) varies according to the domestic legal orders of the SADC Member States.

SADC Member States with ‘monist’ systems

The domestic legal orders of SADC Members with ‘monist’ systems automatically grant legal effect to international agreements. However, even these legal orders do not rank international agreements above their own constitutions.³¹

SADC Member States with ‘dualist’ systems

For SADC Member States with ‘dualist’ systems, international agreements cannot be relied upon in national courts,³² except to the extent that domestic laws will be interpreted by reference to international agreements,³³ or if they give rise to ‘legitimate expectations’ that the executive will act in a certain way.³⁴ But in terms of having direct effect, for these

³¹ Article 13(2) Angola Constitution; Articles 18(1)-(2) Mozambique Constitution; Article 215 Democratic Republic of Congo Constitution; Article 144 Namibia Constitution; Malawi (prior to 1994): but see now Section 211 Constitution and Section 4 of the Treaties and Conventions Publication Act, introducing a dualist system. As the SADC Treaty was concluded in 1992, it, and any valid amendments to it in accordance with Article 36, is part of Malawi law, subject to the Constitution. However, other SADC instruments concluded subsequently will not be part of Malawi law unless implemented by legislation. South Africa is dualist except for ‘self-executing’ provisions of treaties: s231 South Africa Constitution. This may apply to SADC law, which by its own terms is to be given the force of national law.

³² Botswana, Mauritius, Seychelles, Swaziland (see *R v Mngomezulu* [1977-8] SLR 159), Tanzania, Zambia, Zimbabwe: s111B(1)(b) Zimbabwe Constitution. Note that s12(2) of the Section 12(2) of the Constitution of Zimbabwe Amendment (No 12) Act 1993 provided that section 111B should not have the effect of requiring approval by Parliament of any treaty validly concluded before 1 November 1993. The applicant in *Gramara* argued that this provision meant that the SADC Treaty (concluded prior to that date) was in force, and “[h]ence the Tribunal and its judgment is cognisable by this court [the High Court of Zimbabwe] in terms of the common law, just as a foreign court and its judgment are”: *Gramara*, Heads of Argument for Applicants, para 61. However, it seems questionable that mere legislation can affect the interpretation of the constitution. Second, even if it does, by its own terms the legislation is concerned with s111B(1)(a) (validity of treaties), not s111B(1)(b) (their effect in domestic law).

³³ It is common in dualist countries that legislation is interpreted in light of international agreements. Some constitutions state that they, too, are to be interpreted in this way: s11 and s13 Malawi Constitution; s233 South Africa Constitution.

³⁴ *Teoh* (1995) 128 ALR 353, cited with approval in *Gramara*, above at n 3, 19, thus indicating that the position is the same in Zimbabwe (although this principle was not applied due to other public policy considerations. Note that the Australian Government sought to overturn *Teoh* by means of the Administrative Decisions (Effect of International Instruments) Bill 1995, although the legislation (and its successor) never came into force.

countries constitutional or at least legislative change is required in order to ensure that SADC norms are given the force of national law.³⁵

In principle, this may be done on a piecemeal basis. Zimbabwe takes the view that '[a]t this early stage, the SADC Treaty itself does not require the passing of a local statute since it does not itself impose obligations which would necessitate the enactment of legislation in order to have force of law in Zimbabwe'³⁶ and also points out that it has in fact implemented a number of individual SADC instruments. It is notable that no SADC Member State has taken any formal steps to incorporate SADC law *en bloc* into its domestic legal system, an indication that that Zimbabwe's opinion is widely shared.

However, for two reasons an *en bloc* implementation of SADC law by SADC Member States with dualist systems is considered desirable. First, it may not be true that all SADC norms are already implemented domestically. For example, it does not appear that many SADC Member States have adopted legislation requiring their domestic courts to make references to the SADC Tribunal for preliminary rulings on SADC law in accordance with Article 6(4) of the SADC Treaty.³⁷ Second, even if this assessment is true now, it may not be true in the future. Further norms, whether in the form of protocols or other acts of the institutions intended to have legal effect, may be adopted at the legislative and executive levels, and existing norms may come to be understood differently as a result of rulings by the SADC Tribunal. For these reasons, while not strictly necessary, it would be more convenient to deal with the implementation of SADC norms *en bloc*.³⁸

Observation 5

SADC Member States must ensure that they give the force of law to SADC law. For dualist countries, this may require the amendment of national laws. This may be done on a case by case basis, but because the scope of SADC law is not always clear, it would be preferable for this to be done by means of *en bloc* implementing legislation.

³⁵ See below on the question of supremacy of SADC law over constitutions. Hartley, above at n 5, Ch 8, gives examples of the changes made by various EU Member States on their joining the EU to give effect to EU law domestically.

³⁶ Zimbabwe response to questionnaire, 42.

³⁷ See below at Section 4.4.

³⁸ Should this be considered desirable, one model is the European Communities Act 1972 of the United Kingdom, section 2(1) of which states that: '[a]ll such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable EU right" and similar expressions shall be read as referring to one to which this subsection applies.' Note that Cl 11 of the European Union Bill 2010 states that '[i]t is only by virtue of an Act of Parliament that directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restriction, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom.'

Supremacy

The applicability of an international norm within a domestic legal order is not to be confused with its hierarchy *vis-à-vis* domestic law in that legal order. The term 'force of national law' in Article 6(5) is ambiguous in this respect. It could mean that SADC law has the status of domestic legislation, and therefore subordinate to both the constitution and/or any subsequent legislation. Alternatively, it could mean that SADC law is hierarchically superior (ie 'supreme') to later domestic legislation, but not the constitution. Finally, it could mean that SADC law is supreme *vis-à-vis* all domestic norms, including the constitution. Whether SADC law comes to be seen as supreme in either of the last two ways is a question for the SADC Tribunal and the national courts of the SADC Member States.³⁹ For present purposes, it is sufficient to note that supremacy (in either of these forms) has the advantage of reducing the possibility that a SADC Member State will, by virtue of its domestic laws, be in violation of SADC law.

Observation 6

It is not certain whether SADC law is supreme *vis-à-vis* national laws (including national constitutions), but such an interpretation would have the advantage of reducing the risk that SADC Member States are in violation of their SADC obligations.

³⁹ The ECJ claims that the supremacy of EU law is inherent in the EU legal order, which is a 'new legal order': Case 6/64, *Costa* [1964] ECR 585. The constitutional courts of the EU Member States generally maintain that supremacy remains a creature of international treaty law, which is given effect domestically by virtue of domestic constitutional law. Consequently, for example, the German Constitutional Court has said that an EU act in violation of constitutional law could not be applied domestically: *Lisbon Decision*, 2 BvE 2/08, para 339 (available in English at www.bverfg.de/entscheidungen/es20090630_2bve000208en.html). Similarly, the Inter-American Court of Human Rights (IACtHR) claims that ACHR law is supreme and has direct effect. However, the ACHR contracting states have adopted a variety of views. In Peru, the doctrines of supremacy and direct effect are fully accepted (*Chirinos* (Expediente N° 2730-06-PA/TC), 21 Jul 2006); in other contracting states they are not. Rather, the ACHR and the decisions of the IACtHR are drawn upon for interpretive guidance at most.

3. The law applied by the SADC Tribunal

3.1 Introduction

Formally, the SADC Tribunal only has the power to hear cases involving the interpretation and application of SADC law; it does not have any power to hear cases on the interpretation and application of national laws. However, this does not mean that the SADC Tribunal does not have an impact on national laws. This happens in two cases: first, when SADC norms are directly incorporated into national law (by virtue of Article 6(5) of the SADC Treaty), and second, when national laws, and national court decisions based on those laws, represent acts for which a SADC Member State is responsible under international law. In this respect, the SADC Tribunal has a very real impact on national laws and national courts. However, this is quite different from characterizing the SADC Tribunal as a court of 'appeal', as is sometimes erroneously done.

3.2 Jurisdiction and applicable law clauses

The law to be applied by international tribunals is typically found in two types of clause: jurisdiction clauses and applicable law clauses.⁴⁰ Jurisdiction clauses delimit the cases which a tribunal may hear, usually in terms of certain relevant norms and facts (jurisdiction *ratione materiae*, or 'material jurisdiction'), parties to proceedings (jurisdiction *ratione personae*, or 'personal jurisdiction') and the time during which the relevant facts must have occurred (jurisdiction *ratione temporae*, or 'temporal jurisdiction').

Jurisdiction clauses are to be distinguished from applicable law clauses, which specify that, in the exercise of its jurisdiction, a tribunal may apply law from a set range of sources. These sources are typically more general than the sources of law set out in the jurisdiction clauses (ie its jurisdiction *ratione materiae*). The sources of law set out in an applicable law clause can be used for the purposes of interpretation, to establish the validity of norms set out in a jurisdiction clause, and serve other similar ancillary functions. But they cannot override or limit the norms applicable under a relevant jurisdiction clause.

3.3 The SADC Tribunal: jurisdiction clauses

The jurisdiction of the SADC Tribunal is set out in a number of different clauses. Article 32 of the SADC Treaty states that '[a]ny dispute arising from the interpretation or application of this Treaty, the interpretation, application or validity of Protocols or other subsidiary instruments made under this Treaty, which cannot be settled amicably, shall be referred to the Tribunal.' This provision is buttressed by more detailed jurisdiction clauses in Article 14

⁴⁰ Lorand Bartels, 'Jurisdiction and Applicable Law Clauses: Where Does a Tribunal Find the Law Applicable to the Case before it?' in Yuval Shany and Tomer Broude (eds), *Multi-Sourced Equivalent Norms in International Law* (Oxford: Hart, 2011).

to Article 20A of the SADC Tribunal Protocol, as well as by an applicable law clause in Article 21 of the SADC Tribunal Protocol. These provisions overlap with Article 32 of the SADC Treaty but, more problematically, with each other. The following elaborates.

i. Articles 14 and 15 of the Tribunal Protocol

Article 14, headed (and misnamed) 'basis of jurisdiction', sets out the material jurisdiction of the Tribunal. Article 15, headed (and also misnamed) 'scope of jurisdiction', sets out the personal jurisdiction of the Tribunal. It is not expressly stated that parties mentioned in Article 15 can only bring cases falling under Article 14, but this is relatively clear from the juxtaposition of the two provisions, and the fact that logically they must work together to delimit the subject matter (Article 14) and the persons (Article 15) over which the Tribunal exercises jurisdiction. Both provisions should be renamed to make this clear.

Recommendation 1

Rename Article 14 'Jurisdiction *ratione materiae*' (or 'Material Jurisdiction') and Article 15 'Jurisdiction *ratione personae*' (or 'Personal Jurisdiction').

ii. Other jurisdiction clauses

Articles 16 to 20A are further jurisdiction clauses. Most of these replicate (and incorporate by reference) the subject matter jurisdiction in Article 14 but are more specific on personal jurisdiction. This is done expressly in Article 17 (jurisdiction with respect to disputes between Member States and the Community), Article 18 (jurisdiction with respect to disputes between persons and the Community) and Article 19 (disputes between staff and the Community); and it is done by making these provisions 'subject to Article 14'.⁴¹

In a roundabout manner, this is also done by Article 16 ('preliminary rulings'). Article 16 refers to 'the provisions in issue', which is ambiguous, although, as suggested below, the matter is clarified when it is read together with Rule 75, which is broadly similar Article 14. A recommendation is made below to clarify this point.

In contrast, Article 20 of the SADC Tribunal Protocol and Article 16(4) of the SADC Treaty are not limited by Article 14 of the SADC Tribunal Protocol. These provisions authorize the Tribunal to give advisory opinions 'on such matters as the Summit or the Council may refer to it.' It is not entirely certain whether the Tribunal is restricted in its advisory jurisdiction also to the norms set out in Article 14. Article 20A gives the Tribunal an appellate jurisdiction over panels established under protocols with respect to 'issues of law covered in the panel report and legal interpretations developed by the panel', wording reiterated (somewhat redundantly) in Article 15(4). This provision is addressed further below.

⁴¹ This term implies that Article 14 governs the matters set out in Articles 17-19. In fact, the two sets of provisions are about somewhat different issues (material and personal jurisdiction respectively).

3.4 The SADC Tribunal: the applicable law clause

As mentioned, in interpreting and applying the norms within its jurisdiction, the SADC Tribunal is mandated to apply the norms set out in the applicable law clause in Article 21. This provision states that:

The Tribunal shall:

- (a) apply the Treaty, this Protocol and other Protocols that from part of the Treaty, all subsidiary instruments adopted by the Summit, by the Council or by any other institution or organ of the Community pursuant to the Treaty or Protocols; and
- (b) develop its own Community jurisprudence having regard to applicable treaties, general principles and rules of public international law and any rules and principles of the law of Member States.

Taken together, these paragraphs empower the SADC Tribunal, while determining cases within its jurisdiction, to apply norms of SADC law (Article 21(a) as well as 'Community law' based on the sources listed in Article 21(b)).⁴²

In some respects, the sources of law in Article 21(b) are well defined. There is no ambiguity about a reference to the principles and rules of public international law, even if it is not always an easy task to identify these rules. Most significantly, this reference authorizes the SADC Tribunal to apply equitable principles, such as estoppel, as well as the rules of treaty law, including rules on the interpretation of treaties (codified in Articles 31-33 of the Vienna Convention).⁴³ This includes, importantly, the rule that treaties are to be interpreted in light of any relevant rules of international law applicable in the relations between the parties (codified in Article 31(3)(c) VCLT). Given the generous reference to 'the principles and rules of international law', there is not much, if anything, added by the additional reference in Article 21(b) to 'applicable treaties'.

The same cannot however be said of the reference to 'any rules and principles of the law of Member States'. This is potentially a significant source of law. The main question concerns the method the identification of these 'rules and principles': specifically, the question is whether it is sufficient that some Member States adhere to a certain rule, or whether a majority or even unanimity is necessary. The practice of the European Court of Justice, which applies 'general principles of Union law' based on the constitutional traditions of EU Member States, is instructive. The Court has consistently refused to adopt what is known as a 'maximalist' approach, according to which a principle must be found in a given number of Member States before it can be used.⁴⁴ Recently, and controversially, it decided that a prohibition on age discrimination was a 'general principle of Union law', without even

⁴² As mentioned, but worth emphasizing, this does not enlarge the jurisdiction of the Tribunal.

⁴³ Even in the absence of this reference, this would be the default position under customary international law.

⁴⁴ Bruno de Witte, 'The Role of the ECJ in the Protection of Human Rights,' in Philip Alston (ed), *The EU and Human Rights* (Oxford: OUP, 1999), 881.

looking at the constitutional traditions of EU Member States.⁴⁵ The power of the ECJ to apply general principles of Union law has been an important element of the ECJ's drive to integration.⁴⁶ Quite how the SADC Tribunal would approach this aspect of its powers is an open question, though perhaps not one that is pressing.

3.5 Tribunal decisions affecting national laws and courts

As mentioned, all of the various jurisdictions of the SADC Tribunal are restricted to questions of SADC law. All decisions by the SADC Tribunal are rulings on the interpretation and application of SADC norms, and not national laws.⁴⁷ Correspondingly, there is no formal appeal from domestic courts to the SADC Tribunal, and, as mentioned, it is wrong to describe the SADC Tribunal as an 'appellate court'.⁴⁸ The SADC Tribunal has no power to make determinations on national laws or to review the decisions of domestic courts as 'law'.

However, in two respects the SADC Tribunal exercises direct power over national laws and decisions of domestic courts based on those laws. The first concerns cases in which SADC norms are co-extensive with domestic norms, and there is the possibility of overlap between the jurisdiction of the SADC Tribunal and the jurisdiction of domestic courts. Indeed, the rule, stipulated expressly in the SADC Tribunal Protocol, that an individual must have exhausted all available domestic remedies before bringing a case to an international tribunal, is predicated on a degree of identity between national and international actions. The second concerns cases in which the acts of a domestic court are attributed to a SADC Member State, such that this Member State is responsible for violating an international obligation.

There is an argument, at least in relation to the first category of cases, that an international tribunal should exercise a degree of deference to a national court. This is particularly the case when it comes to the interpretation of national laws, and to findings of fact.⁴⁹ In *Diallo*, the International Court said:

it is for each State, in the first instance, to interpret its own domestic law. The Court does not, in principle, have the power to substitute its own interpretation for that of the national authorities, especially when that interpretation is given by the highest national courts ...⁵⁰

⁴⁵ C-144/04, *Mongold* [2005] ECR I-9981.

⁴⁶ For a recent discussion, see Koen Lenaerts and José A Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) 47 *Common Market Law Review* 1629.

⁴⁷ One difficulty is presented by the fact that SADC Tribunal decisions are to be enforced as foreign judgments (Article 32(1) SADC Tribunal Protocol). It is not easy to see how SADC Tribunal decisions can simultaneously be equivalent to norms with 'the force of national law' and foreign norms.

⁴⁸ Eg *Ex parte CFU*, above at n 6, 14.

⁴⁹ Yuval Shany, *Regulating Jurisdictional Relations Between National and International Courts* (Oxford: OUP, 2007), at 183-4.

⁵⁰ *Diallo (Guinea/DRC)* [2010] ICJ Rep, not yet reported (30 Nov 2010), para 70.

But this deference has its limits. The Court continued:

Exceptionally, where a State puts forward a manifestly incorrect interpretation of its domestic law, particularly for the purpose of gaining an advantage in a pending case, it is for the Court to adopt what it finds to be the proper interpretation.⁵¹

In some cases, an international tribunal may be specifically directed to respect the findings of fact of a national decision-maker, and limit itself to determining whether the findings of fact were made 'objectively'. This 'standard of review' is similar to the deference exercised by many national courts in relation to the decisions of the executive, acting within their discretion.

Further principles demonstrating a respect of the international tribunal for national courts include rules on parallel proceedings (*lis alibi pendens*), and the principle, adopted by the European Court of Human Rights, that in ordering 'just satisfaction' it will take into account any remedies already paid at the domestic level.⁵² It is however very rare indeed for the principle of *res judicata* to be applied by an international tribunal such that it will respect the findings of a national court on a given issue. There are examples in international criminal law. For example, the International Criminal Court is not able to reopen criminal cases determined by national courts (and *vice versa*).⁵³ However, even this example has its limits: this rule does not apply if the ICC considers that national proceedings were not conducted in good faith. In all other cases, deference is just that, and no more. The international tribunal will always reserve to itself the power to review a case *de novo* if it has good cause; and it will always do so when the decision of the court is the very subject matter of the action.

In summary, the deference of any international tribunal to national courts exists but also has limits. It may lead to temporary stays of proceedings. But is quite clear that the international tribunal cannot be bound by any doctrine of *res judicata*. This would entirely defeat the hierarchical relationship between the international tribunal and national courts in those cases in which the tribunal needs to assess the legality of national acts, including those of courts, against an international standard.⁵⁴ This also sets a limit to any deference that might be exhibited by the SADC Tribunal to the national courts of SADC Member States.

⁵¹ *ibid.*

⁵² Eg *Tomasic* [2006] ECHR 878. In *Paudicio v Italy*, 24 May 2007, para 59, the Court decided not to make an award for pecuniary damage because proceedings could be instituted at domestic level for this purpose even though none were pending.

⁵³ Article 20 of the ICC Statute (*ne bis in idem*). The ICTR applies a stricter *ne bis in idem* rule only where the legal standard is the same.

⁵⁴ Shany, above at n 49, 184.

4. Specific jurisdictional issues

4.1 Basis of jurisdiction (Article 16(1) and Article 32 of the SADC Treaty; Article 14 of the SADC Tribunal Protocol)

There are three main provisions establishing the jurisdiction of the SADC Tribunal, which must be read cumulatively.⁵⁵ The first is Article 16(1) of the SADC Treaty, which states that '[t]he Tribunal shall be constituted to ensure adherence to and the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it.'

The second is Article 32 of the SADC Treaty, which permits the reference to the SADC Tribunal of '[a]ny dispute arising from ... the interpretation, application or validity of Protocols or other subsidiary instruments made under this Treaty, which cannot be settled amicably'. Article 32 repeats part of the jurisdiction granted in Article 16(1), but adds jurisdiction to determine the *validity* of subsidiary instruments, and jurisdiction with respect to the interpretation, application and validity of the *Protocols*.

The third provision is Article 14 of the SADC Tribunal Protocol, which states that:

The Tribunal shall have jurisdiction over all disputes and all applications referred to it in accordance with the Treaty and this Protocol which relate to:

- (a) the interpretation and application of the Treaty;
- (b) the interpretation, application or validity of the Protocols, all subsidiary instruments adopted within the framework of the Community, and acts of the institutions of the Community;
- (c) all matters specifically provided for in any other agreements that Member States may conclude among themselves or within the community and which confer jurisdiction on the Tribunal.

Article 14(a) reiterates the jurisdiction established in Article 16(1) of the SADC Treaty, while Article 14(b) reiterates the jurisdiction established in Article 32 of the SADC Treaty, as well as adding a jurisdiction with respect to disputes on the interpretation, application and validity of the 'acts of the institutions of the Community'. Article 14(c) adds a jurisdiction with respect to other agreements that themselves provide for such a jurisdiction.

There are two comments to be made on Article 14. First, the italicized words in the phrase 'all disputes and all applications *referred to it in accordance with the Treaty and this Protocol*' confusingly introduces a procedural issue into a provision concerned with jurisdiction. Second, the term 'acts of the institutions of the Community' should be clarified to indicate that these are acts *intended to have legal effect*; in other words, a legislative or

⁵⁵ *Electricity Company of Sofia and Bulgaria (Belgium/Bulgaria)* [1939] PCIJ Series A/B, No 77, 76.

administrative measure⁵⁶ but not simple policy statements, or more factual 'acts'.⁵⁷ This leads to the following recommendation.

Recommendation 2

Amend Article 14 of the SADC Tribunal Protocol as follows:

The Tribunal shall have jurisdiction over all disputes and all applications referred to it in accordance with the Treaty and this Protocol which relate to ...

Recommendation 3

Amend Article 14(b) of the SADC Tribunal Protocol as follows:

(b) the interpretation, application or validity of the Protocols, all subsidiary instruments adopted within the framework of the Community, and acts of the institutions of the Community intended to have legal effect'.

4.2 Jurisdiction over SADC Protocols and subsidiary instruments (Article 32 of the SADC Treaty and Article 14 of the SADC Tribunal Protocol)

Under Article 32 of the SADC Treaty and Article 14(b) of the SADC Tribunal Protocol the SADC Tribunal has jurisdiction over Protocols and other subsidiary instruments adopted within the SADC framework, as well as over any other agreements that may be concluded by the parties. There are a number of such other instruments (as these will collectively be termed in this section). Article 20A of the SADC Tribunal Protocol also provides for appeals to the Tribunal on the legal findings and conclusions of panels established under the Protocols, and Article 15(4) of the SADC Tribunal Protocol adds, redundantly, that such an appeal shall be limited 'to issues of law and legal interpretations'.

The primary issue that arises concerns the possibility of overlapping primary jurisdictions between dispute settlement systems established under these other instruments and the SADC Tribunal. Already there are two dispute settlement systems established under such instruments: a panel system (modelled on the WTO panel system) applicable to disputes under the Trade Protocol⁵⁸ and a more primitive system of dispute settlement applicable to disputes under the SQAM Memorandum of Understanding.⁵⁹ The simplest means of resolving this problem would be to remove the Tribunal's original jurisdiction in matters covered by special dispute settlement systems.

However, this would not solve certain related problems. One is that the same matter can arise under a number of different instruments. For example, a technical regulation in the

⁵⁶ Eg Case 22/70, *ERTA* [1971] ECR 263, para 39.

⁵⁷ See below at 34.

⁵⁸ Annex VI of the SADC Trade Protocol.

⁵⁹ Article 13 of the SQAM MoU.

area of fisheries could easily fall under the Protocol on Trade, the SQAM Memorandum of Understanding, and the Protocol on Fisheries. Another is that the same rules risk being interpreted differently; or that the corpus of SADC law becomes fragmented. This may be illustrated by a counter-example: in *Schmidberger*, the European Court of Justice balanced human rights and free movement of goods obligations in considering whether it was legal for an EU Member State to grant permission to block a motorway for a public demonstration.⁶⁰ This type of ruling can only be given by a tribunal with a general power to interpret all applicable law.

Furthermore, there are fundamental features of the SADC legal system that are at least in some tension and possibly incompatible with the existence of multiple dispute settlement systems. Most fundamentally, this arises from the fact that SADC law must be given direct effect within the legal systems of the SADC Member States, and that, in order to ensure the uniform interpretation of SADC law with this effect, questions on the interpretation of such law must be referred by national courts to the SADC Tribunal for a preliminary ruling. Related to this is the fact that the parties with access to jurisdiction under the dispute settlement mechanisms set out in the subordinate SADC instruments are not necessarily the same as those with access to the SADC Tribunal. For example, only the SADC Member States have access to a panel under Annex VI of the Trade Protocol, whereas individuals (as well as Member States) have access to the SADC Tribunal, also in relation to trade matters, as well as under their own domestic law (as implied by Rule 75). All of this demonstrates the serious risk of fragmentation of SADC law posed by the present system of multiple jurisdictions.

For all of these reasons, it needs seriously to be considered whether the entire package of SADC law should rather fall to be interpreted and applied solely by the SADC Tribunal. This would have the most consequence for the system of panels established in Annex VI of the Trade Protocol, and one hesitates to recommend that this system be abolished. It is therefore only fair to consider whether doing so would come at any cost. There are two ostensible advantages to the panel system. The first is the possibility of appointing competent arbiters. But this advantage is more spurious than real. The WTO experience shows that the panel system frequently throws up incompetent panellists, and progressive thinking on this point, and a formal EU proposal, is to replace *ad hoc* panellists with a permanent body of panellists. In any case the problem could be fixed at source, by ensuring that there are competent arbiters on the SADC Tribunal (see Recommendation 15). The second ostensible advantage is that a panel procedure is supposed to be more efficient and deliver a faster result. However, not only is there no reason to believe that this would be the case; in at least one respect, the panel procedure could take far longer: under Article 8(4) of Annex VI a party may object indefinitely to the selection of a panellist, effectively blocking the composition of a panel. Indeed, this is only one of the many flaws of the current panel system.⁶¹

⁶⁰ Case C- 112/00 *Schmidberger* [2003] ECR I- 5659.

⁶¹ For critical analyses of Annex VI see Jan Bohanes, 'A Few Reflections on Annex VI to the SADC Trade Protocol', *tralac Working Paper No 3/2005*, and Joost Pauwelyn, 'Going Global, Regional, or Both? Dispute

Furthermore, the origins of Annex VI to the Trade Protocol indicate that it was only ever intended to protect against the possibility that the Tribunal would never come into operation.⁶² Now that the Tribunal is in operation, the primary rationale for Annex VI, and similar mechanisms, has disappeared. In short, radical as it may seem, there is no reason why SADC should not adopt the model that has been adopted in virtually every regional economic organization that purports to be a 'Community' with its own internally consistent and directly applicable system of law: namely, that of a single Tribunal to hear all dispute arising under the applicable law.

Recommendation 4

Repeal all dispute settlement mechanisms established under SADC Protocols and other instruments, as well as Article 20A and Article 15(4) of the SADC Tribunal Protocol.

4.3 Scope of jurisdiction (Article 15 of the SADC Tribunal Protocol)

Article 15 states that '[t]he Tribunal shall have jurisdiction over disputes between Member States, and between natural or legal persons and Member States.' The relationship of this provision with Article 14 has been addressed above. Here some comments are made on the provision itself.

Disputes between Member States

There is nothing to be said about this head of jurisdiction, which is straightforward.

Disputes between individuals

In *Mutize*, in the context of an application for intervention under Article 30 and Rule 70, the SADC Tribunal observed that Article 15 did not allow for jurisdiction in disputes between individuals.⁶³ This is quite correct, although it is not clear what this has to do with applications for interventions (as discussed below).

Disputes between individuals and Member States

Generally

At present, individuals may bring cases against Member States. The view was expressed by one Member State at the Senior Officials meeting that this is inappropriate, and it is also worth noting that such a jurisdiction is not always found in legal systems similar to the SADC legal system. For example, in the EU individuals have no right to bring cases against Member States before the European Court of Justice. However, this must be seen in connection with

Settlement in the Southern African Development Community (SADC) and Overlaps with the WTO and Other Jurisdictions' (1999) 2004 Minnesota Journal of Global Trade 231.

⁶² Bohanes, *ibid*, 6.

⁶³ *Mutize*, Case No SADC (T) 08/2008, 30 May 2008.

the fact that EU law is enforced by the European Commission,⁶⁴ which stands in for individuals in this respect (there is a mechanism for individuals to request that the Commission take enforcement action).⁶⁵ In the absence of such an enforcement mechanism, the absence of an individual right of access to the SADC Tribunal would leave individuals with no recourse against their Member States beyond national courts. Should national remedies be insufficient, individuals would be left without effective protection. In view of this, no recommendations are made in this report to change the *status quo*.

Nationality/residence of a 'natural or legal person'

Article 15 does not specify whether a 'natural' or 'legal' person must be a national or a resident of a SADC Member State. This is rather generous: by contrast, the COMESA Treaty and the EAC Treaty restrict access to their courts to residents of their respective territories,⁶⁶ and the Caribbean Court of Justice restricts access to its nationals.⁶⁷ The European Court of Justice has no such limitation, but here it is worth noting that before this court only direct actions against the EU but not against the EU Member States are permitted. Whether such openness is desirable is a policy question, and it is not suggested here that it be revised, simply noted. As to the detail, such as the question of the law applicable to determine the capacity of a legal person, this is an issue on which the Tribunal may 'develop its jurisprudence' under Article 21(b) of the SADC Tribunal Protocol.

Exhaustion of remedies

Article 15(2) states that '[n]o natural or legal person shall bring an action against a Member State unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction'.⁶⁸ This provision, which, notably, only applies to actions against the Member States, codifies a common rule of international law, found, for example, in many human rights treaties. Whether or not the local remedies rule should be abolished is a policy decision, and the advantages and disadvantages of such a rule are well known. As summarized by the SADC Tribunal in *Campbell*:

The rationale for exhaustion of local remedies is to enable local courts to first deal with the matter because they are well placed to deal with the legal issues involving national law before them. It also ensures that the international tribunal does not deal with cases which could easily have been disposed of by national courts.⁶⁹

⁶⁴ Article 258 TFEU.

⁶⁵ A form is available at http://ec.europa.eu/community_law/docs/docs_your_rights/complaint_form_en.rtf.

⁶⁶ Article 26, COMESA Treaty; Article 30 EAC Treaty.

⁶⁷ Article XXIV CCJ Agreement.

⁶⁸ See *Cimexpan*, Case No SADC (T) 01/2009 [2010] SADCT 5, 11 Jun 2010, *Bach's Transport*, Case No SADC (T) 14/2008 [2010] SADCT 6, 11 Jun 2010, *Kethusegile-Juru*, Case No SADC (T) 02/2009 [2010] SADCT 2, 5 Feb 2010, *Tembani*, Case No SADC (T) 07/2008 [2009] SADCT 3, 14 Aug 2009, *Campbell*, Case No SADC (T) 02/2007, above at n 11. While some of these cases have been criticized by SADC Member States, they are not manifestly incorrect.

⁶⁹ *Campbell*, Case No SADC (T) 02/2007, above at n 11, 20.

25

It should be noted that not every similar regional judicial system applies a local remedies rule. The EAC Treaty and ECOWAS Protocol, which lack a local remedies rule, have been interpreted by their respective courts as meaning that no such rule exists: consequently, individuals have unimpeded access to the courts.⁷⁰ These rulings, interestingly, are at odds with the position of the International Court, which in *ELSI* 'could not accept that an important principle of customary international law [the local remedies rule] should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so.'⁷¹ Taken together, what these cases show is that the question whether or not to have such a rule is a question of policy, not legal necessity. As the policy within SADC is clearly to apply such a rule, no recommendation is made here for its removal.

Legal interest

The SADC Tribunal Protocol and the Rules of Procedure are silent on the question whether a legal interest is required for direct actions under Article 15 (although it does cover this ground in relation to adjectival actions such as intervention, appeals and applications for stay of proceedings).⁷² This is a particularly important and controversial topic in the context of public interest litigation.

In the region, courts and tribunals have taken different views on whether to imply a requirement of legal interest into treaties which, like the SADC Tribunal Protocol, are silent on the matter. The East African Court has permitted bar associations to bring cases on the basis that they 'have a duty to promote adherence to the rule of law' and are therefore 'genuinely interested in the matter complained of, that is, the alleged non-observance of the Treaty by the Respondents'.⁷³ The ECOWAS Court has been much more radical, holding that:

A close look at the reasons above and public international law in general, which is by and large in favour of promoting human rights and limiting the impediments against such a promotion, lends credence to the view that in public interest litigation, the plaintiff need not show that he has suffered any personal injury or has a special interest that needs to be protected to have standing. Plaintiff must establish that there is a public right which is worthy of protection which has been allegedly breached and that the matter in question is justiciable. This is a healthy development in the promotion of human rights and this court must lend its weight to it, in order to satisfy the aspirations of citizens of the sub-region in their quest for a pervasive human rights regime.⁷⁴

⁷⁰ *Nyong'o* [2007] EACJ 6 (30 March 2007), 21; *Koraou*, ECOWAS Case No ECW/CCJ/JUD/06/08; (2008) AHRLR 182, para 49. See, generally, Henry Onoria, 'Locus Standi of Individuals and Non-State Entities Before Regional Economic Integration Judicial Bodies in Africa' (2010) 18 African Journal of International and Comparative Law 143, 156-7.

⁷¹ *ELSI (US/Italy)* [1989] ICJ Rep 15, para 50.

⁷² Article 30 and Rule 70 (intervention), Article 20A (appeals) and Rule 60 (stay).

⁷³ *East African Law Society* [2007] EACJ 2 (11 July 2007), 158.

⁷⁴ *Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP)*, ECW/CCJ/APP/0808, 27 Oct 2009, para 34.

C4

At present, it would appear that the SADC Tribunal would be able to formulate a rule on standing based on Article 21(b) of the SADC Tribunal Protocol, taking into account international law and the principles applicable in the SADC Member States. Nonetheless, at the Senior Officials Meeting it was considered desirable for a rule on legal interest to be included in Article 15, at least equivalent to that currently applicable to intervention.

Recommendation 5

Amend Article 15 as follows:

The Tribunal shall have jurisdiction over disputes between Member States, and between natural or legal persons and Member States, *provided that any such natural or legal persons have an interest of a legal nature in subject matter of the dispute.*

4.4 Preliminary rulings (Article 16 of the SADC Tribunal Protocol)

The Tribunal has jurisdiction under Article 16 to make preliminary rulings 'in proceedings of any kind and between any parties before the courts or tribunals of States' on any questions of 'interpretation, application or validity of the provisions in issue' referred to the Tribunal by a domestic court or tribunal of a SADC Member State.

As mentioned, Rule 75 adds that:

1. Where a question is raised before a court or tribunal of a Member State concerning the application or interpretation of the Treaty or its Protocols, directives and decisions of the Community or its Institutions, such a court or tribunal shall, if it considers that a ruling on the question is necessary to enable it to give judgement, request Tribunal to give a preliminary ruling thereon.

2. A court or tribunal of a Member State against whose judgment there are no judicial remedies under national law, shall refer to the Tribunal a case pending before it where any question as that referred to in sub-rule 1 of this Rule is raised.

The following discusses the types of questions that a national court may refer to the SADC Tribunal, and the duty of national courts to make such references.

i. Questions which may be referred

The purpose of the preliminary rulings mechanism is to enable national courts to obtain a definitive answer to a question concerning the interpretation (but not the application) of SADC law. This is not well reflected in Article 16, which states, ambiguously, that the SADC Tribunal may give a preliminary ruling on 'the provisions at issue'. This wording has given rise to the concern that the Tribunal has jurisdiction under Article 16 to make rulings on the national laws of SADC Member States. Such concerns are to a small degree justified, though much exaggerated: Article 16 must be read in the context of both Rule 75, which has equal status to the SADC Tribunal Protocol, and Article 14, which sets out the 'scope of jurisdiction'

03

of the Tribunal. It is therefore clear that the preliminary reference procedure cannot be invoked in relation to a norm other than one of the SADC norms referred to in those provisions. This is however clarified in the redrafted provision recommended below.

It has also been noted that Article 16(2) states that 'the Tribunal shall not have original jurisdiction'. In context, this must be taken as a clarification that preliminary rulings are not to be considered cases of 'original jurisdiction'. It does not mean that the Tribunal never has jurisdiction. But it is unnecessary at best, and confusing at worst. Again, the recommended text takes this into account.

ii. The duty of a national court to make a reference

The compulsory nature of the preliminary reference procedure in the SADC judicial system is unusually onerous, for the domestic courts of SADC Member States, for the SADC Tribunal, and for national litigants. Certainly, it is necessary for some questions to be referred to the SADC Tribunal, in order to achieve uniform interpretation of SADC norms across SADC Member States. But a balance must be struck between this objective, and the disadvantages of halting domestic proceedings to have even a minor (if essential) point decided by another Tribunal, especially one in another country. The balance struck in the EU is to *allow* domestic courts to refer questions of EU law to the ECJ, and only to *require* such references in the case of courts of final appeal. The separation of these two instances in Rule 75 indicates that the same distinction may have been envisaged here, too, but the distinction has disappeared in practice as a result of imposing the same obligation on both instances.

iii. The power of a national court to make a reference

If a domestic court of a SADC Member States considers that it cannot give judgment without ruling on SADC law, and does not refer the matter to the SADC Tribunal in accordance with Article 16 of the SADC Tribunal Protocol, the SADC Member State of which that court is an organ will be in violation of Rule 75.

This raises a difficulty noted above, which is that the domestic court may lack the power, under its rules of procedure, to make such a reference. Again, the answer is that the SADC Member States have the obligation to make sure that domestic courts are given this power. Indeed, aside from the general obligation on SADC Member States to ensure that they carry out their SADC obligations under general international law, and their obligation to 'take all necessary steps to accord this Treaty the force of national law' (Article 6(5) SADC Treaty), they are under a specific obligation 'to take all steps necessary to ensure the uniform application of this Treaty' (Article 6(4) SADC Treaty). Among other things, this necessarily implies that SADC Member States must ensure that their domestic courts are able to make references for preliminary rulings, and also that they do so when required. In short, SADC Member States are obliged to institute any domestic legal reforms necessary to ensure that domestic courts comply with their obligation set out in Rule 75 to make use of the procedure in Article 16.

iv. Other issues

Conflicts between preliminary rulings and original jurisdiction of the SADC Tribunal

Some concerns have been expressed that the preliminary reference procedure could conflict with the original jurisdiction of the SADC Tribunal. This concern is not unfounded, but it is not serious. The situation could arise that an individual brings an action in a national court, which in the course of its proceedings makes a reference on a point of SADC law to the Tribunal. It is conceivable that the individual, dissatisfied with the result of the national case, and now having exhausted domestic remedies, brings a second action before the SADC Tribunal on a matter involving the same point of law. Technically, the same point would be at issue. However, there would be no actual conflict between the two jurisdictions in this case. The conflict, such as it is, is between two proceedings before the SADC Tribunal. Thus, even if the matter is not treated as one of *res judicata* (which is a complicated issue), the Tribunal would in all probability simply affirm its previous conclusion.

Binding or advisory preliminary rulings

In the EU, it is longstanding and settled case law that 'a judgment in which the Court gives a preliminary ruling is binding on the national court, as regards the interpretation or the validity of the acts of the European Union institutions in question, for the purposes of the decision to be given in the main proceedings'.⁷⁵ However, the view was expressed at the Senior Officials meeting that a preliminary ruling should not be binding on the domestic court or tribunal that has made the reference, but should rather be advisory. The reason for this view was that, at an early stage of integration, it might be inappropriate to require complete harmonization of SADC law across the SADC Member States, which would be the result of a binding preliminary ruling.

The underlying concern is certainly justified. However, the proper solution is not to weaken the effect of preliminary rulings, but rather to ensure flexibility in SADC lawmaking. The European Union regulates not only by means of regulations, which are harmonized and binding instruments applicable within the legal orders of the EU Member States, but also by means of directives, which are binding on the Member States, but which give the Member States flexibility in terms of implementation. The result is that a great degree of variation can exist in the implementation of EU directives, which permits a respect for national diversity when this is considered appropriate. In this light, it is suggested that the appropriate way for SADC Member States to ensure that diversity of national conditions can be respected by SADC law is via the legislative process, not via the judicial process.

Indeed, for preliminary rulings to have merely advisory effect is at odds with the structure of SADC law, which requires that SADC law both have the status of national law (Article 6(5) SADC Treaty) and be uniform across SADC (Article 6(4) SADC Treaty). It simply does not make sense, given this overarching structure, for SADC law to have different meanings in different Member States.

⁷⁵ C- 173/09, *Elchinov* [2010] ECR I-0000, para 29 (5 Oct 2010).



Intervention

It may further be noted that, in the EU, a preliminary ruling is *de facto* binding on other national courts as well, as a proper interpretation of EU law.⁷⁶ This is merely a logical extension of the uniformity of EU law. It should be noted, however, that there are extensive possibilities of intervention in such cases. Not only are all EU Member States notified of a reference for a preliminary ruling by a national court; they are also entitled to submit observations to the court.⁷⁷ Along these lines, the text in the following recommendation provides that an automatic right of intervention be granted to all SADC Member States whenever the Tribunal is requested to make a preliminary ruling on a question of SADC law.

Recommendation 6

Replace Article 16 and Rule 75 with the following text:

Article 16 Preliminary rulings

- (1) The Tribunal shall have jurisdiction to give preliminary rulings concerning the matters set out in Article 14.
- (2) Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Tribunal to give a ruling thereon.
- (3) Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Tribunal.
- (4) The decision of the court or tribunal of a Member State which suspends its proceedings and refers a case to the Tribunal shall be notified to the Tribunal by the court or tribunal concerned. The decision shall then be notified by the Registrar of the Tribunal to the parties, to the Member States and to the institution of the Community which adopted the act the validity or interpretation of which is in dispute. The parties, the Member States and, where appropriate, the institution which adopted the act the validity or interpretation of which is in dispute, shall be entitled to intervene in the proceedings before the Tribunal and, within two months of this notification, to submit statements of case or written observations to the Tribunal.

⁷⁶ Morten Broberg and Niels Fenger, *Preliminary References to the European Court of Justice* (Oxford: OUP, 2010), 443.

⁷⁷ Article 23 of Protocol No 3 on the ECJ Statute [2010] OJ C83/210. Indeed, the same applies to non-EU Member States affected by the subject matter of a reference for a preliminary ruling.

4.5 Disputes between Member States and the Community (Article 17) and between persons and the Community (Article 18)

Articles 17 and 18 provide for the exclusive jurisdiction of the Tribunal in cases between the Member States and the Community and in cases between persons and the Community (with any of these bringing the complaint), on the matters set out in Article 14. There is no need for any reform of these provisions.

4.6 Staff cases (Article 19 of the SADC Tribunal Protocol)

Article 19 states that '[s]ubject to the provisions of Article 14 of this Protocol the Tribunal shall have exclusive jurisdiction over all disputes between the Community and its staff relating to their conditions of employment.' This raises a question concerning conditions of employment that are in part governed by national laws, over which the Tribunal has no direct jurisdiction under Article 14. In *Kethusegile-Juru (Preliminary Objections)* the Tribunal dealt with such a contract by determining that its termination was an 'act of an institution of the Community'.⁷⁸ This case also raised the question of the jurisdiction of the national courts in cases in which the SADC Tribunal has exclusive jurisdiction. In fact, had the national court exercised jurisdiction in that case, the respective SADC Member State would have been in violation of the SADC Treaty. In light of these comments, there is no need for recommendations on this provision.

4.7 Advisory jurisdiction (Article 16(4) of the SADC Treaty and Article 20 of the SADC Tribunal Protocol)

Under Article 16(4) of the SADC Treaty and Article 20 of the SADC Tribunal Protocol the Tribunal has jurisdiction to give advisory opinions 'on such matters as the Summit or the Council may refer to it'.

i. Applicable law

As mentioned, it is not clear whether the law applicable in such cases is limited to SADC law (as set out in Article 14). The better view is that it is not, and indeed, this is sensible when one considers that a request for an advisory opinion might concern matters of general international law. The advisory jurisdiction of the Tribunal has not yet been engaged, and it does not appear to raise any theoretical issues. The main problem arising in the context of the advisory jurisdiction of the International Court of Justice concerns the increasing

⁷⁸ *Kethusegile-Juru (Preliminary Objections)*, Case No SADC (T) 02/2009 [2010] SADCT 2, 5 Feb 2010, 4. This may have been unnecessary, given that the SADC Tribunal would also have had jurisdiction on the basis that the contract was itself governed by the Administration Rules and Procedures Handbook of the SADC Parliamentary Forum. The facts are set out in *Kethusegile-Juru (Judgment)*, Case No SADC (T) 02/2009 [2010] SADCT 7, 11 Jun 2010. Cf Art 270 TFEU: '[t]he Court of Justice of the European Union shall have jurisdiction in any dispute between the Union and its servants within the limits and under the conditions laid down in the Staff Regulations of Officials and the Conditions of Employment of other servants of the Union.'

tendency of requests to be made on matters involving inter-state disputes, which runs counter to the principle of consent to jurisdiction. However, as the SADC Tribunal enjoys compulsory jurisdiction over inter-state disputes between SADC Members, at least on matters governed by the SADC Treaty, this problem does not arise.

At the Senior Officials Meeting, contrary views were expressed on the desirability of the SADC Tribunal delivering an Advisory Opinion primarily involving matters of general international law. One view was that this might risk overlapping jurisdictions with other international courts, such as the African Court of Human Rights or the International Court of Justice. On the other hand, the view was also expressed that there was merit in a regional tribunal being able to deal with such issues. In light of the variety of opinions, and the absence of any particularly strong objections to the current rule, this report makes no recommendation for changing the *status quo*.

ii. Intervention

It is appropriate for Member States and any SADC institution to have an automatic right to intervene in proceedings following a request for an Advisory Opinion. The following recommendation is modelled on Article 66 of the ICJ Statute:

Recommendation 7

Renumber Article 20 as Article 20(1) and add the following paragraphs:

- (2) SADC Member States and any SADC institution may submit to the Tribunal written statements relating to the subject of the request and may make oral statements relating to the request at a public sitting of the Tribunal.
- (3) SADC Member States and SADC institutions having presented written or oral statements or both shall be permitted to comment on other statements subject to rules of procedure to be determined by the Tribunal.

4.8 Appellate jurisdiction (Article 20A of the SADC Tribunal Protocol)

The existing appellate jurisdiction of the SADC Tribunal with respect to panels established under protocols and other instruments has already been discussed. It was recommended, for the reasons given, that the panel system be abolished, and with it the present appellate jurisdiction of the Tribunal. However, an idea that is worthy of consideration is the establishment of an appellate jurisdiction for decisions of the Tribunal. There is an increasing trend internationally to establish formal appellate tribunals, examples including the WTO Appellate Body, the International Criminal Court and specific international criminal tribunals, and, in modified form, the Grand Chamber of the European Court of Human Rights and the Annulment Committees established under the ICSID Convention.

There are both advantages and disadvantages to the establishment of an appellate system. The main advantage is that an appellate system can greatly enhance the quality and credibility of the overall dispute settlement system. On the other hand, appeals are costly,

21

both to the litigants and to the Member States, and appeals delay binding decisions. These benefits and costs were considered by the Senior Officials, and the consensus was that overall there was merit in the establishment of an appellate system. In consequence, the following recommendation is made to establish an appellate tribunal. Given the institutional implications of this recommendation, including, among other things, the appointment of Appellate Tribunal Members, the following is merely a framework recommendation. The details of such a system remain to be determined.

Recommendation 8

Amend the SADC Tribunal Protocol to provide for an appellate tribunal to hear appeals from decisions of the SADC Tribunal.

4.9 Revisions of decisions (Article 26)

Article 26 provides for applications for review of decisions of the SADC Tribunal in cases where a new fact is discovered. This is a standard jurisdiction, found in Article 61(1) of the ICJ Statute and Article 44 of the ECJ Statute, and additionally considered to be within the inherent powers of all international tribunals.⁷⁹ Provisions such as these come with certain outstanding interpretive questions, such as whether a new 'fact' means new information related to a matter that was not at issue during the original proceedings, or whether it means simply new information of a factual nature,⁸⁰ but these issues are best determined by the Tribunal. It is however worth noting that Article 26 does not apply to preliminary rulings under Article 16; this is for the simple reason that preliminary rulings are not based on facts, but are limited to interpretations of law. In the Draft Report it was suggested that, in the interests of finality, a time limit might be introduced on applications for revisions of decisions. However, a number of disadvantages to this recommendation were pointed out at the Senior Officials Meeting and no recommendation is made to this effect.

4.10 Interpretation of decisions (Rule 73)

Rule 73 gives the Tribunal jurisdiction to interpret decisions 'where there is a dispute as to the meaning and scope of a decision of the Tribunal'. This is similar to Article 60 of the ICJ Statute, which states that: '[i]n the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.'⁸¹ In itself, there is no particular disadvantage to such a jurisdiction, provided that it is not used to subvert the principles of *res judicata*. Thus, in the *Land and Maritime Boundary Case*, the International Court of Justice rejected a request by Nigeria for an interpretation of a previous judgment on

⁷⁹ *Effect of Awards of Compensation* [1954] ICJ Rep 47; DW Bowett, 'Res Judicata and the Limits of Rectification of Decisions by International Tribunals' (1996) 8 African Journal of International and Comparative Law 577.

⁸⁰ The ICTY and ICTR have adopted the former, stricter, interpretation. This has been criticized: Jean Galbraith, "'New Facts' in ICTY and ICTR Review Proceedings' (2008) 21 Leiden Journal of International Law 131.

⁸¹ The European Court of Human Rights has determined that it has such a jurisdiction as an aspect of its inherent jurisdiction: *Ringeisen* (1979) 1 EHRR 513.

the basis that its previous judgment was clear.⁸² However, such a jurisdiction is only required in the absence of an appellate jurisdiction.

Recommendation 9

If Recommendation 8 is adopted, delete Rule 73 on interpretation of decisions.

4.11 Intervention (Article 30 and Rule 70)

Article 30 and Rule 70 permit Member States and persons with an 'interest of a legal nature that may affect or be affected by the subject matter of a dispute' to intervene in proceedings before the Tribunal. There are various points to be made.

i. Cases in which intervention is possible

In *Chirinda*, the SADC Tribunal refused an application by individuals to intervene in proceedings between an individual and a Member State. It cited Article 15(1) of the SADC Tribunal Protocol, and said that '[t]he alleged dispute in the application is between the present applicants and the applicants in the *Campbell* case. Since the dispute is not between persons and State, the Tribunal has no jurisdiction to hear the application, as was decided in the *Mutize* case ...'.⁸³ It would seem that the Tribunal confused the 'dispute' at issue, which was the dispute in *Campbell*, with the application for intervention by *Chirinda*. This application was not itself a 'dispute', not did it need to be. Indeed, in *UPP* the SADC Tribunal seemed to come to the opposite conclusion on relevantly identical facts (not mentioning *Mutize*).⁸⁴ It would seem that the Tribunal has corrected its earlier error, and in light of this, no recommendation on this aspect of the rules on intervention is required.

ii. The requirement of an 'interest of a legal nature'

In line with the considerations above on standing, it is worth considering whether the rules on intervention should be relaxed to permit *amici curiae* to intervene in cases in the public interest, at least by submitting written observations. This would be in line with an increasing trend in the practice of international tribunals. Again, there both advantages and disadvantages to such an approach. The advantages are relatively simple, and indeed expressed in the term *amicus curiae* (friend of the court). It is perhaps worth noting the following statement of the EAC Court in *Mwatela*, with reference to the East African Law Society, which had appeared as *amicus curiae* in this case:

We would like, while commending all counsel who appeared and addressed us in this case, especially to commend the very useful and helpful submissions addressed to us by Counsel for the *amicus curiae* who very ably and conscientiously assisted the

⁸² *Request for Interpretation of Land and Maritime Boundary Case (Preliminary Objections) (Nigeria/Cameroon)* [1999] ICJ Rep 31, para 16.

⁸³ *Chirinda*, Case No SADC (T) 09/2008 [2008] SADCT 1 (17 Sep 2008), 4.

⁸⁴ *UPP*, Case No SADC (T) 12/2008 [2010] SADCT 5, 7.

Court without any attempt to side with any other party in the reference. The Court, as a friend of the *amicus curiae*, was guided accordingly.⁸⁵

Sometimes the requirement of 'legal interest' is read liberally to permit *amici curiae* to participate in proceedings. Reference has been made above to the East African Court, which has permitted bar associations to bring cases on the basis that they 'have a duty to promote adherence to the rule of law' and are therefore 'genuinely interested in the matter complained of, that is, the alleged non-observance of the Treaty by the Respondents'.⁸⁶ The SADC Tribunal has been more conservative. In *Chirinda*, the Tribunal said as follows:

The main issues in the *Campbell* case are the denial of access to justice, racial discrimination and compensation. We fail to see how the interests of the applicants would be affected by our decision on these issues since the applicants have not adduced any evidence before us to the effect that they have indeed been denied access to justice and have suffered racial discrimination or loss.⁸⁷

This is a very narrow reading of 'interest of a legal nature'. It is far from clear that the 'interest' needs to involve the *same rights and obligations* as those of the parties to the dispute. Nor is it clear that, in cases of this type, the 'interest' needs to involve rights and obligations *under the SADC Treaty* or even under international law. Particularly in cases involving property, it seems counter-intuitive to deny a right to intervene to applicants whose property rights are the very subject matter of the dispute. Even on the current wording of the rules on intervention, it is submitted that *Chirinda* should be reconsidered.

However, the broader question is whether the current rules are unduly restrictive, even if interpreted more generously, as is suggested here. It is to be recalled that Article 23 of the SADC Treaty states that 'SADC shall seek to involve fully, the people of the Region and key stakeholders in the process of regional integration.' It is a legitimate question whether the 'key stakeholders', defined in the same article to include private sector, civil society, non-governmental organizations, and workers' and employers' organizations, should not also be permitted to intervene in proceedings before the SADC Tribunal, which would generally be precluded by the present requirement of 'legal interest'.

There are also other considerations: the rule in Article 30 is taken from the quite different context of the Statute of the International Court.⁸⁸ The International Court only exercises jurisdiction with the consent of the parties to the proceedings, and the Court is conscious that this consent may not extend to the involvement of third parties in proceedings; furthermore, the International Court is cautious not to allow a party to be heard that would otherwise have no right to bring a case, and in addition would not be bound by the results of

⁸⁵ *Mwatela*, EACJ Reference No 1/2005, quoted in Onoria above at n 70, 160.

⁸⁶ *East African Law Society*, EACJ Application No 9/2007, 7, quoted in Onoria above at n 70, 158.

⁸⁷ *Chirinda*, above at n 83, 6. In *Theron*, Cases No SADC 2/2008, 3/2008, 4/2008 and 6/2008, 28 Mar 2008, the 'factual and legal background of the applications [was] similar' to the main proceedings and intervention was permitted.

⁸⁸ Article 62 ICJ Statute.

215

the case in which it seeks to intervene.⁸⁹ These considerations are obviously quite different in the case of the SADC Tribunal, as it is for most regional courts, where more relaxed rules on intervention have been adopted. For example, the COMESA Treaty and the EAC Treaty provide that:

A [Member/Partner] State, the Secretary General or a resident of a [Member/Partner] State who is not a party to a case before the Court may, with leave of the Court, intervene in that case, but the submissions of the intervening party shall be limited to evidence supporting or opposing the arguments of a party to the case.⁹⁰

There is a need also to consider the negative effects of a more relaxed rule on the parties to the dispute in terms of increased cost and delay. On balance, however, such negative effects should be manageable, and in any event outweighed by the interests of justice in allowing a wide range of voices to be heard. It is therefore recommended that intervention be permitted to any person with a right to bring proceedings under Article 15, but subject to the leave of the Court, in the interests of avoiding abuse.

Additional recommendations concern housekeeping matters: Article 30 is misnamed 'joinder' and should be renamed 'intervention'; Rule 70(1) reiterates the language of Article 30 and should be deleted, and references to 'this Rule' in Rule 70 should be replaced as references to 'Article 30'.

Recommendation 10

Rename and revise Article 30 as follows:

Article 30 (Intervention)

A Member State, the SADC Secretariat or any natural or legal person may, with leave of the Tribunal, intervene in dispute, but the submissions of the intervening party shall be limited to argument supporting or opposing the arguments of a party to the case.

Delete Rule 70(1) and replace references to 'this Rule' in Rule 70 with 'Article 30'.

⁸⁹ See Shigeru Oda, 'The International Court of Justice Viewed from the Bench (1976-1993)' (1993-VII) 244 *Receuil des Cours* 9, 83-85.

⁹⁰ Article 36 COMESA Treaty; Article 40 EAC Treaty. The reference to 'evidence' is misplaced: it should read 'argument', evidence being limited to factual matters. It should however be noted that the Caribbean Court has an even stronger condition, requiring a 'substantial interest of a legal nature': Article XVIII CCJ Agreement, although in cases involving the interpretation of a 'convention' to which Member States and other persons are parties there is an automatic right of intervention. It is not clear what 'convention' means.

5. Instruments governing the powers of the SADC Tribunal

5.1 Power to make rules of procedure

At present, by virtue of Article 23 of the SADC Tribunal Protocol, the Rules of Procedure are made an integral part of the Protocol, which by virtue of Article 16(2) of the SADC Treaty is itself an integral part of the SADC Treaty. In other words, the Tribunal's Rules of Procedure are treaty text, able only to be amended in accordance with the procedure set out in Article 36 of the SADC Treaty. This is extremely rigid, and not in keeping with the practice of other Tribunals. Indeed, the norm is for international tribunals are given an express power to determine their own rules of procedure. Thus, Article 30(1) of the ICJ Statute states that: '[t]he Court shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure.' Whether the absence of such an express power for the SADC Tribunal makes much difference, in practice, is debatable, given that the SADC Tribunal possesses certain inherent powers to regulate its proceedings.⁹¹ However, it would be more transparent for the SADC Tribunal to be given an express power to this end, and would avoid the SADC Tribunal from appearing to invent powers when this becomes necessary (as it inevitably will). For example, it has been suggested that procedural objections should be argued and determined together with the merits, so as to expedite proceedings and save financial and other resources, and that general practice directives be adopted providing for the filing of written submissions in advance of a hearing. These are matters of practice and procedure that should be regulated by the SADC Tribunal, not by the SADC Summit.

Recommendation 11

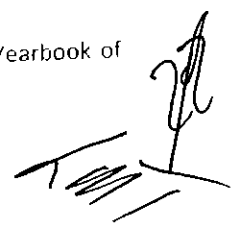
Delete Rule 1(3) and amend Article 23 as follows:

The Tribunal shall determine its own Rules of Procedure.

5.2 Structure of the SADC Tribunal Protocol and Rules of Procedure

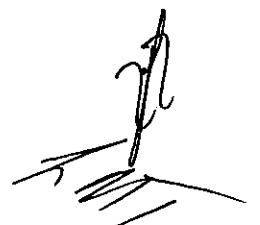
A second problem concerns the relationship of the SADC Tribunal Protocol and the Rules of Procedure. In certain cases, substantive rules that should be in the Protocol are instead found in the Rules of Procedure. This matter was considered by the SADC Tribunal Task Force, which identified Part II ('Constitution and Functions of the Tribunal'), except for Section D ('Seat, Sessions and Sittings of the Tribunal'), ie Rules 3-19, as candidates for relocation in the SADC Tribunal Protocol. However, the same can be said of a number of other rules, and also certain paragraphs of rules. In light of the various recommendations made in this report, which require renumbering and rewording, it is potentially risky to identify in advance the rules which should be relocated in the Tribunal Protocol. Hence the following recommendation is made.

⁹¹ Chester Brown, 'The Inherent Powers of International Courts and Tribunals' (2005) 76 British Yearbook of International Law 195.



Recommendation 12

The SADC Tribunal should establish a Working Group to identify the Rules (for example Rule 2(2) and Rules 3-19) which are not properly considered Rules of Procedure, and which should then be relocated to the SADC Tribunal Protocol.



6. SADC Tribunal decisions: compliance and enforcement

6.1 Nature of SADC Tribunal decisions

i. Decisions on the law

The SADC Tribunal issues 'decisions' on matters within its jurisdiction which are final and binding.⁹² These decisions are concerned with the interpretation of the applicable law and (except in the case of preliminary rulings, and some advisory opinions) the application of the applicable law to the facts at issue. It follows that the SADC Tribunal has the power to make decisions as to whether a given party has violated a relevant obligation.

ii. Remedies

The powers of the SADC Tribunal are less clear when it comes to the question of remedies for breach of a SADC obligation (other than costs).⁹³ Rule 2(2) states that '[n]othing in these Rules shall limit or otherwise affect the inherent power of the Tribunal to make such orders as may be necessary to meet the ends of justice.' This includes the power to order remedies.⁹⁴ It is also implicit in Article 32 of the SADC Tribunal Protocol that the Tribunal has the power to order remedies that are enforceable by individuals. Taken together, these provisions make it clear that the Tribunal has the power to make orders of the type that are usual in international law, including orders that can be executed domestically. This would include an order for compensation, although not necessarily specific performance of a treaty obligation owed to an individual (as opposed to one owed to a State).⁹⁵ No recommendation for change is made to these provisions.

6.2 Compliance with Tribunal decisions

i. Obligation to comply

It is axiomatic that States are obliged to comply with binding decisions of international tribunals, including any decision on remedies.⁹⁶ This rule is reiterated in the SADC Treaty and

⁹² Article 16(5) SADC Treaty; Article 24(3) and Article 32(3) SADC Tribunal Protocol.

⁹³ A breach of an international obligation owed to another State entails secondary obligations to cease any continuing acts in violation of the obligation, to offer appropriate assurances and guarantees of non-repetition, if circumstances so require and make full reparation for any injury caused, and reparation includes restitution, compensation, and satisfaction: Article 30-31; Article 34 of the ILC Articles on State Responsibility.

⁹⁴ James Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge: CUP, 2002) 218; Christine Gray, *Judicial Remedies in International Law* (Oxford: OUP, 1987) 12, 60.

⁹⁵ Zachary Douglas, *The International Law of Investment Claims* (Cambridge: CUP, 2009), 100-103.

⁹⁶ Oscar Schachter, 'The Enforcement of International Judicial and Arbitral Decisions The Enforcement of International Judicial and Arbitral Decisions' (1960) *American Journal of International Law* 1-24, 12-15. The obligation to comply (though not necessarily the act of compliance) is established when the decision is

Tribunal Protocol, according to which the decisions of the SADC Tribunal are binding⁹⁷ and must be complied with. In particular, Article 32(2) of the SADC Tribunal Protocol states that 'Member States and institutions of the Community shall take forthwith all measures necessary to ensure execution of decisions of the Tribunal.'

ii. Non-compliance as a violation of Article 32(2) of the SADC Tribunal Protocol

A failure to comply with a Tribunal decision would amount to a violation of Article 32(2) of the SADC Tribunal Protocol, justifying a new action on this basis. Thus, even though the Tribunal has no specific powers to order remedies for non-compliance with its decisions, it always has the possibility to make orders based on a secondary action for non-compliance.⁹⁸

Observation 7

Non-compliance with a decision of the SADC Tribunal amounts to a violation of Article 32(2) of the SADC Tribunal Protocol, and can support new proceedings for non-compliance before the SADC Tribunal.

iii. Non-compliance and 'actions' and 'sanctions' adopted by Summit

The SADC Treaty and SADC Tribunal Protocol also establish two mechanisms under which the SADC Summit may ensure that a SADC Member State complies with SADC Tribunal decisions. Article 32(4) of the SADC Tribunal Protocol states that '[a]ny failure by a State to comply with a decision of the Tribunal may be referred to the Tribunal by any party concerned' and Article 32(5) states that '[i]f the Tribunal establishes the existence of such failure, it shall report its finding to the Summit for the latter to take appropriate action.' This has occurred on a number of occasions.⁹⁹

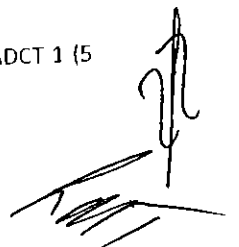
Independently, Article 33(1) of the SADC Treaty states that '[s]anctions may be imposed against any Member State that (a) persistently fails, without good reason, to fulfil obligations assumed under this Treaty; [or] (b) implements policies which undermine the principles and objectives of SADC'. There is little doubt that the 'obligations' mentioned include the obligation to comply with SADC Tribunal decisions, and that it is a SADC 'principle' that SADC

rendered: Elizabeth Lambert Abdelgawad, *The Execution of Judgments of the European Court of Human Rights*, 2nd ed (Strasbourg: Council of Europe Publishing, 2008), 9.

⁹⁷ Article 16(5) of the SADC Treaty and the first part of Article 32(3) of the SADC Tribunal Protocol, which states, more specifically, that the decisions are binding on the parties to the dispute in respect of that particular case. This aspect of Article 32(3) of the SADC Tribunal Protocol may be relevant to individual parties who are not otherwise bound by the SADC Treaty or Tribunal Protocol.

⁹⁸ In *Gondo*, above at n 4, the SADC Tribunal determined that a failure to enforce a domestic court decision violated human rights under the SADC Treaty. If the same applies to a SADC Tribunal decision, as seems likely, at least in similar cases, then it could be claimed that a failure to enforce a SADC Tribunal decision, in relevant cases, is also a violation of the human rights protected under the SADC Treaty.

⁹⁹ *Campbell*, Case No SADC (T) 11/2008, 18 Jul 2008; *Campbell*, Case No SADC (T) 03/2009 [2009] SADCT 1 (5 Jun 2009); *Fick*, Case No SADC (T) 01/2010, above at n 122.



Member States will comply with Tribunal decisions, given the principle of 'the peaceful settlement of disputes' by SADC Member States.¹⁰⁰ The standard required under these paragraphs requires more than mere non-compliance. Article 33(1)(a) requires that the failure to fulfil obligations be *persistent* and *without good reasons*; Article 33(1)(b) requires the implementation of a 'policy'. What is required for a violation of these paragraphs is difficult to state in the abstract, but it would certainly cover a public declaration by a SADC Member State that it will not implement SADC Tribunal decisions.

Determinations of non-compliance

This difference in the standard of non-compliance for 'action' and 'sanctions' is mirrored in the identity of the organ making the determination of non-compliance. Under Article 32(5) of the SADC Tribunal Protocol, it is the SADC Tribunal that makes a determination of non-compliance, and which then refers the matter to the Summit for 'action'. By contrast, it seems that determinations made under Article 33(1) of the SADC Treaty are to be made in the first instance by the Summit. There is nothing unusual about leaving such matters to the political organs: the European Council determines when a Member State has violated the fundamental principles of the EU, leading to sanctions, and the UN Security Council makes determinations on whether there is a 'threat to international peace and security'.

The nature of 'action' and 'sanctions'

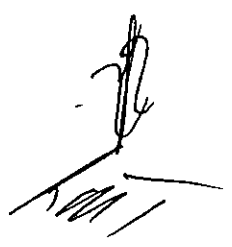
Little is said about the nature of 'action' and 'sanctions'. The SADC Tribunal Protocol is silent on the nature of 'action', and Article 33(2) merely says that 'sanctions', in the cases mentioned, are to be determined on a 'case-by-case basis'. It is difficult to say what is meant by each term, but it would appear that they are likely to differ in intensity. This follows from the fact that, as mentioned, 'action' and 'sanctions' are different both in terms of the degree of non-compliance required and in terms of the organ that determines non-compliance. In determining the possible scope of 'action' and 'sanctions' it is appropriate to consider their respective purposes.

'Action'

The purpose of 'action' is to provide a mechanism for enforcing the decisions of the SADC Tribunal. An analogy might be drawn with the right to take countermeasures (ie 'sanctions') against another State that fails to comply with its international obligations for the purpose of inducing that State to comply with these obligations, subject to a criterion of proportionality.¹⁰¹ 'Action' under Article 32(5) of the SADC Tribunal Protocol thus has the purpose of inducing a SADC Member State to comply with SADC Tribunal decisions. Taking this as a guiding principle, it would follow that such 'action' can include any measure, subject to a criterion of proportionality, that is required to induce the recalcitrant SADC Member State to comply with SADC Tribunal decisions.

¹⁰⁰ Article 4(e) of the SADC Treaty.

¹⁰¹ The rules on countermeasures are set out in Part II of the ILC Articles on State Responsibility.



Sanctions

As mentioned, Article 33(2) of the SADC Treaty does not indicate the nature of sanctions that may be adopted by the Summit in the cases under consideration. Article 33(3) sets out the sanctions available in the case of arrears in paying membership dues, staggered according to the number of years that contributions are in arrears. These include suspension of (i) the right to speak and receive documentation at meetings of SADC; (ii) recruitment, and renewal of contracts of employment, of personnel from the Member State; (iii) SADC funds for new projects in the Member State; and (iv) cooperation, between SADC and the Member State, in the areas of cooperation spelt out in Article 21 of the SADC Treaty. As a failure to comply with a SADC Tribunal decision is at least as serious as being in arrears, it goes without saying that all of these measures would be available as 'sanctions', and arguably also as 'action'. The question, however, is what other measures might be available. Two types of measure are particularly important: suspension of other SADC rights, particularly economic rights, and the suspension of SADC membership.

There is no reason to suggest that 'sanctions' and 'action' could not include the suspension of other SADC rights. For example, Article 354 of the Treaty on the Functioning of the European Union permits the suspension of rights of free movement of goods, persons, services and capital, among others. What is less clear is whether, as a matter of the law of international organizations, an international organization has the implied power to suspend membership. For example, in considering the possibility of suspending Myanmar from the International Labour Organization (ILO) in 1999, the ILO Governing Body took the view that in the absence of an express clause in the ILO Constitution to this effect, such an act would be impermissible.¹⁰² However, there is also contrary practice, both internationally and, relevantly, in SADC, which suspended Madagascar in March 2009 with the active participation or acquiescence of all SADC Members. This arguably amounts to 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' within the meaning of Article 31(3)(b) of the Vienna Convention. Consequently, it may be said that the suspension of membership of SADC is an available 'sanction' under Article 33(2) of the SADC Treaty. On the other hand, as the most serious of available measures, this is probably not available as 'action' under Article 32(5) of the Tribunal Protocol.

Proportionality

Any 'action' or 'sanctions' adopted by the SADC Summit must comply with the principle of proportionality, which, as set out in Article 51 of the ILC Articles on State Responsibility, states that '[c]ountermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question'. Some measure of what this means in practice might be gleaned from Article 7 of the EU Treaty and

¹⁰² Measures, including action under article 33 of the Constitution of the International Labour Organization, to secure compliance by the Government of Myanmar with the recommendations of the Commission of Inquiry established to examine the observance of the Forced Labour Convention, 1930 (No. 29), Governing Body of the International Labour Organization, GB.276/6, 276th Session, November 1999, para 20. For a conservative view, see also Amerasinghe, above at n 2, 117, 121-4.

220

Article 354 of the Treaty on the Functioning of the European Union. These provisions state that, in deciding to suspend of rights of an EU Member State, 'the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons'. A similar condition should apply in the case of measures adopted by the SADC Summit under the SADC Treaty and the SADC Tribunal Protocol.

Observation 8

Any 'action' or 'sanctions' adopted by Summit must comply with the principle of proportionality, in particular by taking into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

Consensus voting

A final question concerns the voting procedure by which 'action' and 'sanctions' are adopted. Article 10(9) of the SADC Treaty provides that '[u]nless otherwise provided in this Treaty, the decisions of the Summit shall be taken by consensus and shall be binding' and this is reinforced by Article 19 of the SADC Treaty, which states that '[e]xcept as otherwise provided in this Treaty, decisions of the institutions of SADC shall be taken by consensus'. It is well established in the law of international organizations that 'consensus' means the adoption of a decision without formal opposition. It is true that, in an Advisory Opinion, the EAC Court has held that 'consensus' could be understood to mean majority voting.¹⁰³ But this decision rested on flimsy grounds, including a definition of the word 'consensus' from Wikipedia. One may assume, therefore, that normally any SADC Member State is able to veto a Summit decision unless the Treaty provides otherwise.

There is however a question whether the same rule applies to Summit decisions involving a recalcitrant SADC Member State. The SADC Tribunal Protocol and the SADC Treaty are silent on the matter. By comparison, Article 148 of the EAC Treaty ('[e]xceptions to the Rule of Consensus') states that '[n]otwithstanding the provisions of paragraph 3 of Article 12 of this Treaty, the views of the Partner State being considered for suspension or expulsion shall not count, for the purposes of reaching a decision under the provisions of Articles 146 and 147 of this Treaty'.¹⁰⁴ Similarly, Article 254 of the Treaty on the Functioning of the European Union states that '[f]or the purposes of Article 7 of the Treaty on European Union on the suspension of certain rights resulting from Union membership, the member of the European Council or of the Council representing the Member State in question shall not take part in the vote ...'.

The question is then whether, notwithstanding the absence of an express provision in the relevant SADC instruments, such a rule may be implied. It is suggested that it can, for the following reasons: first, on the basis of the practice of international organizations such as those mentioned (the EAC and the EU), it would appear that where there is an express

¹⁰³ Shabtai Rosenne, 'The Perplexities of Modern International Law: General Course on Public International Law' (2001) 291 *Receuil des Cours* 1, 428.

¹⁰⁴ Advisory Opinion No 1/2008 of the EAC Court.

mechanism for suspending the rights of a member of the organization, that member is not entitled to participate in the decision to suspend its own rights.¹⁰⁵ Second, the wording of Article 10(9) indicates that exceptions to the consensus rule were envisaged: this can be taken to mean that there is no inherent objection to an implied exception. Third, any other interpretation would make the Article 32(5) of the SADC Tribunal Protocol and Article 33(2) a nullity, and therefore an implied exception to the consensus rule is necessary on the basis of the principle of effective interpretation (*ut res magis valeat quam pereat*). Fourth, the practice of SADC Member States has conformed to this interpretation, insofar as the decision to suspend Madagascar from SADC in March 2009 was taken without Madagascar, and also was not objected to by Madagascar. It is also not irrelevant that there is a similar rule for decisions on disqualification of Tribunal Members in Article 9(3) of the SADC Tribunal Protocol, and that in domestic law, it is a common principle of all organizations that parties with a conflict of interest are precluded from voting on matters involving that conflict of interest.

Observation 9

Article 10(9) of the SADC Treaty should be understood to contain an implied condition that the Member State in question shall not take part in a vote on 'action' or 'sanctions'.

iv. Improving compliance

The preceding discussion has focused on the enforcement of SADC Tribunal decisions within the existing legal framework. Looking ahead, however, it is appropriate to review other institutional solutions, bearing in mind that, ultimately, there is no alternative to repeated non-compliance by a party to a tribunal than the suspension of its rights. The following considerations are to be seen as softer compliance mechanisms to be applied before that step needs to be taken.

Fines

An obvious mechanism used to enforce compliance is the imposition of a fine by the court or tribunal. This mechanism is most evolved is best developed in the EU, where, since 1992, the European Court of Justice has had the express power to impose a fine for non-compliance.¹⁰⁶ In practice, the European Commission recommends the maximum amount, which is calculated according to a formula taking into account the seriousness of the infringement, its duration and the need to ensure that the sanction itself is a deterrent to further infringements. Both a lump sum fine, corresponding to the original breach, and a penalty, corresponding to a failure to comply with the judgment, may be imposed; interest for late payment is also payable.¹⁰⁷ A number of such fines have been imposed for failure to comply

¹⁰⁵ The practice of consensus in the pre-WTO GATT is an exception to this rule.

¹⁰⁶ Article 260 TFEU.

¹⁰⁷ European Commission, Communication on Application of Article 260 of the Treaty on the Functioning of the European Union, SEC(2010) 923/3, and Communication on Implementation of Article 260(3) of the Treaty, SEC(2010) 1371 final.

222

with Court judgments, running in some cases to millions of euros.¹⁰⁸ The general assessment of this regime has been that it has vastly improved compliance: namely, that the mere prospect of fines has improved compliance.¹⁰⁹

Member State liability for non-compliance

The EU has also evolved another mechanism for enforcing compliance, which is to render Member States liable in their domestic courts for violations of EU law, including failure to comply with European Court of Justice judgments. The cause of action may be understood as analogous to a breach of statutory duty, and it was said to be 'inherent in the system of the Treaty'.¹¹⁰ Naturally, a principle of this type depends upon the existence of enforceable individual rights, based on Community law, in the domestic legal orders of the members of the supranational organization. One might think that the EU is the only example of Community which has evolved this far, especially bearing in mind that this principle dates only from 1989, thirty years after the EU was first established and almost thirty years after the establishment of the principle of directly effect Community law (discussed above). It is therefore remarkable to note that the same principle, expressly drawing on the EU experience, has now been applied by the Caribbean Court.¹¹¹ As to the applicability of this principle in SADC, it should be noted that the structural underpinnings of the application of this principle are almost – but not quite – in place. As noted above, SADC law must be given the force of law in the SADC Member States: where it has this force of law, there is no logical reason precluding the application of a principle of Member State liability for failure to comply with SADC law, or to comply with a SADC Tribunal decision, enforceable in the domestic courts of the Member State. The key is to ensure that SADC Member States comply with their obligation to give SADC law the force of national law.

Observation 10

It would be open to the SADC Tribunal to adopt a rule of SADC Member State liability for violating SADC law, enforceable in the courts of the SADC Member States.

¹⁰⁸ The cases since 1992 are as follows: *Greece*: Case C-387/97, failure to implement directives: €20,000 per day; Case C-109/08, failure to comply with judgment; €3,000,000 lump sum and €31,536 per day; Case 568/07 failure to comply with judgment; €1,000,000 lump sum; Case 369/07 failure to comply with judgment: €2,000,000 lump sum and €16,000 per day; *France*; Case 304/02, failure to comply with judgment €20,000,000 lump sum and €57,761,250 for each period of six months; Case C-121/07 failure to comply with judgment €10,000,000 lump sum; Case C-177/04 failure to comply with judgment and incorrect implementation of directive, €31,650 penalty payment per day; *Spain*; Case C-278/01, failure to comply with judgment €624,150 per annum and per percentage of inshore bathing areas not complying; *Portugal*; Case C-70/06, failure to comply with judgment and fulfil its obligations under directive €19,392 per day.

¹⁰⁹ Stine Anderson, 'Procedural Overview and Substantive Comments on Articles 226 and 228 EC' (2008) 27 Yearbook of European Law 121, 161-2.

¹¹⁰ Joined cases C-6/90 and C-9/90, *Francovich* [1991] ECR I-5357.

¹¹¹ *TCL & TGI v Guyana* [2009] CCJ 5 (OJ), para 33.

Supervisory mechanisms

The responses to non-compliance mentioned above must be distinguished from the mechanisms evolved in various human rights courts to address the *means* by which states comply. For example, the Inter-American Court of Human Rights has adopted a practice of making very specific orders to defendant State parties explaining in detail how the judgment is to be carried out. This practice dates from 1989, when the Court stated that it would 'supervise the indemnification ordered and ... close the file only when the compensation ha[d] been paid.'¹¹² This procedure has now become routine, and from one 'order' issued to Peru in 2001 on the status of compliance with five decisions, the Court in 2010 issued 34 'orders' regarding the compliance status of previous cases. The procedure is now formalized in the Court's 2010 Rules of Procedure, under which the Court may request reports by the States and other sources and convene a hearing, then 'determine the state of compliance with its decisions and issue the relevant orders'.¹¹³ Nor are the responses discussed here to be confused with compliance mechanisms directed at determining whether there has been compliance, which is a topic of interest principally in cases of systemic abuse. These are also issues that have arisen before human rights courts, including the European Court of Human Rights.¹¹⁴ In short, the immediate problem for the SADC Tribunal is how to *enforce* compliance, not how to *order* compliance or how to *determine* compliance. It is premature to make recommendations for the establishment of a supervisory mechanism along the lines of these human rights courts.

6.3 Domestic enforceability of SADC Tribunal decisions

i. Obligations concerning domestic enforceability of decisions

SADC Member States are additionally under various obligations to make Tribunal decisions enforceable within their domestic legal orders. Article 32(3) states, in its second part, that '[d]ecisions of the Tribunal shall be ... enforceable within the territories of the Member States concerned'.¹¹⁵ Article 32(1) elaborates by specifying the applicable domestic mechanism:

The law and rules of civil procedure for the registration and enforcement of foreign judgements in force in the territory of the Member State in which the judgement is to be enforced shall govern enforcement.

It would seem that these two provisions cover much the same ground, one stating that decisions must be made domestically enforceable; the other stating how this is to be

¹¹² *Velásquez-Rodríguez (Reparations and Costs)*, Inter-American Court of Human Rights, Ser C No 7 (21 Jul 1989), para 60(5).

¹¹³ IACtHR, Rules of Procedure, Article 69.4 (www.corteidh.or.cr/reglamento_eng.cfm).

¹¹⁴ Open Society Justice Initiative, *From Judgment to Justice: Implementing International and Regional Human Rights Decisions* (2010), 52.

¹¹⁵ Rule 74 ensures that the documents relevant to the decision are authentic.

224

achieved. It seems relatively clear, also, that only certain types of Tribunal decisions will be enforceable under these provisions, namely, those enforceable by individuals acting within the domestic legal order. It may be that some Tribunal decisions are not so enforceable.

ii. Relationship to the obligation to comply with SADC Tribunal decisions

It is important to note that these obligations are independent of the original obligations to comply with SADC Tribunal decisions. This may be illustrated by reference to a number of recent investment cases under the ICSID regime involving Articles 53(1) and 54(1) of the ICSID Convention. Article 53(1) states that awards are binding and must be complied with:

The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

Article 54(1), which is similar to the second part of Article 32(3) and Article 32(1) of the SADC Tribunal Protocol, states that awards must be made enforceable domestically:

Each Contracting State shall recognize an award rendered pursuant to the Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. ...¹¹⁶

The relationship between the two obligations has been described, in a passage that has gained widespread approval,¹¹⁷ as follows:

[N]othing in the language of these provisions suggests that these two obligations [Article 53(1) and Article 54(1)] are related, and in particular, that there is nothing in the language to suggest that the obligation in the second sentence of Article 53(1) must be read as being subject to an award creditor invoking enforcement mechanisms established pursuant to the obligation in the first sentence of Article 54(1).¹¹⁸

Indeed, the obligation to comply exists even if a party fails to invoke the specified domestic enforcement mechanism:

Article 54(1) does not state that a party to an award must use the enforcement machinery established pursuant to this provision as a condition of the award being complied with. Nor does it state that a Contracting State or a constituent subdivision or agency that is an award debtor is entitled to decline to comply with the terms of the

¹¹⁶ It will of course be noted that this provision differs from Article 32(1) in various respects, most notably in that as it requires ICSID awards to be treated as domestic judgments, not as foreign judgments (on which see below). But this difference is irrelevant for present purposes.

¹¹⁷ See also *Vivendi (Stay)*, ICSID Case No ARB/97/3, 4 Nov 2008, paras 31-37; *Sempra (First Stay)*, ICSID Case No ARB/02/16, 5 Mar 2009, paras 32-53. *Continental Casualty Company (Annulment)*, ICSID Case No ARB/03/9, 23 Oct 2009, para 12.

¹¹⁸ *Enron (Stay)*, ICSID Case No ARB/01/3, 7 October 2008, para 61.

award until the enforcement machinery that exists under that Contracting State's own national law is used by the award creditor.¹¹⁹

Against this background, some comments may be made on the interpretation that has to date been given to these provisions by the SADC Tribunal and the courts of the SADC Member States.

In *Gramara*, the Zimbabwe High Court declined to register and enforce the Tribunal decision in *Campbell* on the basis that this would contravene public policy under the applicable Zimbabwe law. This was on two grounds: enforcement of the decision would contradict a decision of the Zimbabwe Supreme Court, and hence undermine the authority of the Supreme Court; second, enforcement would be contrary to legislation validly enacted by the Zimbabwe Parliament.¹²⁰ This ruling does not seem manifestly incorrect as a question of Zimbabwe law. It is common for courts to interpret public policy exceptions in terms of a fundamental policy of domestic law (even if 'mere' illegality does not rise to this level).¹²¹ Consequently, there can be no objection that *Gramara* has put Zimbabwe in violation of the obligations in the SADC Treaty concerning the domestic enforceability of SADC Tribunal decisions.

The point, however, is that these obligations are entirely distinct from Zimbabwe's obligations to comply with SADC Tribunal decisions. This became apparent in *Fick*,¹²² a SADC Tribunal case concerning Zimbabwe's failure to enforce the Tribunal's decision in *Campbell*. The SADC Tribunal ignored the reference of the domestic court to the public policy exception in the applicable domestic law. Rather, it relied on Article 32(3), under which a 'decision of the Tribunal is binding upon the parties to the dispute in respect of a given case and is enforceable within the territory of the Member States concerned.'¹²³ It follows from the analysis above that this only partially covers Zimbabwe's obligations. What is more relevant is Article 32(2), under which Zimbabwe must ensure the execution of the Tribunal's decisions. But the result of the case is correct, and consistent with the ICSID jurisprudence, insofar as it demonstrates that the obligation to comply with a SADC Tribunal decision is independent of any obligation to ensure the enforcement of those decisions domestically.

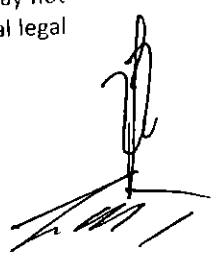
¹¹⁹ *Enron (Stay)*, *ibid*, para 62.

¹²⁰ *Gramara*, above at n 3, 16-19.

¹²¹ In *Marketing Displays International v VR Van Raalte Reclome BV* (2006) XXXI Yearbook of Commercial Arbitration 808, the Netherlands Court of Appeal refused to enforce an arbitral award on the grounds that it violated EU competition law; and in Case C-126/97, *Eco Swiss* [1999] ECR I-3055, para 39, the European Court stated that EU Member States must consider EU competition rules as 'public policy' when determining whether to enforce a decision under the New York Convention. It is true that, under international law, a State may not claim that its international obligations are an interference in its domestic affairs; but, unless the national legal system requires this, this does not govern national courts interpreting national law.

¹²² *Fick*, Case No SADC (T) 01/2010 [2010] SADCT 8, 16 Jul 2010.

¹²³ *Fick*, *ibid*, at 4.



iii. Enforcement of SADC Tribunal decisions as foreign judgments

The foregoing leads to the question whether the mechanism of enforcing SADC Tribunal decisions as foreign judgments is sensible. The following considers first the current state of the law in the common law¹²⁴ and the civil law¹²⁵ SADC Member States, and then makes some remarks on the suitability of the current enforcement system.

Common law SADC Member States

It would seem that SADC Tribunal decisions are enforceable at common law. Two examples are *Gramara* (although the decision was not enforced on other grounds) and in *Fick*, where a South African court enforced a SADC Tribunal decision on costs.¹²⁶ It has been suggested that the law on the recognition and enforcement of foreign judgments was chosen in the SADC Tribunal Protocol precisely because 'it is well-known that the common law provides for the recognition and enforcement of foreign judgments'.¹²⁷ Whether this makes it the most appropriate mechanism is addressed below.

On the other hand, the legislation governing the recognition and enforcement of civil judgments in the common law SADC Member States does not appear to be applicable. This legislation typically only applies to foreign judgments from designated countries or, in one case, also decisions of designated 'international tribunals'.¹²⁸ Not a single one of these Member States has adopted the necessary legislation or administrative reforms that would be required for this legislation to apply to decisions of the SADC Tribunal. Indeed, it is not even clear that such legislation would cover all pertinent aspects of a decision of the SADC Tribunal. This legislation covers ordinary money judgments, including compensation claims, but not it does not cover judgments imposing penalties in the form of fines, nor decisions granting injunctive relief, or decisions on the ownership of property (as opposed to compensation for the loss of property). The problems of relying on this legislation can be seen in *Gramara*, where the High Court of Zimbabwe considered the relevant Zimbabwe legislation on the recognition and enforcement of foreign judgments to be inapplicable, firstly because the SADC Tribunal had not been designated under the legislation, and secondly because the decision was for declaratory and injunctive relief.¹²⁹

Civil law SADC Member States

The civil law SADC Member States have a different system for the recognition and enforcement of foreign judgments. In these jurisdictions, foreign judgments are enforceable

¹²⁴ Botswana, Lesotho, Malawi, Mauritius (hybrid), Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.

¹²⁵ Angola, the Democratic Republic of Congo and Mozambique.

¹²⁶ *Fick v Zimbabwe*, Case No 77881/2009, High Court of South Africa, 25 Feb 2010.

¹²⁷ Applicant Head of Argument in *Gramara*, para 21.

¹²⁸ Civil Matters (Mutual Assistance) Act 1996 of Zimbabwe: see *Gramara*, above at n 3, 6.

¹²⁹ *Gramara*, *ibid*, 6.

by national courts;¹³⁰ it is likely also that decisions of the SADC Tribunal would, in principle, be enforceable as 'foreign judgments' on this basis.¹³¹

The appropriateness of the present system of enforcing SADC Tribunal decisions as foreign judgments

The system adopted by SADC, according to which SADC tribunal decisions are treated as foreign judgments, is unique among international courts and tribunals. The normal model is for international decisions to be equated with domestic judgments for enforcement purposes. For example, the judgments of the East African Court and the COMESA Court 'shall be governed by the rules of civil procedure in force' in the Partner or Member State in which execution is to take place.¹³² For the Inter-American Court of Human Rights, '[t]hat part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state'.¹³³ And the judgments of the ECOWAS Court are enforceable upon submission of a writ of execution by the Registrar 'to the relevant Member State for execution according to the rules of civil procedure of that Member State'.¹³⁴

There is one major difference between this usual system and the system adopted in SADC: the SADC system permits SADC Member State national courts to deny enforcement of SADC Tribunal decisions on public policy grounds. A review on these grounds makes perfect sense in the context of genuinely foreign judgments, which are made according to a foreign law that might not be consistent with the public policy of the enforcing State. Not all SADC Member States wish to recognize a gay marriage. But it makes no sense when the decision at issue is based on a legal system – SADC law – that is already binding on the SADC Member States and which, for that matter, has to be given the force of national law in any case. In sum, the current system for enforcing SADC Tribunal decisions domestically is unjustified in principle, likely to lead to SADC Member States violating their obligations to comply with the SADC Treaty, and detrimental to the effectiveness of the SADC Tribunal. For these reasons it is recommended in the strongest terms that SADC Tribunal decisions be enforced as domestic judgments, as in every other equivalent international system.

¹³⁰ Democratic Republic of Congo: Article 105 of the Congo Code of Civil Procedure and Article 117 of the Congo Code de l'Organisation et de la Compétence Judiciaires Congo; Article 71(d) and Article 95 of the Angola Code of Civil Procedure (recognition only by the Supreme Court); the same applies in Mozambique.

¹³¹ Respondents from Angola and Mozambique. Note also *Socobel v Greece* (1951) 18 ILR 3, where the Brussels tribunal civil admitted the possibility of recognition of an ICJ judgment (although it refused to enforce the judgment on the grounds of non-reciprocity, which was a condition of recognition and enforcement of foreign judgments under domestic law). On the other hand, the International Tribunal of Tangier refused to recognize an ICJ judgment: *Mackay Radio and Telegraph Co v Lal-la Fatma and others* (1954) 21 ILR 136.

¹³² Article 44 EACJ; Article 40 COMESA. The order for execution must be appended to the judgment, which requires only the verification of its authenticity by the Registrar before execution.

¹³³ Article 68(2) of the American Convention on Human Rights.

¹³⁴ Article 24(2), (3) and (4) ECOWAS Protocol. Such a writ shall be enforced '[u]pon the verification by the appointed authority of the recipient Member State that the writ is from the Court.' Member States are obliged to 'determine the competent national authority for the purpose of receipt and processing of execution' and must notify the Court accordingly.

Recommendation 13

Delete Article 32(1) and revise Article 32(3) of the SADC Tribunal Protocol as follows:

Decisions of the Tribunal shall be binding upon the parties to the dispute in respect of that particular case and enforceable within the territories of the Member State concerned in accordance with domestic procedure governing the execution of judgments against the State.

iv. Domestic enforcement in other SADC Member States

A further question is whether the mechanism for domestic enforcement of SADC Tribunal decisions is restricted to Member States party to any given proceedings, or all Member States (bearing in mind that in the latter case, the doctrine of sovereign immunity would operate to protect certain State property).¹³⁵

Article 32(3) of the SADC Tribunal Protocol states that:

Decisions of the Tribunal shall be binding upon the parties to the dispute in respect of that particular case *and enforceable within the territories of the Member States concerned* (emphasis added).

This is ambiguous. It is not clear whether the reference to 'Member States concerned' means Member States that are party to the dispute, or Member States in which enforcement is sought. The immediate context of this provision is also unhelpful, in that both Article 32(2) and Article 32(1) are consistent with either interpretation. This means that an answer must be identified in the broader context of rules of international law applicable to the SADC parties.

Here, too, the answer is not entirely clear, but tends to support the broader interpretation. The Dutch Hoge Raad has said, for example, that '[i]nternational law is not opposed to any execution against foreign State-owned property situated in the territory of another State'.¹³⁶ It also seems accepted that, in the context of the International Court, third States are entitled to assist in the execution of a decision of the International Court by transferring assets of a debtor State to a creditor State, provided that third country claims are safeguarded.¹³⁷ Treaty practice is also supportive. The EAC Treaty uses the phrase 'the

¹³⁵ The question is whether the legal relationship underlying the dispute arises out of acts *jure imperii* (acts of sovereign authority), to which sovereign immunity attaches, or *acts jure gestionis* (acts of a private or commercial character), to which it does not.

¹³⁶ *Société Européenne d'Etudes et d'Entreprises en liquidité volontaire (SEEE) v Yugoslavia*, Supreme Court of the Netherlands (1973) 65 ILR 356 (26 Oct 1973).

¹³⁷ Oscar Schachter, 'The Enforcement of International Judicial and Arbitral Decisions' (1960) 54 *American Journal of International Law* 1, 11-13; Jonathan Charney, 'Third State Remedies in International Law' (1989) 10 *Michigan Journal of International Law* 57, 67; Constanze Schulte, *Compliance with Decisions of the International Court of Justice* (Oxford: OUP, 2004), 73-73 (also noting that it is contested whether this amounts to an obligation).

Partner State in which execution is to take place',¹³⁸ and the ICSID Convention expressly requires enforcement in *all* contracting parties. On balance, then, it may be said that 'Member States concerned' simply means 'SADC Member States in which enforcement is sought'. And this is also supported by national practice, insofar as the High Court of South Africa has enforced a SADC Tribunal judgment (on costs in the Campbell case) against another SADC member.¹³⁹

Observation 11

SADC Tribunal decisions are enforceable within the territories of all SADC Member States.

¹³⁸ Article 44 EAC Treaty.

¹³⁹ *Fick v Zimbabwe*, above at n 126.



7. Qualifications and appointment of SADC Tribunal Members

The ultimate goal of any judicial selection process, whether for international or domestic courts, is to select qualified and independent judges committed to upholding the rule of law. The achievement of this goal confers legitimacy on the tribunal by establishing its credibility and integrity as an impartial arbiter of legal disputes. In this respect, the method of appointing (and removing) judges is of critical importance. Historically, international tribunals have failed due to a perceived lack of independence of judges: the 1907 Central American Court of Justice is an example, its failure being attributed to the fact that 'the justices of the court seem to have been looked upon not as international officials of all five States, but as officials of their respective States ... as there was no method for a cooperative election of the justices'.¹⁴⁰ In part, this was because the judges took their oath of office before their appointing States and received their salaries from these States.¹⁴¹

Over the past century of permanent international dispute settlement, certain basic principles have evolved directed to ensuring the impartiality and independence of international judges. In considering the applicability of these principles to any given case, however, it is critical to bear in mind that each tribunal is the product of its own particular context.¹⁴² Thus, while there are certain basic principles are applicable to all judicial systems (for example, that judges must be impartial), others depend very much on the judicial system at issue, in terms of its parties and its jurisdiction. The consideration governs the following comments on the rules governing the appointment and removal of SADC Tribunal Members; and on the rules securing their independence while in office, including budgetary matters.

7.1 Qualifications

It is basic that judges need to be properly qualified to undertake their functions.¹⁴³ Article 3(1) of the SADC Tribunal Protocol states that SADC Tribunal Members shall 'possess the qualifications required for appointment to the highest judicial offices in their respective Member States' or [be] 'jurists of recognised competence'. With some variations, this is a very common formulation for international tribunals, deriving originally from Article 2 of the

¹⁴⁰ M O Hudson, *The Permanent Court of International Justice, 1920-1942: A Treatise* (New York: Macmillan, 1944), para 44.

¹⁴¹ *Ibid.*

¹⁴² Ruth Mackenzie, Kate Malleson, Penny Martin, and Philippe Sands, *Selecting International Judges: Principle, Process, and Politics* (Oxford: OUP, 2010), 7 and 22.

¹⁴³ This does not always require legal expertise: for example, WTO panelists do not need to be lawyers, even if in practice non-lawyers are in the minority on any given panel.

231

Statute of the Permanent Court of International Justice.¹⁴⁴ Nonetheless, experience has demonstrated that this wording is not always unproblematic.

i. Eligibility for domestic judicial office: the question of age limits

The main question concerning the first category (eligibility for the highest judicial office) relates to age. It is common that a candidate for an international tribunal with domestic judicial experience is past the age of compulsory domestic retirement. Indeed, questions have been raised on this ground as to the eligibility of certain sitting ICJ judges.¹⁴⁵ This is generally considered to be an unnecessary restriction, and reduces unnecessarily the pool of available candidates.¹⁴⁶ However, it must at the same time be ensured that judges are capable of performing their functions. A recommendation to this effect is made below. Minimum age requirements carry the same consequence, although, given the need for a candidate's overall experience, this is less likely to be a problem in any individual case.

Recommendation 14

Amend Article 3(1) of the SADC Tribunal Protocol by adding the following sentence:

Members may be of any age.

ii. Jurists of recognized competence

The second category allows for candidates without formal legal qualifications or professional experience provided that the candidate is otherwise legally knowledgeable. For many international tribunals (though not the SADC Tribunal), this is the category into which candidates most frequently fall. Most importantly, this category captures legal academics, but it also captures candidates who are ineligible for judicial office in their Member State, for reasons of age (but see previous recommendation) or because they are qualified elsewhere.¹⁴⁷ However, Article 3(1) rules out the appointment of a person with no legal competence. This seems appropriate.

It is worth highlighting the absence of a requirement that a candidate be expert in any particular area of law relevant to SADC. On this, international practice is inconclusive. The International Court specifies that the 'recognized competence' of the candidates be in 'international law'.¹⁴⁸ The Statute of the International Criminal Court requires that

¹⁴⁴ In fact, the first category (eligibility for the highest judicial office) derives from the 1907 Central American Court of Justice.

¹⁴⁵ Chittharanjan F Amerasinghe, 'Judges of the International Court of Justice – Election and Qualifications' (2001) 14 *Leiden Journal of International Law* 335. See also the case noted at 58.

¹⁴⁶ Notwithstanding this, certain statutes of international tribunals that expressly contain an age restriction: eg the Caribbean Court (70, raised to 72), the East African Court (70), and the ECOWAS Court (60; or 65 on reappointment).

¹⁴⁷ This was the case for Judge Chloros, the Greek nominee to the European Court of Justice, who was qualified to practice law in England but not in Greece: Richard Plender, 'Rules of Procedure in the International Court and the European Court' (1991) 2 *European Journal of International Law* 1, 6, fn 33.

¹⁴⁸ Article 2 of the ICJ Statute.

candidates either have 'established competence in criminal law and procedure, and the necessary relevant experience' or 'have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity';¹⁴⁹ and in total at least nine judges must satisfy the 'criminal law' criteria, and five the 'international law' criteria.¹⁵⁰ Regional human rights courts typically require candidates to have expertise in human rights,¹⁵¹ the European Court of Human Rights being a notable exception.¹⁵² The ECOWAS Court requires competence in international law,¹⁵³ and the Caribbean Court states that 'the Judges of the Court shall be the President and not more than nine other Judges of whom at least three shall possess expertise in international law including international trade law.'¹⁵⁴ On the other hand, there are also other tribunals which adopt the shorter formulation of Article 3(1), including the European Court of Justice, the EFTA Tribunal, the Andean Community Court, and the East African Court.¹⁵⁵

Given this variety of practice, the issue is best treated on the basis of principle. On the one hand, a subject matter stipulation would ensure the competence of the bench on matters relevant to SADC law. It may not be possible to require expertise in all such areas, but certainly a working knowledge of international law would seem to be important, as the existing jurisprudence of the SADC Tribunal has already demonstrated. One might also wish for more specificity, such as including international trade law or international human rights law, but as subspecies of international law this might not be necessary.¹⁵⁶ On the other hand, a subject matter stipulation may reduce the pool of potential candidates. Perhaps an appropriate compromise is that struck in the Caribbean Court, which requires a minimum number of judges to have relevant expertise. However, this example tends to prove the point: in fact, only one of the original judges on this court had international law expertise, and indeed his tenure needed to be specially extended when he reached retirement age to allow him to continue sitting on the bench.¹⁵⁷ In this light, the most appropriate solution

¹⁴⁹ Article 36(3)(b) of the ICC Statute.

¹⁵⁰ Article 36(5).

¹⁵¹ Article 52(1) of the American Convention on Human Rights; Article 31(1) of the African Charter on Human and Peoples' Rights; Article 11 of the Protocol to the African Charter on Human and Peoples' Rights. Membership of the UN Human Rights Committee similarly requires recognised competence in the field of human rights: Article 28(2) ICCPR.

¹⁵² Jutta Limbach et al, *Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights* (London: Interrights, 2003), 33-34.

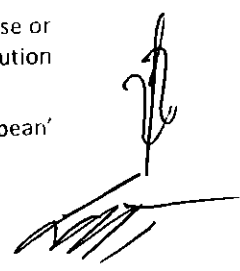
¹⁵³ Article 3(1) of the Protocol on the Community Court of Justice, A/P.1/7/91, adopted 6 July 1991; in force 5 November 1996; amended on 19 January 2005.

¹⁵⁴ Article IV.1 of the CCJ Agreement.

¹⁵⁵ Eg Article 24(1) EAC Treaty.

¹⁵⁶ It may be noted that Article 7(a) of Annex VI to the Trade Protocol requires that panelists 'have expertise or experience in international trade or international law, other matters covered by this Protocol or the resolution of disputes arising under international trade agreements ...'.

¹⁵⁷ Kate Malieson, 'Promoting Judicial Independence in the International Courts: Lessons from the Caribbean' (2009) *International and Comparative Law Quarterly* 671, at 683.



may be to indicate that international law expertise is desirable but not essential, along the lines of Article 4(2) on gender balance.

Recommendation 15

Insert a paragraph in Article 4 stating that:

Due consideration shall be given to expertise in international law.

iii. Personal criteria

Sometimes more personal criteria are considered relevant, although these are not set out in the SADC Tribunal Protocol. The Caribbean Court refers to 'high moral character, intellectual and analytical ability, sound judgment, integrity, and understanding of people and society'. In principle, such criteria may seem unobjectionable. However, they are notoriously difficult to assess, and it is questionable whether, to the extent that they goes beyond the criteria of professional qualification, these criteria are even relevant to the exercise of the judicial function. Furthermore, there is evidence that such criteria are open to abuse: a State Party to the European Convention on Human Rights allegedly refused to reappoint its sitting judge on the grounds of a lack of moral integrity, seemingly without good grounds.¹⁵⁸ It is of course necessary to ensure that a sitting Member can be removed on grounds of proven misconduct (see below), but this is a separate matter. No recommendation is therefore made to amend the existing rules in this respect.

iv. Independence and impartiality

It is important that candidates be independent of government or other private sector interests. Article 5 of the SADC Tribunal Protocol requires every Member to make a solemn declaration to carry out judicial duties independently, impartially, and conscientiously before taking up the duties of office,¹⁵⁹ and Article 6(5) and Article 9(1) stipulate rules on alternative employment during a Member's tenure. These provisions are discussed below in the context of the rules governing sitting SADC Tribunal Members. Suffice it to say that the same rules should govern the selection of candidates as well.

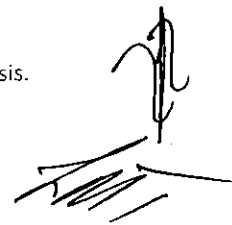
v. Representativeness

Both at the domestic and international levels, it is becoming increasingly accepted that the judiciary should reflect its constituency, although without compromising its integrity.¹⁶⁰ At the international level, it is customary to seek a bench that is representative in terms of geography, legal traditions, language, and, in some contexts, also ethnic background and gender. In part, these considerations are reflected in the SADC Tribunal Protocol, which provides that '[d]ue consideration shall be given to fair gender representation in the nomination and appointment process' (Article 4(2)). However, the SADC Tribunal Protocol

¹⁵⁸ Limbach, above at n 152, 17.

¹⁵⁹ See also above at 56.

¹⁶⁰ This principle exists in tension with the principle that candidates be chosen on a non-discriminatory basis.



234

could be improved to ensure that all legal traditions are properly represented on the Tribunal. At present, Article 3(6) ensures that no SADC Member State may have more than one national appointed as a Tribunal Member. Given that there are to be at least ten Tribunal Members, at least ten SADC Members will be represented on the bench, five in the form of regular Members and five in the form of non-regular Members. However, this is inadequate in two respects. In the first place, one cannot assume that nationality always equates to experience in the legal system of that Member State.¹⁶¹ Second, while this does not reflect existing practice, it is possible for the minority legal systems of Angola, DRC and Mozambique (and to some extent Mauritius), to be excluded from among the ten Tribunal Members, and, more importantly, from among the five regular Tribunal Members. This should be corrected by means of a statement, based on Article 4(2), as follows:

Recommendation 16

Introduce a new paragraph in Article 4 stating that:

Due consideration shall be given to fair representation of the different SADC Member State legal systems in the nomination and appointment process.

A further point may be made. Article 3(6) seems to prohibit the appointment of a Tribunal Member with multiple SADC Member State nationalities. This seems unnecessarily restrictive, and indeed contrary to the spirit of regional integration. A better solution is that stipulated in Article 3(3) of the ECOWAS Court Protocol, stating that where a candidate holds more than one ECOWAS nationality, he or she will be deemed to be the national of the State 'in which he [sic] originally exercises civil and political rights'. The following recommendation uses the language taken from the International Court's judgment in *Nottebohm*.¹⁶²

Recommendation 17

Amend Article 3(6) by adding the following sentence.

A person who for the purpose of membership of the Tribunal could be regarded as a national of more than one Member State shall be a national of the one with which he or she has a genuine link.

7.2 Appointment process

The appointment process for SADC Tribunal Members takes place in two stages: nomination and selection. This process resembles that used for most international and regional tribunals. There are however ongoing debates on reforms to the selection process for these tribunals, and more recently established tribunals, such as the Caribbean Court, have adopted radically different selection processes. Generally, there is a trend toward placing less emphasis on the authority of states to control the judicial selection process and more

¹⁶¹ See above at n 147.

¹⁶² *Nottebohm (Liechtenstein/Guatemala)* [1955] ICJ Rep 4.

emphasis on a pre-determined formal selection process based on objective criteria. In light of this comparative experience, the following elaborates on the existing process and makes some suggestions for reform.

i. Nomination

Each SADC Member State may propose one candidate, who need not be a national of that Member State (Article 4(1)). There are various comments to be made on this rule.

Nationality of candidates

It is indeed desirable that the candidate need not be a national, as it cannot be assumed that States will always appoint nationals to international tribunals. It has sometimes occurred that States appoint non-nationals as judges, both permanent and *ad hoc*, to the International Court.¹⁶³ Although, as discussed below, the appointment mechanism used for the Caribbean Court is radically different from the norm, it is worth noting that its original bench included a judge from a non-contracting party, the Netherlands Antilles (and at the same time did not include a judge from the most populous Caribbean country, Jamaica).¹⁶⁴

On the other hand, problems can arise when a State nominates a national of another State with the right to nominate its own nationals. Belgium once caused diplomatic irritation when it nominated an Egyptian to the ICJ, who was perceived to be in competition with Egypt's own candidate.¹⁶⁵ This precedent is particularly pertinent to the SADC Tribunal, where the situation is even more likely to result in friction, given that at present Members may only be the nationals of one Member State (Article 3(6)). The present rules do not resolve this potential conflict, and therefore need, as a matter of logic, to be amended. One means of resolving the conflict is to remove the sole nationality rule in Article 3(6); another is to introduce an equivalent sole nationality rule into Article 4(1)). On balance, the interests of diversity and Member State commitment to the process militate in favour of an amendment of Article 4(1), though with two stipulations: first, that non-SADC Member State nationality is permitted, and second, as per the previous recommendation, that dual nationality is permitted.

Recommendation 18

Amend Article 4(1) as follows:

SADC Member States may only nominate their nationals or non-SADC Member State nationals, subject to Article 3(6) [see Recommendation 17].

¹⁶³ Mackenzie et al, above at 142, 95-7.

¹⁶⁴ *ibid*, 170 n 165.

¹⁶⁵ *ibid*, 96. Belgium withdrew its nomination.

Number of candidates

Another question is whether the limitation to one candidate per SADC Member State is desirable. On this matter, there is a wide divergence of practice, not entirely explained by the ratio of judges to member states. For the European Court of Justice and EFTA, on which there is a one-to-one ratio, each Member State nominates one candidate, but for the European Court of Human Rights, where there is also a one-to-one ratio, each nominates three.¹⁶⁶ For the East African Court, where there are more judges than members, each member state nominates up to two (and one at the appellate level),¹⁶⁷ but the same rule applies for the ECOWAS Court, where there are fewer judges than members.¹⁶⁸

At the Senior Officials Meeting there was a general consensus that increasing the number of candidates from which the final selection is made could increase the likelihood of identifying high quality appointees, especially taking into account the need for appropriate representation of gender and the need for diversity of legal traditions, as per Recommendation 16. Consequently, the following recommendation is made.

Recommendation 19

Amend Article 4(1) as follows:

Each Member State may nominate *two candidates* having the qualifications prescribed in Article 3 of this Protocol.

National processes

In keeping with usual practice internationally, the process of identifying candidates who are then nominated by the SADC Member States is unregulated by SADC law. It would however appear that, at present, SADC itself has no formal role in the advertising of positions; so long as the SADC Member States nominate candidates, they are also responsible for advertising the positions (should this be the mechanism chosen by them).

The procedures for identifying a candidate vary considerably between the SADC Member States. Some SADC Member States have a system of examinations,¹⁶⁹ or nominations are scrutinized by the Judicial Services Commission, or the bar association.¹⁷⁰ In others the process is rather informal. In one SADC Member State the government consults with the

¹⁶⁶ Article 22 ECHR.

¹⁶⁷ Article 24(1) EAC Treaty.

¹⁶⁸ Article 3(2) ECOWAS Court Protocol.

¹⁶⁹ Angola; Mozambique. Note however that the academic response to the questionnaire considered the process in Mozambique to be a decision of the Ministry of Foreign Affairs.

¹⁷⁰ In Botswana, the Judicial Services Commission administers the process but the scrutiny is conducted by the Law Society. It is unclear whether the Namibian Judicial Service Commission is involved in the process: the official interviewed considered this to be 'a good idea'. In South Africa, a 'National Group' consisting of member of the legal profession nominates candidates to the Minister of Justice, who makes the final decision. Formerly, it was the Judicial Services Commission.

Chief Justice,¹⁷¹ in others the government consults with a range of stakeholders, such as the judicial, the law association and law enforcement agencies.¹⁷² In certain cases the respondents to the questionnaire were unable to answer this question, indicating that there is a lack of transparency and knowledge of this procedure.

It should be noted that the wide discretion provided to member states in putting forward a candidate does not accord with the increasing trend to limit state influence by preferring established and transparent selection criteria. That said, it must be remembered that the involvement of states in judicial selection enhances the perceived legitimacy of the Tribunal and maintains a certain level of 'buy in' from member states. Should states feel that they have lost the opportunity to exert any influence on the composition of the Tribunal, they may be correspondingly less inclined to fully participate in cases and implement the Tribunal's decisions. As such, any reform in this regard must be carefully considered.

The next section considers the possibility of an independent appointment committee, based on the Regional Judicial and Legal Services Commission that appoints judges to the Commission Caribbean Court. But even if such a reform is undesirable, a less intrusive solution would be to require SADC Member States to institute an open nomination process at the domestic level. This could include open advertising, publication of information on the general process and consultation with individuals or organisations in seeking nominations, and a standardised interview template. Along these lines, the Parliamentary Assembly of the Council of Europe, which has the responsibility of electing judges to the European Court of Human Rights from a list of candidates supplied by the States party to the Convention, issued a resolution in which it 'strongly urges the governments of member states which have still not done so, to set up – without delay – appropriate national selection procedures to ensure that the authority and credibility of the Court are not put at risk by *ad hoc* and politicised processes in the nomination of candidates.'¹⁷³ Such a call would also be appropriate in the context of SADC. At the very least, SADC Members should be required to identify nominees using recruitment procedures no less favourable than are used for their domestic judges.

ii. Selection

The process of selecting SADC Tribunal Members from the list of candidates submitted by the SADC Member States is highly political. The Council selects 'not less than' ten Members (Article 3(1)) from the list submitted to it (Article 4(3)). Five of these are appointed as regular Members, and five as reserve Members (Article 3(2)), to be drawn upon by the President when a regular Member 'is temporarily absent or is otherwise unable to carry out his or her

¹⁷¹ Mauritius.

¹⁷² Zambia.

¹⁷³ Parliamentary Assembly of the Council of Europe, Resolution 1646 (2009) on the nomination of candidates and election of judges to the European Court of Human Rights, 27 January 2009. Slowly, countries are coming to formalize their national processes. Uniquely, Uniquely, Slovenia has placed this on a legislative footing: see the *Law on Nomination of Judges to International Tribunals/Courts* (17 July 2001), at www.iccnw.org/documents/SloveniaLaw.pdf.

functions' (Article 3(2)). There seems to be a numerical flaw in this rule: if the pool Members can comprise more than ten, then the stipulation that only 'five' Members are to be 'pool' Members is too restrictive. This discrepancy should be removed.

Recommendation 20

Amend the second sentence of Article 3(2) by deleting the reference to 'five' pool Members, as follows:

The additional ~~five (5)~~ Members shall constitute a pool from which the President may invite a Member to sit on the Tribunal whenever a regular Member is temporarily absent or is otherwise unable to carry out his or her functions.

The Members are ultimately appointed by the Summit upon the recommendation of the Council (Article 4(4)). The SADC Tribunal Protocol does not prescribe the mechanics of these elections, which is the norm for international tribunals. However, it is also the norm for the election of judges to be characterized by campaigning, political considerations and other factors not having a bearing on the objective qualities of the candidates.¹⁷⁴ This does not necessarily mean that the best candidate is not selected. But it must also be considered that this stage is the first time that there is any formal benchmarking of candidates against the selection criteria. There is a risk that conflating this process with the other considerations that emerge at the election stage of proceedings reduces the importance of these criteria relative to other, more political, criteria. There is no obvious solution to this problem, however, other than by means of establishing an independent commission either at the nomination or at the election stage of the overall appointment process. The following section considers these options.

iii. An alternative: an independent appointment process

Introduction

In discussing the possibility of an independent commission for appointing SADC Tribunal Members, it is appropriate to begin by noting that the removal of political involvement from the appointment process is not necessarily cost-free. An infusion of politics at the point of selection can confer legitimacy on judges who are called upon to make decisions featuring a political element. Indeed, it can be argued that having a national judge on a tribunal has the effect of diminishing the risk of non-compliance by an unsuccessful defendant. Such a defendant would find it politically more difficult to claim that the decision was taken on any other basis than the rule of law. Nonetheless, there are also advantages to a system in which political influence is removed from the appointment process, the most obvious of which is the perception that such a system is more likely to promote appointment based on merit. In addition, it increases the chance of selecting qualified candidates who are otherwise unknown to the Member States.¹⁷⁵

¹⁷⁴ For a sobering empirical account of the election process, see Mackenzie et al, above at n 163, Ch 4.

¹⁷⁵ Mackenzie et al, *ibid*, 78-84.

The Caribbean Regional Judicial and Legal Services Commission

The great importance which States attach to their control over the process of appointing judges to international courts and tribunals may be gauged by the novelty – in both senses – of independent appointment commissions at the international level. There is only one fully independent commission: the Regional Judicial and Legal Services Commission (RJLSC) of the Caribbean Court, which commenced in 2004. There are also three commissions that are responsible for compiling a shortlist of candidates who are then appointed by political bodies: these are the European Union Civil Service Tribunal (CST), which commenced in 2005, and the United Nations Dispute Tribunal (UNDT) and the United Nations Appeals Tribunal (UNAT), which commenced in 2009.¹⁷⁶ It is relevant to make some comments on the RJLSC of the Caribbean Court, the most important of these.

The RJLSC is established under the Agreement Establishing the Caribbean Court as an organization with juridical personality, and comprises eleven members: the President of the Court (as Chair); two lawyers, two lay people, two academics, two regional Bar representatives and two chairs of the public service commissions and judicial services commissions of the Member States. This diversity has, by all accounts, helped the Commission to achieve an independent identity, the main criticism being that the Commission is too dominated by the legal profession.¹⁷⁷ The process followed by the Commission in selecting the first bench of judges has been described as follows:

In the application round used to appoint the first cohort of judges, the RJLSC sent out an open call for candidates with advertisements for the posts being placed throughout the region and internationally. Approximately 90 applications were received and a shortlist of 30 was drawn up from which 12 were interviewed and seven were chosen. The absence of any form of lobbying for or against candidates was a particularly striking feature of the system in contrast to the selection process for most international courts and was identified by many of those interviewed for this research as a very positive feature of the system which encouraged good quality candidates to come forward and reduced any danger of political interference. ... The interview process itself, although undertaken by the full commission, was relatively informal and undemanding when measured against comparable procedures such as the interviews for South African judges before the Judicial Services Commission. Nor were they held in public as they are in South Africa. Candidates were asked about such matters as their past legal experience, their publications and academic work as well as their general opinions of Caribbean society. The commission was careful to avoid potential controversial questions such as the candidates' views on the death penalty.¹⁷⁸

The author of this description concludes that 'the evidence to date suggests that [the RJLSC] has established essentially sound processes for an independent, rigorous and fair appointments system. In so doing the CCJ [Caribbean Court of Justice] has provided a very

¹⁷⁶ *ibid*, 148-9.

¹⁷⁷ Malleon, above at n 157, 681.

¹⁷⁸ *ibid*, 681-2.

useful model of an alternative approach to selecting judges to an international court at a time when more established courts are rethinking their selection methods.¹⁷⁹

The establishment of an independent commission to appoint SADC Tribunal Members is clearly a large step to take. Should this be considered too large a step, it might be possible to adopt the smaller reform of establishing an independent commission for the purpose of selecting a short-list of candidates, who are then voted on by the SADC Council. This model, which is based not on the RJLSC but rather on the other commissions mentioned in this section, combines the virtues of a merit-based and independent selection procedure with those of political involvement in the system. But clearly the matter is worthy of significant further discussion.

Recommendation 21

- (a) The SADC Secretariat should formulate Guidelines setting out a transparent process for the nomination of Tribunal Members, specifying in particular the desirability of advertising and consultation with all key stakeholders at the national level. The process should be at least as transparent as that used for the selection of national judges.
- (b) In the future, consideration should be given to the establishment of an independent commission, comprising representatives of all SADC stakeholders, with the power (a) to select and appoint SADC Tribunal Members, or (b) to select a shortlist of SADC Tribunal Members, who would then be elected by the SADC Council.

¹⁷⁹ *ibid*, 682.

8. Impartiality and independence of the SADC Tribunal and its Members

In common with almost all international tribunals, the instruments establishing the SADC Tribunal make no specific mention of its independence.¹⁸⁰ But a number of provisions exist to ensure that the both the Tribunal and its Members are independent of public and private sector interests, and that its Members discharge their duties impartially. The following considers whether these provisions are adequate to serve the objective.

8.1 Independence

i. Tribunal budget

Article 33 of the SADC Tribunal Protocol states that:

The budget of the Tribunal shall be funded through the regular budget of the Community, in accordance with criteria that the Council may, from time to time determine, and from such other sources as may be determined by the Council.

It is normal for the budgets of international tribunals to be funded from the general budget of the organizations to which they are attached, and also that this is subject to the overall control of the political organs of the organization. However, this comes with two disadvantages. First, a lack of guaranteed funding can impair the functioning of a tribunal. This is presently the case with the SADC Tribunal, which, due to a lack of funding, lacks staff. Second, dependence on a political organ can have a negative impact on the independence of a tribunal and its judges.¹⁸¹

It was generally agreed at the Senior Officials Meeting that independent funding was a desirable objective, and a number of models for achieving this objective were discussed. One idea was to determine the budget as a fixed percentage of the overall SADC budget. However, this proposal suffers from the disadvantage that the overall SADC budget may fluctuate, both in terms of SADC Member State contributions and in terms of outside donor contributions. It is therefore suggested that Article 33 be amended to provide for guaranteed funding in substantive, not relative terms, based on an estimate provided by the Registrar every five years.

¹⁸⁰ Unusually, the Caribbean Court was expressly not established as an 'organ' of the Caribbean Community in order to stress its independence: Adrian Saunders, 'A Comment on the Early Decisions of the Caribbean Court of Justice in its Original Jurisdiction' (2010) 59 *International and Comparative Law Quarterly* 761, 763. This seems excessive.

¹⁸¹ It might be noted in this context that Article 33 refers to funding from 'other sources' is somewhat vague, and may give rise to the impression that non-SADC funding sources may have an undue influence on the workings of the Tribunal. However, the sources of such other funding must be approved by the Council; indeed, in the past, when such funding has been made available, not only the source but even the amount of funding has been approved by the Council. This appears to be an adequate safeguard against donor influence.

For the future, it is worth noting the model is provided by the Caribbean Court, which is financed entirely by an independent trust fund administered by independent trustees.¹⁸² This fund was initially endowed with \$100m, contributed by the governments in agreed proportions,¹⁸³ and has powers to invest and manage the fund to ensure the financial independence of the court. The Fund has been considered a significant success, and a model for other tribunals, particularly in developing countries.¹⁸⁴ Ideally this model would also be implemented for the SADC Tribunal, but it is premature to suggest that this model might be adopted now.

Recommendation 22

Amend Article 33 as follows

The budget of the Tribunal shall be funded through the regular budget of the Community, ~~in accordance with criteria that the Council may, from time to time determine,~~ and from such other sources as may be determined by the Council, based on a proposed budget prepared by the Registrar every five years.

Alternative Recommendation 22A

Amend Article 33 to provide for independent funding of the SADC Tribunal by the establishment of an independent trust fund similar to the Caribbean Court of Justice Trust Fund.

ii. Tribunal Members' terms and conditions of service, salaries and benefits

A related issue concerns the establishment of the terms and conditions of service and salaries and benefits of the Tribunal Members, which are at present determined by the SADC Council (Article 11 of the SADC Tribunal Protocol). This has the potential for a negative impact on the independence of the Tribunal Members. Again, the Caribbean provides a model: there, the independent Commission described above has the power to determine judges' expenses,¹⁸⁵ which 'shall not be altered to their disadvantage during their tenure.'¹⁸⁶ Should this model not be possible, an alternative would be to fix these terms and conditions of service, salaries and benefits according to an appropriate regional benchmark, though in no case should this be less advantageous than the comparable terms and conditions of service, salaries and benefits applicable to judges of the superior court of the nominating

¹⁸² Revised Agreement Establishing the Caribbean Court of Justice Trust Fund, signed and in force, 12 Jan 2004. Further information, including annual reports, is at www.caribbeancourtofjustice.org/trustees/index.html; and background in H Rawlins, *The Caribbean Court of Justice: The History and Analysis of the Debate* (CARICOM, Georgetown, 2000).

¹⁸³ These proportions are set out in the Annex to the Revised Agreement Establishing the Caribbean Court of Justice Trust Fund.

¹⁸⁴ Malleson, above at n 157, at 678.

¹⁸⁵ Article XXVIII C CJ Agreement.

¹⁸⁶ Article XXVIII.3 C CJ Agreement.

Member State. There should also be a guarantee that these conditions of service, salaries and benefits will not be altered to the disadvantage of Members during their tenure.

Recommendation 23

Amend Article 11 as follows:

The terms and conditions of service, salaries and benefits of the Members shall be determined by the Council based on regional standards, and in no case less favourable than those applicable to judges of superior courts of the nominating Member State, and shall not be altered to the disadvantage of Members during their tenure.

Alternative Recommendation 23A

Amend Article 11 as follows:

The terms and conditions of service, salaries and benefits of the Members shall be determined by ~~the Council~~ an independent Commission based on regional standards, and in no case less favourable than those applicable to judges of superior courts of the nominating Member State, and shall not be altered to the disadvantage of Members during their tenure.

iii. Immunity of Tribunal Members

Article 10 of the SADC Tribunal Protocol establishes a permanent legal immunity for SADC Tribunal Members in respect of the exercise of their judicial function. This rule appears adequate.

iv. Tenure and reappointment

The length of tenure of a judge needs to strike a balance between independence, renewal and accountability. Article 6(1) establishes the tenure of office for SADC Tribunal Members as five years, renewable once. There are alternatives: the East African Court and the Caribbean Court both provide for single maximum term of seven years.¹⁸⁷ By contrast, the International Court provides for a renewable term of nine years.¹⁸⁸ There is no one right answer to the question of term of appointment, or renewal. However, what is clear is that the mechanism for reappointment must not be allowed to influence the independence of sitting Members. In this respect, the present rules governing tenure and reappointment of SADC Tribunal Members are manifestly deficient.

The first problem is that it is not specified how the decision to reappoint a Tribunal Member is to be made. It may however be assumed that such a decision would be taken by the same body that made the initial appointment, which is to say the Summit (under Article 4(4)).

¹⁸⁷ Article 25(1) EAC Treaty; Article IX.2 CCJ Agreement.

¹⁸⁸ Article 13 ICJ Statute.

244

Second, and more serious, nothing is said about the mechanism for requesting a reappointment. For example, it is not clear whether a request for reappointment must be made by the SADC Member State that originally nominated the Member. Nor is it clear what follows if such a request is rejected by Summit. The provisions on vacancy are limited to those arising before the completion of a full term of office; they do not relate to the situation at hand. Presumably, in such a situation the original Member State that nominated the sitting Member must nominate a new candidate. Such a situation is time-consuming and lacking in certainty; meanwhile, the Tribunal would have to operate without a full bench.

These points of ambiguity in the existing rules, and considerations of independence, lead to the suggestion that reappointment (if sought by the Tribunal Member) should be assumed unless Summit (or any independent appointment body) decides not to reappoint a Tribunal Member. In this way, the Tribunal is not left with an unfilled vacancy, and the question of reappointment by any given Member State will not have any bearing on the work of the Tribunal Member.

Recommendation 24

Introduce a second sentence in Article 6(1) stating:

Members will be reappointed subject to the appointment of any new Members.

v. Removal of Tribunal Members

Article 8(3) provides that '[n]o Member may be dismissed unless in accordance with the rules.' It barely needs to be said that it is impossible for a SADC Member State to withdraw 'its' Member from the Tribunal; once nominated, a SADC Member State has no independent power over the Tribunal Members.¹⁸⁹ On the other hand, there is no mechanism for removing a Tribunal Member on the grounds of incapacity or misconduct. By contrast, there is such a provision for removal of the Registrar: Rule 19(1) of the Rules of Procedure, which stipulates that the decision is to be made by two-thirds majority of Tribunal Members. For the removal of a Tribunal Member, it would be more appropriate for the decision to rest with the Summit (or an independent appointment body, should one be established), on the advice either of an independent tribunal appointed by Summit (the solution adopted by the East African Court)¹⁹⁰ or of the Tribunal itself, sitting in plenary (the solution adopted by the ECOWAS Court).¹⁹¹ Given the present difficulties experienced by the Tribunal in maintaining a full bench, the former solution is likely to be more appropriate.

¹⁸⁹ Zimbabwe has announced that it will withdraw its Tribunal Member.

¹⁹⁰ Article 26(1) EAC Treaty.

¹⁹¹ Article 4(7) ECOWAS Court Protocol. It is not stipulated that the relevant judge may not take part in this decision, although this is implied.

Recommendation 25

Introduce an article into the SADC Tribunal Protocol stating that:

A Member may be removed from office only if he or she has either become permanently incapacitated from exercising his functions, or has committed a serious breach of his duties or a serious act of misconduct, as determined by Summit following a referral to an independent tribunal to be established by Summit for this purpose.

8.2 Impartiality

i. General rule

According to Article 5 of the SADC Tribunal Protocol (and Rule 3 and Annex I of the Rules of Procedure), every Member must make a solemn declaration to carry out his or her judicial duties independently, impartially, and conscientiously before taking up the duties of office. In addition, Article 9(1) prohibits Tribunal Members from holding any other position or engaging in any other activity that may interfere in their carrying out the judicial function or impair judicial independence or impartiality. The qualification is important, as it does not prohibit Members from holding *any* other position: thus, they may continue to sit as domestic judges, provided that this does not impair their independence or impartiality. An exception to this is provided by Article 6(5) which prohibits full-time Tribunal Members from holding *any* other office or employment. Article 9(2) also prohibits Tribunal Members from participating in cases in which they have had prior involvement.

These provisions are largely adequate, although they apply to Tribunal Members *per se*. They do not properly deal with situations in which Members should recuse themselves from hearing a case due to a perceived lack of impartiality in the given case.¹⁹² Furthermore, it would be appropriate to specify two cases in which impartiality may be questioned: first, financial or property interests of Members relevant to a dispute, and second, the affiliations and interests of close family members. This issue almost arose, but did not need to be decided, by the UK House of Lords in the *Pinochet* case, in which the wife of one of the judges was an employee of a charity intervening in the proceedings.¹⁹³

¹⁹² See, generally, Hon Justice David Hayton, 'Recusing Yourself from Hearing a Case', Inaugural Meeting of the Caribbean Association of Judicial Officers, Hyatt Regency Hotel, Port of Spain, 26 June 2009, at www.caribbeancourtsofjustice.org/papersandarticles/.

¹⁹³ *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No 2)* [2002] 1 AC 119.

246

Recommendation 26

Amend Article 9 as follows by including a new paragraph (before existing paragraph 3), as follows:

A Tribunal Member shall disqualify himself or herself in any case in which his or her impartiality might reasonably be questioned. Relevant reasons include, without limitation, the possession by a Tribunal Member, or a close family member or associate of a Tribunal Member, of any financial and property interests relevant to the dispute, and the affiliations or employment of a close family member or associate of a Tribunal Member.

ii. Nationality of Members hearing cases

There is no rule concerning the hearing of a case by a Tribunal Member with the nationality of a party to the proceedings. This is often a consideration in international tribunals in which the number of judges is fewer than the number of parties to the Statute of the Court or Tribunal. Thus, the International Court permits a party to appoint an *ad hoc* judge if no judge hearing the case has its nationality while a judge has the nationality of another party to the proceedings.¹⁹⁴ Taking the opposite approach, WTO panellists (though not Appellate Body Members) are precluded from hearing disputes involving a party of which they hold nationality. The model of the ICJ is certainly impractical in the context of SADC; and it is doubtful whether the WTO panellist model is an improvement. Indeed, as mentioned in the context of the appointment procedure, having a judge of the same nationality as a State party to a dispute can enhance the credibility of the final decision. No change to the present rules on nationality is therefore recommended.

¹⁹⁴ The justification is that the party's views are thus fully taken into account: *Genocide Convention Case (Provisional Measures) (Order)* [1993] ICJ Rep 325, Judge *ad hoc* Lauterpacht (Sep Op), paras 4-6.

247

9. Legal status of the SADC Tribunal Protocol

Zimbabwe argues that the SADC Tribunal is not validly established because the SADC Tribunal Protocol has not yet entered into force. It argues that this is because the Agreement Amending the SADC Treaty adopted by the SADC Summit in August 2001 (the 2001 Agreement) was not ratified by the SADC Member States.

9.1 The Summit decision to adopt the 2001 Agreement

i. Article 36 of the SADC Treaty

The SADC Summit adopted the 2001 Agreement as an amendment under Article 36 of SADC Treaty. This provision states as follows:

1. An amendment of this Treaty shall be adopted by a decision of three-quarters of all the Members of the Summit.
2. A proposal for the amendment of this Treaty may be made to the Executive Secretary by any Member State for preliminary consideration by the Council, provided, however, that the proposed amendment shall not be submitted to the Council for preliminary consideration until all Member States have been duly notified of it, and a period of three months has elapsed after such notification.

Zimbabwe makes a number of arguments about this provision, and the procedure adopted in relation to the 2001 Agreement.

Article 36 as an amendment provision

First, Zimbabwe argues that multilateral treaties may not be amended by a subset of their full membership with effect for the entire membership. Zimbabwe cites Article 40 of the Vienna Convention, which states that '[the] amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement.' But this provision is concerned amending agreements concluded *inter se* by a subset of the parties. It is not relevant to the 2001 Agreement, which was concluded by all of the parties to the SADC Treaty.¹⁹⁵ The relevant provision of the Vienna Convention, as recognized by Justice Patel in *Gramara*,¹⁹⁶ is actually Article 39, which provides that the parties to a treaty may agree to amend the treaty in any way they choose. In any case, Zimbabwe quotes Article 40 of the Vienna Convention selectively: it begins '[u]nless the treaty otherwise provides', which the SADC Treaty does.

There is in fact nothing unusual about amendment provisions permitting a subset of the parties to a treaty to amend a treaty with effect for all of them. An example is Article 108 of

¹⁹⁵ In *Gramara*, above at n 3, 12, Patel J erroneously states that thirteen of fourteen SADC parties signed the 2001 Agreement.

¹⁹⁶ *Gramara*, *ibid*, 9-10.

the UN Charter.¹⁹⁷ Nor is it required that amendments must be ratified. Article 40 of the Vienna Convention allows for amendment by any means chosen by the parties to a treaty. The EU Treaties can be amended by decision of the European Council;¹⁹⁸ and there are other examples.¹⁹⁹ At least under international law, there is no difficulty with an amendment of the SADC Treaty by a 'decision' adopted by a three-quarters majority of the Members of the Summit.²⁰⁰ There is no doubt that Article 36 of the SADC Treaty is valid.

The constitutional implications of Article 36

Zimbabwe also questions the implications of Article 36 for the domestic constitutions of SADC Member States. As demonstrated by the recent experience of the European Union, these questions are well founded.

In a manner similar to Article 36 of the SADC Treaty, the EU Treaties have recently been amended to provide for later amendment by decision of the European Council – but with a significant difference, that the decision is to be taken unanimously. These provisions, among others, were challenged recently before the German Constitutional Court. The German Constitutional Court responded that while the conclusion of the treaty containing the amendment provision was constitutional, Germany would be unable to take a decision under that provision without first obtaining the approval of the German Parliament.²⁰¹ There can be no doubt that, should the EU rule have permitted amendment by majority vote, the German Constitutional Court would have found the treaty unconstitutional.

Zimbabwe's concerns about the likely constitutional illegitimacy of Article 36 appear therefore to be well founded. But, as discussed above, this question is irrelevant to Zimbabwe's performance of its international obligations under the SADC Treaty.

¹⁹⁷ Article 108 of the UN Charter states that '[a]mendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations including all the permanent members of the Security Council.' For a comprehensive discussion, see Henry Schermers and Niels Blokker, *International Institutional Law*, 4th ed (The Hague: Martinus Nijhoff, 2004) 731-752.

¹⁹⁸ The European Council comprises all EU Member States, the President of the Council and the President of the European Commission, but only the EU Member States participate in voting: Article 235 TFEU(1).

¹⁹⁹ See the examples given in the 'Commentary on Draft Article 35 [now Article 40]' in *Draft Articles on the Law of Treaties with Commentaries* (1966) II Yearbook of the International Law Commission 1, at 234: 'Article 3 of the Geneva Convention on Road Traffic (1949), for example, provides that any amendment adopted by a two-thirds majority of a conference shall come into force for all parties except those which make a declaration that they do not adopt the amendment.'

²⁰⁰ It is unclear, but likely, that such a decision is formally speaking a decision of the Summit, as an organ of SADC. In any case, this makes no difference to the point at issue.

²⁰¹ *Lisbon Decision*, above at n 39, para 328; Cl 3 of the European Union Bill 2010 UK, www.publications.parliament.uk/pa/cm201011/cmbills/106/11106.8-11.html.

249

ii. Legality of the decision to adopt the 2001 Agreement under Article 36

A separate question is whether the Summit decision to adopt the 2001 Agreement was in accordance with Article 36.

Article 36 is in two parts: its first paragraph states that SADC Summit may adopt a decision to amend the SADC Treaty, and its second establishes the applicable mechanism for such decisions: namely, a SADC Member State may propose an amendment to the Executive Secretary for submission to the Council for preliminary consideration, provided that the proposed amendment has been circulated to the other Member States with three months' notice. The adoption of the 2001 Agreement did not fully comply with these steps in one respect: the proposal itself was initiated by the Secretariat, not a SADC Member State.²⁰²

The question is whether a failure fully to comply with the mechanism set out in Article 36(2) defeats the legitimacy of a decision adopted under Article 36(1). In the first place, it cannot be said that Article 36(2) is entirely independent of Article 36(1).²⁰³ Such a reading would leave Article 36(2) with an improbable meaning: a three month notice period would be required before submission of an amendment proposal to Council for its preliminary consideration, but not for the submission of a proposal to Summit for its immediate vote. But does it matter whether a Member State initiated the proposal?

This seems unlikely. There is no reason to believe that this formality has any bearing on the legitimacy of the decision. But even if it did, it is relevant that the procedure adopted for this decision followed the consistent practice of SADC Member States (including, prior to 2009, Zimbabwe) in the context of amendments made following a policy decision by the Summit. This practice has legal relevance. In *Namibia*, the International Court discussed the legal consequence of a decision-making practice of an international organization that is not entirely in accordance with procedural rules. In this case, South Africa argued that a UN Security Council resolution was invalid because it had not been adopted by a concurring vote of the five permanent members, as required by Article 27(3) of the UN Charter, two having abstained. The Court rejected this argument, based on the subsequent practice of the Security Council members, coupled with the acquiescence in this practice of all UN Members, including South Africa.²⁰⁴ The result was that South Africa lost rights it otherwise would have had.²⁰⁵ The present case is identical. Because the decision to adopt the 2001 Agreement was taken by a means consistently treated as valid, this decision cannot now be considered to be *ultra vires*.

²⁰² Information provided by the SADC Secretariat Legal Unit.

²⁰³ This was the view taken in *Gramara*, above at n 3, 12.

²⁰⁴ *Namibia (Advisory Opinion)* [1971] ICJ Rep 16, para 22.

²⁰⁵ Daniel Sarooshi, 'Some Preliminary Remarks on the Conferral by States of Powers on International Organizations', Jean Monnet Working Paper 4/03, New York, 2003, 27; Donald Greig, 'The Interpretation of Treaties and Article IV.2 of the Nuclear Non-Proliferation Treaty' (1978) 6 *Australian Yearbook of International Law* 77, 98; Hugh Thirlway, 'The Law and Procedure of the International Court of Justice 1960-1989, Part Two', (1990) 61 *British Year Book of International Law* 3, 76-77.

9.2 The 2001 Agreement as an amending treaty under international law

A separate question is whether the 2001 Agreement validly amended the SADC Treaty as an amending treaty under international law. This is relevant if, contrary to the preceding argument, the decision to adopt the 2001 Agreement was *ultra vires* due to non-compliance with the procedure set out in Article 36(2) of the SADC Treaty.²⁰⁶

It is basic international law that a treaty concluded by all of the parties to an original treaty can override that original treaty regardless of any restrictions contained in that treaty.²⁰⁷ The only issue is whether the 2001 Agreement is a valid treaty binding on all the signatory States. There are two objections to consider: that the 2001 Agreement was not ratified, and that this renders it invalid as a matter of international law, and that, because it did not ratify the 2001 Agreement, Zimbabwe never expressed its consent to be bound by the agreement.

The first argument is inconsistent with international law, which does not state that treaties are only valid if they are ratified.²⁰⁸ To the contrary, Article 11 of the Vienna Convention clearly states that ratification is only one of the means by which States may express their consent to be bound, signature and 'any other agreed means' being other options.²⁰⁹ In any case, it should be noted that 'ratification' for these purposes, which consists of the execution of an instrument of ratification and its exchange or deposit with a depositary, is an international act that is not to be confused with any 'ratification' procedure under domestic law, such as obtaining approval by parliament.²¹⁰

The second question is whether *this* treaty required ratification. The answer to this objection is relatively simple. The 2001 Agreement did not state that it was to come into force subject to ratification: to the contrary, its Article 32 stated that it was to come into force upon the satisfaction of a condition: the adoption of the agreement by decision of three-quarters of Summit.²¹¹ Zimbabwe states that the phrase 'adopted by decision' in Article 36(1) of the SADC Treaty means that the amending treaty is 'open for ratification'.²¹² This is unlikely, but

²⁰⁶ For most SADC Member States it makes no difference whether the 2001 Agreement was an amendment under Article 36 of the SADC Treaty or as a separate treaty. However, it makes a difference for Malawi in terms of the direct effect of the 2001 Agreement in Malawi national law: see above at n 31.

²⁰⁷ Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden/Boston: Martinus Nijhoff, 2009), 512, para 5, with further references (on Article 39 VCLT).

²⁰⁸ Zimbabwe's response to questionnaire, 32.

²⁰⁹ The Legal Opinion by Chibanda Makgalemele & Company, Gabarone (SADC/MJ/1/2010/7, para 7) states that ratification is presumed to be required unless there is an express exception to the contrary. The Legal Opinion citing DJ Harris, *Cases and Materials on International Law*, 6th ed (London: Sweet and Maxwell, 2004), at 806. However, Harris does not say this: the reference is to an ILC Commentary mentioning a debate on the issue.

²¹⁰ Anthony Aust, *Handbook of International Law*, 2nd ed (Cambridge: CUP, 2010), 60. There is a difference between a treaty provision on ratification, and a treaty provision on ratification 'in accordance with their respective constitutional processes' (eg Article 109 UN Charter), although it is arguable that the former may be read as meaning the latter.

²¹¹ Article 24(1) VCLT states that '[a] treaty enters into force in such a manner and upon such a date as it may provide or as the negotiating States may agree.'

²¹² Zimbabwe's response to questionnaire, 34.



in any case it is irrelevant: what is important is the relevance of this term in the 2001 Agreement. As to this, one thing is clear: it was not a requirement of ratification. Hence the argument that the 2001 Agreement itself required ratification is unfounded.

Zimbabwe's final argument is that, under international law, a State is not bound by a treaty unless it has ratified this treaty domestically in accordance with its own constitution. Again, this is inconsistent with settled international law, according to which ratification by way of domestic procedures is only a condition if the treaty makes it so. It might be argued that Zimbabwe's consent was invalid because it was given in manifest violation of its internal law: Article 46 of the Vienna Convention. But, as the International Court has held, this rule does not apply when consent to be bound is expressed by the Head of State, unless the limitation of the capacity of the Head of State is properly publicized (which it was not in this case).²¹³ Aust, a former foreign office legal advisor, states the position in even starker terms:

A State cannot claim that its consent has been expressed in violation of its internal law regarding competence to conclude treaties if the consent has been expressed by its Head of State, head of government or foreign minister, since they each have indisputable authority to express consent (Article 7(2)).²¹⁴

It must be concluded that the 2001 Agreement was validly concluded under international law, and validly amended the SADC Treaty. This is regardless of any failure to comply with procedural rules in the SADC Treaty.

9.3 Subsequent conduct

Finally, as before, even if 2001 Agreement was not a valid amendment of the SADC Treaty, it has the same effect *de facto* as a result of the subsequent conduct of the SADC Member States in treating it as valid. This is for two reasons: first, this conduct amounts to a modification of the treaty; second, for any individual SADC Member, this conduct precludes it from denying the validity of the treaty.

Nature of the subsequent conduct

The subsequent conduct consists of all SADC Member States having treated the 2001 Agreement as effective, insofar as it set out the rules governing the SADC Tribunal. This is seen in a number of ways. All SADC Member States have funded the Tribunal, have participated in its judicial selection procedures, and in general treated it as being fully effective (including, in certain cases, by appearing before the Tribunal). This is further supported by the fact that in the preamble of the 2002 Agreement Amending the Protocol on the Tribunal (the '2002 Agreement') all SADC Heads of State 'recognized' that 'the Protocol entered into force upon the adoption of the Agreement Amending the Treaty of the Southern African Development Community at Blantyre on the 14th August 2001'.

²¹³ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon/Nigeria; Equatorial Guinea intervening)* [2002] ICJ Rep 303, paras 265-6.

²¹⁴ Aust, above at n 210, 99.



Modification

It is well established that the subsequent conduct of treaty parties, if sufficiently consistent, can modify a treaty. One draft of the Vienna Convention stated, as reflecting of a customary rule, an article to the effect that '[a] treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions.'²¹⁵ The rule was applied in the arbitration on *Air Transport Services*, where the tribunal said that:

This course of conduct may, in fact, be taken into account not merely as a means useful for interpreting the Agreement, but also as something more: that is, as a possible source of a subsequent modification, arising out of certain actions or certain attitudes, having a bearing on the rights that each of the parties could properly claim.²¹⁶

This is consistent with the International Court's Advisory Opinion in *Namibia*, discussed above.²¹⁷ In sum, even if the 2001 Agreement was not valid, or did not have the effect of amending the SADC Agreement, it would appear that, by their subsequent conduct, the parties to the SADC Treaty have tacitly amended the SADC Treaty to the same effect.

Preclusion

In addition, it is a basic principle of international law that a party that treats a treaty as valid is later precluded from denying the opposite. An example is found in the judgment of the International Court in the case concerning the *Arbitral Award (King of Spain)*:

the Court considers that, having regard to the fact that the designation of the King of Spain as arbitrator was freely agreed to by Nicaragua, that no objection was taken by Nicaragua to the jurisdiction of the King of Spain as arbitrator either on the ground of irregularity in his designation as arbitrator or on the ground that the Gamez-Bonilla Treaty had lapsed even before the King of Spain had signified his acceptance of the office of arbitrator and that Nicaragua fully participated in the arbitral proceedings before the King, it is no longer open to Nicaragua to rely on either of these contentions as furnishing a ground for the nullity of the Award.²¹⁸

This applies regardless of the ground on which it is claimed that the treaty is invalid.²¹⁹ In sum, even if the 2001 Agreement was invalid, by their subsequent conduct the SADC

²¹⁵ The non-inclusion of this rule in the Vienna Convention itself does not detract from its status as reflective of customary international law: Michael Akehurst, 'The Hierarchy of the Sources of International Law' (1974-5) 47 *British Year Book of International Law* 275, 277.

²¹⁶ *Air Transport Services Arbitration*, 22 December 1963, 16 RIAA, 63.

²¹⁷ See above at n 204.

²¹⁸ *Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras/Nicaragua)* [1960] ICJ Rep 192, 209.

²¹⁹ See also Aust, above at n 210, 99. In *Land and Maritime Boundary between Cameroon and Nigeria*, above at n 213, para 267, the International Court also considered it relevant that Nigeria had previously treated the treaty as binding.

Member States, including Zimbabwe, are now precluded from denying this. In addition, by its specific conduct in nominating a Member and appearing twelve times before the Tribunal, Zimbabwe is individually precluded from denying the legal effect of the 2001 Agreement.²²⁰

9.4 Changes brought about by the 2001 Agreement

The foregoing has considered the validity and effectiveness of the 2001 Agreement, taking into account the subsequent conduct of the parties to this agreement. A separate question concerns the changes that it brought about. Zimbabwe argues that the agreement did not displace the normal rule in Article 22(4) of the SADC Treaty that Protocols must be ratified. The SADC Tribunal Protocol was not ratified and, so argues Zimbabwe, it never entered into force.

In this context, some attention has been given to the meaning of 'notwithstanding' in the amended Article 16(2) of the SADC Treaty, and its relation to Article 22(4) of the SADC Treaty, which requires ratification of SADC Protocols. Article 16(2), as amended, states that:

The composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed in a Protocol, which shall, notwithstanding the provisions of Article 22 of this Treaty, form an integral part of this Treaty, adopted by the Summit.

It is freely admitted that the object of the word 'notwithstanding' is difficult to locate. Logically, it must refer to a part of Article 22 according to which, in the absence of Article 16(2), the Protocol would *not* 'form an integral part of the SADC Treaty, adopted by the Summit'. In this respect, it is relevant that the 2001 Agreement also amended Article 22 of the SADC Treaty by deleting a statement that all Protocols would be an integral part of the SADC Treaty; presumably with the result that Protocols were not, normally, to be integral parts of the SADC Treaty. Thus, it is possible to read the word 'notwithstanding' as a reference to this more limited effect of the amended Article 22. As Zimbabwe points out, '[b]eing an integral part does not *per se* remove the necessity for ratification'.²²¹ The status of an instrument is independent of the means by which it gains that status.

But none of this is relevant. There is no reason to believe that the Tribunal Protocol was ever one of the protocols referred to in Article 22. This provision concerns protocols in the areas of cooperation set out in Article 21, which do not include the topic of dispute settlement. The Tribunal Protocol was always intended to have a separate status under Article 16. In other words, the answer to the question whether the Tribunal Protocol ever became effective must be found within Article 16, not Article 22, which always was and continues to be inapplicable to the Tribunal Protocol. It follows that the meaning of the cross-reference in Article 16 to Article 22 is also irrelevant.

²²⁰ See below at 78.

²²¹ The opposite view is taken in *Gramara*, above at n 3, 12.

The fact is that the original Tribunal Protocol could always have been adopted by Summit under Article 36 without ratification and, for that matter, without being an independent treaty. The present confusion arises from the fact that, when the text of the Tribunal Protocol was drafted, it purported to be a treaty, and in this vein included provisions on ratification and entry into force (Articles 35 and 38). This was unnecessary. On the other hand, it does raise the question whether these provisions had any effect. To this question, the answer must be that, although this was not originally necessary, to the extent that the Tribunal Protocol purported to be an independent treaty, Articles 35 and 38 on its ratification and entry into force were effective; accordingly, until the Tribunal Protocol was ratified it could not enter into force, as a treaty. But that does not mean that it could not be granted legal effect in some other way, either, as a treaty, by a unanimous agreement of its signatories, or by being adopted under Article 36 of the SADC Treaty, as originally envisaged. The question is whether this was ever done.

Here the answer is relatively clear. The 2001 Agreement amended the SADC Treaty by stating that the Protocol 'shall ... form an integral part of the SADC Treaty'. At the time of the 2001 Agreement, the Protocol existed, albeit it was not yet in force, so there can be no argument that 'shall' in this sentence was an expression of the future tense: it was clearly imperative. In other words, the 2001 Agreement amended the SADC Treaty by incorporating into it the SADC Tribunal Protocol. This happened even though the Tribunal Protocol never came into force as a treaty. As an aside, it might be noted that this also means that the preambular statement in the 2002 Agreement that the Tribunal Protocol 'entered into force' on the adoption of the 2001 Agreement is technically incorrect. It would have been more accurate to say that the Tribunal Protocol became effective on that date. But this makes no difference to the result.

Other objections

Zimbabwe makes a number of additional points, some of which points to the confusion surrounding the SADC Treaty amendment process in general. As Zimbabwe notes, it is certainly inconsistent with the present interpretation for Lesotho, Namibia and Mauritius to have ratified the Protocol after Summit adopted the 2001 Agreement. But this simply means that the ratifications were unnecessary. Similarly, Zimbabwe notes that the Protocol, when adopted in 2001, continued to contain provisions on its ratification and further amendment.²²² That type of redundancy, however, is common. The GATT 1994, in force as of 1 January 1995, continues to speak of the Ottoman Empire. Also anomalous, as Zimbabwe notes, is the fact that the 2002 Agreement inserted a new Article 39, which mentions 'instruments of ratification'. Again, this is best explained as infelicitous drafting, but it is of no legal consequence. Finally, Zimbabwe notes that the 2000 Protocol Amending the Trade Protocol was ratified by all then Member States, even though it was purportedly adopted under Article 36 of the SADC Treaty.²²³ But that is what is required by Article 22 Protocols, which does not (and never did) include the SADC Tribunal Protocol. In short, none of these

²²² Articles 34 and 37 SADC Tribunal Protocol. The 2002 Agreement repealed Article 34 and amended Article 37.

²²³ Zimbabwe response to questionnaire, 40-41.

objections detracts from the conclusion that the SADC Tribunal Protocol came into effect by incorporation into the SADC Treaty as a result of the 2001 Agreement.

Observation 12

The 2001 Agreement amending the SADC Treaty is a valid amendment of the SADC Treaty under Article 36 of the SADC Treaty. It is also a valid treaty amending the SADC Treaty. Further, the SADC Member States have by their subsequent conduct treated this Agreement as valid. There can be no argument that the 2001 Agreement is not now valid.

The 2001 Agreement had the effect of amending the SADC Treaty by incorporating into it the SADC Tribunal Protocol. As a consequence, the SADC Tribunal is effective in the terms set out in the Tribunal Protocol.

9.5 Consent to jurisdiction

It has already been mentioned that Zimbabwe is precluded from denying the validity of the Summit decision to adopt the 2001 Agreement, as well as the validity of the treaty itself. It should also be noted that, quite aside from the question whether the SADC Tribunal was validly established, Zimbabwe acknowledged its jurisdiction in the cases in which it appeared before the Tribunal, and is therefore to be taken as having consented to the jurisdiction of the Tribunal for the purposes of those cases: *Arbitral Award (King of Spain)*, cited above.²²⁴ It is also relevant that in the proceedings before the Tribunal the Deputy Attorney-General of Zimbabwe expressly accepted the jurisdiction of the Tribunal. It is a further rule of international law that States are bound by statements made by them before international courts and tribunals.²²⁵ In sum, regardless of the actual legal status of the SADC Tribunal, and consequently its decisions, Zimbabwe is precluded from denying their validity as a result of its express acceptance at the time it consented to the jurisdiction of the Tribunal.

Observation 13

To the extent that it submitted to the jurisdiction of the SADC Tribunal, Zimbabwe is precluded from denying the validity of the decisions of the Tribunal.

²²⁴ See above at n 218.

²²⁵ For a recent statement of the principle, citing numerous authorities, see *Barbados/Trinidad (UNCLOS Arbitration)*, 11 April 2006, para 291, available at http://pca-cpa.org/showfile.asp?fil_id=178.

Annex 1: Recommendations

Section 3. The law applied by the SADC Tribunal

Recommendation 1 (page 20)

Rename Article 14 'Jurisdiction *ratione materiae*' (or 'Material Jurisdiction') and Article 15 'Jurisdiction *ratione personae*' (or 'Personal Jurisdiction').

Section 4. Specific jurisdictional issues

Recommendation 2

Amend Article 14 of the SADC Tribunal Protocol as follows:

The Tribunal shall have jurisdiction over all disputes and all applications referred to it in accordance with the Treaty and this Protocol which relate to ...

Recommendation 3

Amend Article 14(b) of the SADC Tribunal Protocol as follows:

(b) the interpretation, application or validity of the Protocols, all subsidiary instruments adopted within the framework of the Community, and acts of the institutions of the Community *intended to have legal effect*.

Recommendation 4 (page 27)

Repeal all dispute settlement mechanisms established under SADC Protocols and other instruments, as well as Article 20A and Article 15(4) of the SADC Tribunal Protocol.

Recommendation 5 (page 30)

Amend Article 15 as follows:

The Tribunal shall have jurisdiction over disputes between Member States, and between natural or legal persons and Member States, *provided that any such natural or legal persons have an interest of a legal nature in subject matter of the dispute.*

Recommendation 6 (page 33)

Replace Article 16 and Rule 75 with the following text:

Article 16 Preliminary rulings

- (1) The Tribunal shall have jurisdiction to give preliminary rulings concerning the matters set out in Article 14.

- (2) Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Tribunal to give a ruling thereon.
- (3) Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Tribunal.
- (4) The decision of the court or tribunal of a Member State which suspends its proceedings and refers a case to the Tribunal shall be notified to the Tribunal by the court or tribunal concerned. The decision shall then be notified by the Registrar of the Tribunal to the parties, to the Member States and to the institution of the Community which adopted the act the validity or interpretation of which is in dispute. The parties, the Member States and, where appropriate, the institution which adopted the act the validity or interpretation of which is in dispute, shall be entitled to intervene in the proceedings before the Tribunal and, within two months of this notification, to submit statements of case or written observations to the Tribunal.

Recommendation 7 (page 35)

Renumber Article 20 as Article 20(1) and add the following paragraphs:

- (2) SADC Member States and any SADC institution may submit to the Tribunal written statements relating to the subject of the request and may make oral statements relating to the request at a public sitting of the Tribunal.
- (3) SADC Member States and SADC institutions having presented written or oral statements or both shall be permitted to comment on other statements subject to rules of procedure to be determined by the Tribunal.

Recommendation 8 (page 36)

Amend the SADC Tribunal Protocol to provide for an appellate tribunal to hear appeals from decisions of the SADC Tribunal.

Recommendation 9 (page 37)

If Recommendation 7 is adopted, delete Rule 73 on interpretation of decisions.

Recommendation 10 (page 39)

Rename and revise Article 30 as follows:

Article 30 (Intervention)

A Member State, the SADC Secretariat or any natural or legal person may, with leave of the Tribunal, intervene in dispute, but the submissions of the intervening party

shall be limited to argument supporting or opposing the arguments of a party to the case.

Delete Rule 70(1) and replace references to 'this Rule' in Rule 70 with 'Article 30'.

Section 5. Instruments governing the powers of the SADC Tribunal

Recommendation 11 (page 40)

Delete Rule 1(3) and amend Article 23 as follows:

The Tribunal shall determine its own Rules of Procedure.

Recommendation 12 (page 41)

The SADC Tribunal should establish a Working Group to identify the Rules (for example Rule 2(2) and Rules 3-19) which are not properly considered Rules of Procedure, and which should then be relocated to the SADC Tribunal Protocol.

Section 6. SADC Tribunal decisions: compliance and enforcement

Recommendation 13 (page 54)

Delete Article 32(1) and revise Article 32(3) of the SADC Tribunal Protocol as follows:

Decisions of the Tribunal shall be binding upon the parties to the dispute in respect of that particular case and enforceable within the territories of the Member State concerned *in accordance with domestic procedure governing the execution of judgments against the State.*

Section 7. Qualifications and appointment of SADC Tribunal Members

Recommendation 14 (page 57)

Amend Article 3(1) of the SADC Tribunal Protocol by adding the following sentence:

Members may be of any age.

Recommendation 15 (page 59)

Insert a paragraph in Article 4 stating that:

Due consideration shall be given to expertise in international law.

Recommendation 16 (page 60)

Introduce a new paragraph in Article 4 stating that:

Due consideration shall be given to fair representation of the different SADC Member State legal systems in the nomination and appointment process.

Recommendation 17 (page 60)

Amend Article 3(6) by adding the following sentence.

A person who for the purpose of membership of the Tribunal could be regarded as a national of more than one Member State shall be a national of the one with which he or she has a genuine link.

Recommendation 18 (page 61)

Amend Article 4(1) as follows:

SADC Member States may only nominate their nationals or non-SADC Member State nationals, subject to Article 3(6) [see Recommendation 16].

Recommendation 19 (page 62)

Amend Article 4(1) as follows:

Each Member State may nominate *two candidates* having the qualifications prescribed in Article 3 of this Protocol.

Recommendation 20 (page 64)

Amend the second sentence of Article 3(2) by deleting the reference to 'five' pool Members, as follows:

The additional ~~five (5)~~ Members shall constitute a pool from which the President may invite a Member to sit on the Tribunal whenever a regular Member is temporarily absent or is otherwise unable to carry out his or her functions.

Recommendation 21 (page 66)

- (a) The SADC Secretariat should formulate Guidelines setting out a transparent process for the nomination of Tribunal Members, specifying in particular the desirability of advertising and consultation with all key stakeholders at the national level. The process should be at least as transparent as that used for the selection of national judges.
- (b) In the future, consideration should be given to the establishment of an independent commission, comprising representatives of all SADC stakeholders, with the power (a) to select and appoint SADC Tribunal Members, or (b) to select a shortlist of SADC

260

Tribunal Members, who would then be elected by the SADC Council.

Section 8. Impartiality and independent of the SADC Tribunal and its Members

Recommendation 22 (page 68)

Amend Article 33 as follows

The budget of the Tribunal shall be funded through the regular budget of the Community, ~~in accordance with criteria that the Council may, from time to time determine,~~ and from such other sources as may be determined by the Council, *based on a proposed budget prepared by the Registrar every five years.*

Alternative Recommendation 22A (page 68)

Amend Article 33 to provide for independent funding of the SADC Tribunal by the establishment of an independent trust fund similar to the Caribbean Court of Justice Trust Fund.

Recommendation 23 (page 69)

Amend Article 11 as follows:

The terms and conditions of service, salaries and benefits of the Members shall be determined by the Council *based on regional standards, and in no case less favourable than those applicable to judges of superior courts of the nominating Member State, and shall not be altered to the disadvantage of Members during their tenure.*

Alternative Recommendation 23A (page 69)

Amend Article 11 as follows:

The terms and conditions of service, salaries and benefits of the Members shall be determined by ~~the Council~~ an independent Commission *based on regional standards, and in no case less favourable than those applicable to judges of superior courts of the nominating Member State, and shall not be altered to the disadvantage of Members during their tenure.*

Recommendation 24 (page 70)

Introduce a second sentence in Article 6(1) stating:

Members will be reappointed subject to the appointment of any new Members.

267

Recommendation 25 (page 71)

Introduce an article into the SADC Tribunal Protocol stating that:

A Member may be removed from office only if he or she has either become permanently incapacitated from exercising his functions, or has committed a serious breach of his duties or a serious act of misconduct, as determined by Summit following a referral to an independent tribunal to be established by Summit for this purpose.

Recommendation 26 (page 72)

Amend Article 9 as follows by including a new paragraph (before existing paragraph 3), as follows:

A Tribunal Member shall disqualify himself or herself in any case in which his or her impartiality might reasonably be questioned. Relevant reasons include, without limitation, the possession by a Tribunal Member, or a close family member or associate of a Tribunal Member, of any financial and property interests relevant to the dispute, and the affiliations or employment of a close family member or associate of a Tribunal Member.



767
262

Annex 2: Observations

Section 2. SADC law and national laws

Observation 1 (page 8)

All of SADC law is international law, and consequently binds SADC Member States regardless of their national laws, including their constitutions.

Observation 2 (page 9)

SADC Member State national courts are organs of the State. Consequently, if a SADC Member State national court makes a decision under national law that is inconsistent with SADC law, the SADC Member State violates SADC law. Furthermore, it follows from Observation 1 that, if the national court is unable, under national law, to come to an alternative decision, it is for the SADC Member State to bring national law, including, if necessary, its constitution, into line with SADC law.

Observation 3 (page 14)

The SADC Tribunal has the power to interpret the SADC Treaty in light of human rights treaties binding on the SADC Member States, and to this extent there is nothing to be gained by amending the SADC Treaty to include a reference to any such human rights treaties.

Observation 4 (page 16)

Article 6(5) of the SADC Treaty should be understood to mean 'SADC Treaty, its Protocols and subsidiary instruments, and the acts of its institutions intended to have legal effect'.

Observation 5 (page 17)

SADC Member States must ensure that they give the force of law to SADC law. For dualist countries, this may require the amendment of national laws. This may be done on a case by case basis, but because the scope of SADC law is not always clear, it would be preferable for this to be done by means of *en bloc* implementing legislation.

Observation 6 (page 18)

It is not certain whether SADC law is supreme vis-à-vis national laws (including national constitutions), but such an interpretation would have the advantage of reducing the risk that SADC Member States are in violation of their SADC obligations.

263

Section 6. SADC Tribunal decisions: compliance and enforcement

Observation 7 (page 43)

Non-compliance with a decision of the SADC Tribunal amounts to a violation of Article 32(2) of the SADC Tribunal Protocol, and can support new proceedings for non-compliance before the SADC Tribunal.

Observation 8 (page 46)

Any 'action' or 'sanctions' adopted by Summit must comply with the principle of proportionality, in particular by taking into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

Observation 9 (page 47)

Article 10(9) of the SADC Treaty should be understood to contain an implied condition that the Member State in question shall not take part in a vote on 'action' or 'sanctions'.

Observation 10 (page 48)

It would be open to the SADC Tribunal to adopt a rule of SADC Member State liability for violating SADC law, enforceable in the courts of the SADC Member States.

Observation 11 (page 55)

SADC Tribunal decisions are enforceable within the territories of all SADC Member States.

Section 9. Legal status of the SADC Tribunal Protocol

Observation 12 (page 81)

The 2001 Agreement amending the SADC Treaty is a valid amendment of the SADC Treaty under Article 36 of the SADC Treaty. It is also a valid treaty amending the SADC Treaty. Further, the SADC Member States have by their subsequent conduct treated this Agreement as valid. There can be no argument that the 2001 Agreement is not now valid.

The 2001 Agreement had the effect of amending the SADC Treaty by incorporating into it the SADC Tribunal Protocol. As a consequence, the SADC Tribunal is effective in the terms set out in the Tribunal Protocol.

Observation 13

To the extent that it submitted to the jurisdiction of the SADC Tribunal, Zimbabwe is precluded from denying the validity of the decisions of the Tribunal.



264
9

SADC/MJ/1/2011/14



**MEETING OF MINISTERS OF JUSTICE/ATTORNEYS-GENERAL,
SWAKOPMUND, NAMIBIA, APRIL 14 – 15, 2011**

**Recommendations Aimed at Improving the Legal Framework in which the
Tribunal Operates**

Note 1: It should be noted that in this document, references to pages are references to the pages of the Consultant's Final Report on the Role, Responsibilities and Terms of Reference of the SADC Tribunal (Document SADC/MJ/10/2011/4).

Note 2: It should be further noted that the considerations contained herein do not contain a closed list of issues to inform the process referred to under paragraph 4.2.6 of document SADC/MJ/10/2011/5 and particularly incorporates the concerns contained in paragraph 4.2.4 of the same document (document SADC/MJ/10/2011/5). Further examination and deliberation is expected to inform the process.

Note 3: To the extent that the recommendations entail amendments to the relevant SADC legal instruments, the recommendations will be further discussed and developed through the SADC legal drafting process.

Section 3. The law applied by the SADC Tribunal

Recommendation 1 (page 20)

Rename Article 14 'Jurisdiction *ratione materiae*' (or 'Material Jurisdiction') and Article 15 'Jurisdiction *ratione personae*' (or 'Personal Jurisdiction').

Section 4. Specific jurisdictional issues

Recommendation 2

Two handwritten signatures are present in the bottom right corner of the page. The top signature is a stylized, cursive signature, and the bottom signature is a more blocky, less legible signature.

Amend Article 14 of the SADC Tribunal Protocol as follows:

The Tribunal shall have jurisdiction over all disputes and all applications which relate to:....

The Republic of Zimbabwe expressed a reservation to this recommendation. In their view the Tribunal should only have jurisdiction over matters specifically provided for in the Protocol on the Tribunal or in any other instrument of SADC.

Recommendation 3

Amend Article 14(b) of the SADC Tribunal Protocol as follows:

(b) the interpretation, application or validity of the Protocols, all subsidiary instruments adopted within the framework of the Community, and acts of the institutions of the Community *intended to have legal effect*.

Recommendation 4 (page 27)

Repeal all dispute settlement mechanisms established under SADC Protocols and other instruments, as well as Article 20A and Article 15(4) of the SADC Tribunal Protocol.

It might be necessary to review all Protocols that have provisions on dispute settlement mechanisms and to consult with the trade sector so that they can give their input on this issue.

Recommendation 5 (page 30)

Amend Article 15(1) as follows:

The Tribunal shall have jurisdiction over disputes between Member States, and between natural or legal persons and Member States, *provided that any such natural or legal persons have an interest of a legal nature in the subject matter of the dispute.*

The Republic of Zimbabwe expressed a reservation to this recommendation. In their view the Tribunal should not have jurisdiction in matters between persons and Member States, but should be confined to giving preliminary rulings on matters referred to it by National Courts.

The Republic of Botswana made a similar reservation.

Lesotho expressed a reservation on Article 15(2) in that it has the effect of giving the Tribunal appellate and review jurisdiction over decisions of domestic courts.

Recommendation 6 (page 33)

Replace Article 16 and Rule 75 with the following text:

Article 16 Preliminary rulings

- (1) The Tribunal shall have jurisdiction to give preliminary rulings concerning the matters set out in Article 14.
- (2) Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Tribunal to give a ruling thereon.
- (3) Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no appeal or judicial review under national law, that court or tribunal shall bring the matter before the Tribunal.
- (4) The decision of the court or tribunal of a Member State which suspends its proceedings and refers a case to the Tribunal shall be notified to the Tribunal by the court or tribunal concerned. The decision shall then be notified by the Registrar of the Tribunal to the parties, to the Member States and to the institution of the Community which adopted the act the validity or interpretation of which is in dispute. The parties, the Member States and, where appropriate, the institution which adopted the act the validity or interpretation of which is in dispute, shall be entitled to intervene in the proceedings before the Tribunal and, within two months of this notification, to submit statements of case or written observations to the Tribunal.

The Republic of Zimbabwe expressed a reservation to this recommendation. In their view the Tribunal should not have jurisdiction in matters between persons and Member States, but should be confined to giving preliminary rulings on matters referred to it by National Courts.

The Republic of Botswana expressed a reservation similar to the one made by the Republic of Zimbabwe.

Recommendation 7 (page 35)

Renumber Article 20 as Article 20(1) and add the following paragraphs:

- (2) SADC Member States and any SADC institution may submit to the Tribunal written statements relating to the subject matter of the request and may make oral statements relating to the request at a public sitting of the Tribunal.

- (3) SADC Member States and SADC institutions having presented written or oral statements or both shall be permitted to comment on other statements subject to rules of procedure to be determined by the Tribunal.

Recommendation 8 (page 36)

Amend the SADC Tribunal Protocol to provide for an appellate chamber of the tribunal to hear appeals from decisions of the SADC Tribunal.

This is a framework recommendation. It needs further consideration, study and refinement for it to be operationalised.

Recommendation 9 (page 37)

If Recommendation 8 is adopted, amend Rule 73 by adding the following sentence:

Proceedings under Rule 73 will be terminated upon an application for an appeal from a decision of the Tribunal.

Recommendation 10 (page 39)

Rename and revise Article 30 as follows:

Article 30 Application for Intervention

A Member State, the SADC Secretariat or any natural or legal person may, with leave of the Tribunal, intervene in a dispute before the Tribunal, but the submissions of the intervening party shall be limited to argument only, supporting or opposing the arguments of a party to the case.

Article 30A Consolidation

The Tribunal may order the consolidation of proceedings involving substantially the same issues.

Delete Rule 70(1) and replace references to 'this Rule' in Rule 70 with 'Article 30 and 30A'.

Section 5. Instruments governing the powers of the SADC Tribunal

Recommendation 11 (page 40)

Delete Rule 1(3) and amend Article 23 as follows:

The Tribunal shall determine its own Rules of Procedure.

Recommendation 12 (page 41)

The Committee of Ministers of Justice/Attorneys General should establish a Working Group of Senior Legal Officials to identify the Rules (for example Rule 2(2) and Rules 3-19) which are not properly considered Rules of Procedure, and which should then be relocated to the SADC Tribunal Protocol.

The Working Group should report to the Committee of Ministers of Justice/Attorneys General.

Section 6. SADC Tribunal decisions: compliance and enforcement**Recommendation 13 (page 54)**

Delete Article 32(1) and revise Article 32(3) of the SADC Tribunal Protocol as follows:

A decision of the Tribunal shall be binding upon the parties to the dispute in respect of that particular case and enforceable within the Member State in which enforcement is sought *in accordance with domestic procedure governing the execution of judgments.*

The Republic of Zimbabwe agrees with the recommendation if there is agreement about the scope of jurisdiction of the SADC Tribunal and the SADC Applicable Law

Section 7. Qualifications and appointment of SADC Tribunal Members**Recommendation 15 (page 59)**

Insert a paragraph in Article 3(1) stating that:

Due consideration shall be given to expertise in international law.

Recommendation 16 (page 60)

Introduce a new paragraph in Article 4 stating that:

Due consideration shall be given to fair representation of the different SADC Member State legal systems in the nomination and appointment process.

Recommendation 17 (page 60)

Amend Article 3(6) by adding the following sentence.

A person who for the purpose of membership of the Tribunal could be regarded as a national of more than one Member State shall be a national of the one with which he or she has the closest link.

Recommendation 18 (page 61)

Amend Article 4(1) as follows:

SADC Member States may only nominate their nationals, subject to Article 3(6).

Recommendation 19 (page 62)

Amend Article 4(1) as follows:

Each Member State may nominate *two candidates* having the qualifications prescribed in Article 3 of this Protocol.

Recommendation 20 (page 64)

Amend the second sentence of Article 3(2) by deleting the reference to 'five' pool Members, as follows:

The additional Members shall constitute a pool from which the President may invite a Member to sit on the Tribunal whenever a regular Member is temporarily absent or is otherwise unable to carry out his or her functions.

Recommendation 21 (page 66)

- (a) The SADC Secretariat should formulate Guidelines setting out a transparent process for the nomination of Tribunal Members, specifying in particular the desirability of advertising and consultation with all key stakeholders at the national level. The process should be at least as transparent as that used for the selection of national judges. The Secretariat will submit the Guidelines to the Committee of Ministers of Justice/Attorneys General.
- (b) In the future, consideration should be given to the establishment of an independent commission, comprising representatives of all SADC stakeholders, with the power to select a shortlist of SADC Tribunal Members, who would then be elected by the SADC Council.

Section 8. Impartiality and independence of the SADC Tribunal and its Members

Recommendation 22 (page 68)

Amend Article 33 as follows

The budget of the Tribunal shall be funded through the regular annual budget of the Community and from such other sources as may be determined by the Council, *based on a three year work-plan prepared by the Registrar.*

Recommendation 23 (page 69)

Amend Article 11 as follows:

The terms and conditions of service, salaries and benefits of the Members shall be determined by Council *based on regional standards and shall not be altered to the disadvantage of Members during their tenure of office.*

Recommendation 24 (page 70)

Introduce a second sentence in Article 6(1) stating:

Members will be reappointed, unless decided otherwise by Summit.

Recommendation 25 (page 71)

Introduce an article into the SADC Tribunal Protocol stating that:

A Member may be removed from office only if he or she has either become permanently incapacitated from exercising his or her functions, or has committed a serious breach of his or her duties or a serious act of misconduct, as determined by Summit following a referral to an independent tribunal to be established by Summit for this purpose.

Recommendation 26 (page 72)

Amend Article 9 as follows by including a new paragraph (before existing paragraph 3), as follows:

A Tribunal Member shall recuse himself or herself in any case in which he or she might reasonably have a conflict of interest. Relevant reasons include, without limitation, the possession by a Tribunal Member, or a close family member or associate of a Tribunal Member, of any financial and property interests relevant to the dispute, and the affiliations or employment of a close family member or associate of a Tribunal Member.





RECOMMENDATIONS OF SADC LAWYERS AND JUDGES AT THE WORKSHOP ON THE SADC TRIBUNAL REVIEW PROCESS, HELD IN JOHANNESBURG, ON 27 JANUARY 2011

At the Workshop on the SADC Tribunal Review Process, convened on 27 January 2011 at the Birchwood Hotel and Oliver Tambo Conference Centre, Johannesburg, by the SADC Lawyers' Association and the International Commission of Jurists (ICJ Africa Regional Programme), attended by SADC Bar leaders or senior members of Bar Associations and Law Societies, judges, academics and human rights defenders;

In an effort to make in-puts into the SADC Tribunal review process and to ensure that the SADC Tribunal emerges from the review process as a stronger and more effective judicial institution, better placed to interpret SADC laws and to effectively administer justice for SADC citizens and residents,

The following recommendations were formulated and adopted for submission to the Independent Reviewers of the SADC Tribunal, the SADC Secretariat and the SADC Summit:

1. On the Role and Functioning of the SADC Tribunal:

- The individual complaint procedure should be simplified to increase access to justice by SADC citizens and/or residents. This should at least allow interested parties to file complaints and other documents electronically and make use of new technology while acknowledging limitations therein;
- As provided for in the Protocol on the SADC Tribunal, the establishment and operationalisation of national field offices of the SADC Tribunal's Registry would be welcome to increase access to the SADC Tribunal throughout the region;
- Judicial procedures should be simplified to address the issues of procedural delays and unnecessary costs;
- The challenge of languages and translation should be alleviated through further recruitment, for which funding is required;
- Member states, civil society and international concerned partners should support the current efforts made by the SADC Tribunal, such as its Strategic Plan;

2. On the Jurisdiction of the SADC Tribunal and the Inter face between Community and National Laws in SADC:

- The existing normative and institutional framework for human rights in the SADC legal structure should be strengthened further by expanding the human rights provisions to include clear references and links to relevant international instruments such as the Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights, which the SADC Tribunal may apply in its interpretation and application of the SADC Treaty and subsidiary instruments;
- The competence of the SADC Tribunal to receive and determine human rights cases emerging from SADC member states should also be expressly reaffirmed in the relevant treaties;
- The application and interpretation of the SADC Treaty and Protocols, including the Protocol on the SADC Tribunal is a judicial, not an executive function; and should be solely the power of the SADC Tribunal;
- As provided for in the Protocol on the SADC Tribunal, the principle of exhaustion of local remedies should be applied in light of contemporary international treaty, customary and case law;
- All domestic processes and mechanisms should be initiated to ensure that SADC law is incorporated into domestic law of SADC member states;

3. On the Recognition, Enforcement and Execution of SADC Tribunal decisions:

- Decisions of the SADC Tribunal should remain enforceable in all and every SADC member state;
- All SADC countries should confer to those decisions the force of law and empower their judicial organs to implement them;
- The procedures for the enforcement of decisions from the SADC Tribunal should be harmonised, either through a Protocol (that would still need to be incorporated in the laws of the member states) or a Model Harmonised Legislation, with the focus being on ensuring enforcement as of right throughout the region and not as foreign judgments;
- The SADC Tribunal should be empowered to impose remedies for non-compliance with its judgments and other decisions.

4. On the Status and Selection Process of Judges of the SADC Tribunal: Issues, Challenges and Opportunities

SADC must come up with minimum standards governing the nomination and appointment process of members of the Tribunal. These standards must meet international standards for the independence of the judiciary, such as those developed under the Burgh House Principles on the Independence of the International Judiciary and the AU Guidelines, and ensure transparency of process, 50% gender parity, security of tenure, due process for the removal of judges and clear rules respecting the rule of law;

- Advertisement of judicial posts at the SADC Tribunal should be made through media in all member states;
- National Judicial Service Commissions (or similar national organs) should be allowed to advise on nominations to the SADC Tribunal;
- As a general rule, the government should follow the list recommended by the Judicial Service Commission and be obliged to nominate more than one candidate;
- SADC should establish an Independent Panel made up of judges nominated by National Judicial Services Commissions, International Law Experts and representatives of Bar Associations and civil society to interview all prospective candidates and to make a recommendation to the SADC Summit for judicial appointments to the Tribunal;
- SADC must come up with an interview template to ensure fairness and establish an Interview Panel for judge candidates, which panel should be the same for all candidates;
- Members of the Tribunal with reviewable terms should be automatically reappointed, unless they cease to comply with qualification requirements.

5. On Lacunae and Ambiguities in the SADC Treaty and Protocol on the SADC Tribunal:

- The principle of human rights and the rule of law, and the human rights obligations thereto related should be expanded in the SADC legal instruments and respected by all SADC organs and member states;
- The regime of sanctions under the SADC instruments should provide for sanctions in case of violations by SADC states of their obligations under SADC law;
- Sanctions should include coercive measures such as complete or partial interruption of economic relations, the interruption of communication means, the severance of diplomatic relations, the freezing of assets belonging to the defaulting state, and the suspension of voting rights or other rights and privileges.
- In the application of the principle of consensus, a member state with a direct interest in a matter should not take part in the process;
- The review process should be extended to the entire SADC legal and institutional framework to ensure that the entire SADC normative and institutional framework is stronger and more effective.

For any inquiries, please contact:

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17 September 2009

Zimbabwean Justice Minister Patrick Chinamasa criticised for attack on SADC Tribunal

AFRICAN BAR ASSOCIATIONS AND RULE OF LAW INSTITUTIONS ARUSHA COMMUNIQUE

The representatives of the premier regional bar associations and rule of law institutions on the African continent, gathered in Arusha, Tanzania on 15 and 16 September 2009 to among other things reflect on the state of the rule of law in Africa and the current state of regional and sub-regional judicial organs have made and adopted the following communique:

Reaffirming that the observance of human rights, good governance and the Rule of Law are indispensable requirements for the greater democratisation of the African Continent;

Mindful that these are dependent on the existence of independent, impartial and effective institutions that deliver justice without fear or favour;

Acknowledging that in a significant number of African countries the Rule of Law has entrenched itself and judicial institutions operate without interference from any quarters;

Wary that some African countries have depicted a tendency to undermine judicial authority at both the domestic and regional levels;

ON THE SADC TRIBUNAL THE REPRESENTATIVES OF REGIONAL BAR ASSOCIATIONS AND RULE OF LAW INSTITUTIONS

1. Observed with alarm the current efforts of the government of Zimbabwe through the Minister of Justice and Legal Affairs of Zimbabwe, Honourable Patrick Chinamasa, to cause SADC to dismantle a sub-regional judicial organ - the SADC Tribunal - on his perceptions relating to non-ratification and the implications thereof.
2. Are not convinced by the official reasons, which the Minister has raised to justify his decision. They observed among others that:
 - a. The establishment of the SADC Tribunal needs no ratification.
 - b. The Zimbabwean Government nominated a judge to sit as a Member of the Tribunal. Other SADC states have also nominated judges to constitute a full complement of Tribunal judges.
 - c. The Government of Zimbabwe has appeared before the Tribunal in more than one case, and has at no time raised objections to its legality and/or legitimacy.
 - d. The Government of Zimbabwe is only challenging the Tribunal as a result of it being referred to the SADC Heads of State and Government to explain its non-compliance with binding decisions of this sub-regional judicial organ.
 - e. The failure of the Government of Zimbabwe to comply with a court decision, whether of a domestic or international tribunal, is consistent with its endemic culture of defiance of court orders that it dislikes.
 - f. In Zimbabwe the Government dismantled the Supreme Court and the High Court when they were seen as issuing decisions which the Government disliked through forcing out judges and hiring "politically correct" individuals. Its current thrust to

destroy the SADC judicial organ is consistent with the Government's conduct in dealing with judicial organs that it dislikes.

3. There have been suggestions that the SADC Ministers of Justice and Attorneys General will meet shortly to decide the fate of the SADC Tribunal. Attention must be drawn to the fact that the jurisdiction of the Ministers of Justice (as extensions of executives) to consider this matter is irregular, as this potentially amounts to an assault on the principle of separation of powers. It is an established principle of international law that the Tribunal, as the judicial organ itself - and not the executive organ constituted by ministers - must be the ultimate judge of its own jurisdiction.

THE REPRESENTATIVES OF REGIONAL BAR ASSOCIATIONS AND RULE OF LAW INSTITUTIONS THEREFORE IMPLORE THE SADC AND THE AU TO:

1. Encourage the government of Zimbabwe to comply with the decisions of the SADC Tribunal rather than to use disingenuous and convoluted legal arguments to destroy the Tribunal, in an apparent quest to avoid submitting to the rule of law.

2. Strengthen and defend its institutions of justice when they make decisions, which are within their competencies. Failure by the SADC and AU leadership to vigorously defend regional and sub-regional judicial organs from such a blatant assault is likely to have a contagion effect throughout the continent which is so desperate for strong institutions of democracy and rule of law to protect the rights of the people, assure investors of the sanctity of contract and availability of credible enforcement mechanisms, and generally promote socio-economic development on the continent.

SOUTHERN AFRICA DEVELOPMENT COMMUNITY LAWYERS ASSOCIATION (SADCLA)

WEST AFRICAN BAR ASSOCIATION (WABA)

PAN-AFRICAN LAWYERS' UNION (PALU)

COALITION FOR AN EFFECTIVE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS (CEAC)

AFRICAN REGIONAL FORUM OF THE INTERNATIONAL BAR ASSOCIATION (AfriBA)

INTERNATIONAL COMMISSION OF JURISTS (ICJ)

Submitted by:

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In his capacity as Director of the Africa Regional Programme of the International Commission of Jurists, Mr Tsunga is trying to strengthen the rule of law on the African continent.

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SADC TRIBUNAL DISSOLVED BY UNANIMOUS DECISION OF SADC LEADERS

1. Introduction

Thank you for your kind introduction, Justice Kriegler. I wish to thank the sponsors of this event for inviting me over here to make this presentation in both Johannesburg and Windhoek. I mean Freedom under Law and the Constitutional Court Clerks' Alumni Association in Johannesburg and the Law Society of Namibia, The Legal Assistance Centre and Freedom under Law in Windhoek.

It is indeed a pleasure and privilege for me to address such a distinguished gathering this evening. It is, however, a sad occasion for me as I have to speak of the demise of the SADC Tribunal (the Tribunal) and of the dire consequences for the rule of law and human rights in the Southern African Region.

2. Background

Let me give you a short background of events leading to the decisions taken by the Council of Ministers (Council) of the Southern African Development Community (SADC) and the SADC Summit of Heads of State and Government (Summit) during their respective meetings of Thursday 19 May 2011 and Friday 20 May 2011.

a) Membership of Tribunal

All 10 members of the Tribunal, 5 regular and 5 non-regular members were appointed in August 2005 but no lot was drawn, pursuant to Article 6(1) of the Protocol on Tribunal (the Protocol), to determine which 3 regular members and 3 non-regular members sit for 5 years, with an option for re-appointment, and which 2 regular members and 2 non-regular members sit only for three years.

The lot was only drawn in October 2008 after an amendment was made to paragraph (2) of Article 6 to ensure that members whose term of office expires in 3 years shall have their term of office extended until 31 October 2011. The three regular members and three non-regular members of the Tribunal whose term of office expires in five years leave, however, office on 31 August 2010.

The pertinent question that arises at this stage is why those two regular members whose term of office expires in three years should have an unfair advantage in having their term extended from August 2008 to 31 October 2011 whereas those four members whose term of office comes to an end in five years should only stay in office from August 2005 until 31 August 2010?

The answer lies in the fact that these three regular members and three non-regular members, of whom only one remains as the other two had resigned, may be re-appointed for a further and final term of five years-see Article 6 (1) of the Protocol.

b) Judgments of Tribunal

The judgment in the case of Mike Campbell (Pvt) Ltd and others v Republic of Zimbabwe (SADC (T) 02/2007) was handed down in November 2008. Zimbabwe subsequently refused to comply with the judgment and the Tribunal referred the matter to Summit to take appropriate action in June 2009- vide William Campbell and another v Republic of Zimbabwe (SADC (T) 03/2009).

In January and February 2010 the Tribunal quashed respectively the decisions of the SADC Council of Ministers and of Summit not to renew the contracts of employment of Mr Kanyama and Mr Mondlane, high-level officials of SADC Secretariat, without any valid reason being given, when they had a legitimate and reasonable expectation that their term of employment would be renewed- vide Kanyama v SADC Secretariat (SADC (T) 05/2009) and Mondlane v SADC Secretariat (SADC (T) 07/2009).

In June 2010 the Tribunal held that the employment of Ms. Kethusegile-Juru (the applicant) had been unlawfully and

unprocedurally terminated by the SADC Parliamentary Forum in August 2008. The summary dismissal of the applicant violated the rules of natural justice, namely the right to be heard and the rule against bias or the rule that no man shall be a judge in his own cause, since the applicant was not given any opportunity to make representations before an independent and impartial body before the decision was taken by applicant's superior, the former Secretary General of the SADC Parliamentary Forum who had acted as both party and judge in the circumstances to sack her, in spite of the abundant evidence on record that there had been bad blood between the two of them- vide Bookie Monica Kethusegile-Juru and The Southern African Development Community Parliamentary Forum (SADC (T)02/2009).

In July 2010 the Tribunal again made a request to Summit to take appropriate action against Zimbabwe in the light of "*the existence of further acts of non-compliance with the decision of the Tribunal*" by Zimbabwe after the Tribunal's decision of 5 June 2009 under which the earlier acts of non-compliance had already been reported to Summit- vide Fick and Another v Republic of Zimbabwe (SADC (T) 01/2010).

c) Summit's Decision of August 2010

Summit in August 2010, on the recommendation of Council of Ministers, decided to defer action against Zimbabwe and to order a Review relating to the role, responsibilities and terms of reference of the Tribunal by an independent consultant, Dr. Lorand Bartels of Cambridge University.

Summit also decided not to reappoint the three regular members and one non-regular member whose term of office would expire on 31 August 2010 but to allow them to stay in office, pending the review. Summit also ordered the Tribunal NOT to hear any new cases.

d) Draft and Final Reports of Independent Consultant

The draft report of the independent consultant was thoroughly discussed by Senior Legal Officials and members of the Tribunal at

a workshop held in February 2011 in Swakopmund. The consultant then came up with a final report which was again thoroughly examined by Senior Legal Officials and members of the Tribunal at the meeting preceding that of Ministers of Justice/Attorneys General held in April 2011 in Swakopmund. The recommendations, as a result of those lengthy discussions, were unanimously approved by the Senior Legal Officials.

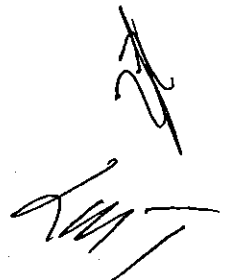
e) Invitations to the President of Tribunal

Normally the President of the Tribunal is invited to meetings of Ministers of Justice/Attorneys General as well as to Council and Summit meetings. This is an opportunity where the President interacts with Ministers and Heads of State and Government not only in relation to the operations and funding of the Tribunal but also with regard to any misunderstandings or untruths aired about the Tribunal.

For the Council and Summit meetings scheduled for 19 and 20 May 2011 respectively, my invitation was issued by the Executive Secretary on Tuesday 17 May 2011 and communicated to me on 18 May by the Registrar of the Tribunal, i.e. on the eve of Council meeting when in fact the dates for both Council and Summit meetings had been fixed more than a month in advance.

Why? Is it because the decision had already been taken not to re-appoint the members of the Tribunal so that it was felt better if the President of the tribunal were absent as his presence would undoubtedly cause an embarrassment to Council, Summit and himself?

Or is it to deny an opportunity to the President of the Tribunal of protesting and making representations to Ministers and Heads of State and Government? I do not know the answers to these questions but your guess is as good as mine! What I know is that the invitation of the Executive Secretary was a clear invitation NOT to attend Council and Summit meetings! The Registrar of the Tribunal who is based in Windhoek was invited to both Council and Summit meetings and was told by the Executive Secretary to represent me at both meetings.



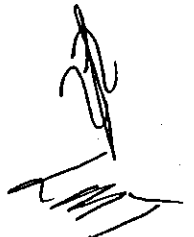
I must point out, however, that this is not the first time that, as President of the Tribunal, I received a last-minute invitation. In April this year there was a Council meeting where the issue of gratuity of members of the Tribunal was being discussed. I was in Namibia at that time for the meetings of Senior Legal Officials and Ministers of Justice/Attorneys General and had to protest personally to the Executive Secretary before being finally invited ONLY to the opening ceremony of the Council meeting of 3 March 2011. I made it a point, however, to attend all the meetings of Council and fortunately was not stopped in doing so! All this took place, in spite of official representations made to the Executive Secretary on two earlier occasions that I should always be invited as President of the SADC Tribunal to all Council meetings.

Indeed I had noticed that the attitude of Council and of the Executive Secretary changed markedly after the decisions taken by the Tribunal in January and February 2010 to quash the decisions of Council and Summit in not renewing the contracts of employment of Mr Kanyama and Mr Mondlane. From then on, there was a reluctance on the part of the Executive Secretary to invite the President of the Tribunal to Council meetings on the pretext, always whispered by some, but never stated openly to me, that there might arise a conflict of interest situation, as if the Ministers and the Executive Secretary, who are not lawyers, know more about conflict of interest than the President of the Tribunal!

3. Decisions of Council and Summit of May 2011

Council at its meeting of 19 May 2011 took in effect the following decisions which were subsequently endorsed by Summit, at its extraordinary meeting of 20 May, in Windhoek, Namibia:

- (1) the non-reappointment of members of the Tribunal whose term of office expired on August 31, 2010;



- (2) the non-replacement of members of the Tribunal whose term of office will expire on October 31, 2011;
- (3) the dissolution of the Tribunal in its present form which is expressly barred from hearing any new or pending cases; and
- (4) the establishment of a new Tribunal, with a different jurisdiction and a new membership, after the Ministers of Justice/Attorneys General have amended the relevant SADC legal instruments e.g. the SADC Treaty and the Protocol on Tribunal(Protocol) and submitted a progress report to Summit in August 2011 and the final report to Summit in August 2012.

4. Analysis of Decisions of Council and Summit

Whether the original Tribunal has been suspended or dissolved, the fact of the matter remains that it has been killed off and is defunct and is to be replaced by a new Tribunal after August 2012, with a new jurisdiction and a new membership.

Moreover, it is to be noted that Summit in August 2010 did not prohibit the hearing of pending cases by the Tribunal whereas now there is an absolute prohibition of "*hearings of any cases by the Tribunal*" until the Protocol has been reviewed and approved by Summit.

I must explain here that Council is made up of Ministers of Foreign Affairs, Finance and Trade of SADC Member States. Council advises Summit. The Ministers of Justice/Attorneys General advise Council and the Senior Legal Officials advise the Ministers of Justice/Attorneys General.

The decision of Summit at (3) above is clearly illegal and ultra vires. Summit has no power to restrict the jurisdiction of the Tribunal, not least because it is subject to the Tribunal's jurisdiction. By the same token, Summit cannot overrule the provisions of Article 8(4) of the protocol which state as follows:

“Notwithstanding the expiration of his or her term of office, a Member shall continue to hear and complete those cases partly heard by him or her”.

Summit does have, of course, the power to amend the SADC Treaty and the Protocol but the proper procedures have not yet been followed. They will no doubt be followed later, pursuant to the decision of Summit at (4) above.

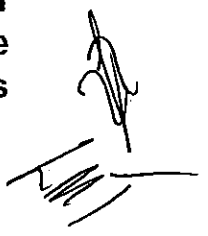
The decisions of Summit at (1) and (2) above are also illegal and ultra vires in that they have been taken to make sure that the original Tribunal is completely paralysed in its core activities, namely the hearing of any new or pending case from August 2010 until well after August 2012. The Tribunal has become an empty shell which consists, however, of sixteen members of staff and a Registrar!

It is significant that, even if the hearing of new or pending cases were not prohibited, the Tribunal would still be paralysed since the Tribunal must at least be constituted by three members to hear any case-vide Article 3(3) of the Protocol. The fundamental principle of access to justice is violated in this regard-vide, for instance, Mike Campbell (Pvt) Ltd and others, already cited.

It is interesting to refer at this stage to two recommendations made by SADC Lawyers and Judges at a Workshop on the Tribunal Review Process held in Johannesburg in January 2010 (the Workshop):

- 1) ***“The individual complaint procedure should be simplified to increase access to justice by SADC citizens and/or residents. This should at least allow interested parties to file complaints and other documents electronically and make use of new technology...”***
- 2) ***“As provided for in the Protocol (Article 13), the establishment and operationalization of national field offices of the Tribunal’s Registry would be welcome to increase access to the Tribunal throughout the region”.***

It is significant that both the ECOWAS (Economic Community of West African States) Court and the East African Court of Justice specifically provide in their treaties for access by private individuals

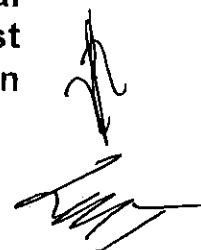


to their respective Courts. Moreover, if there is a common purpose to have a Tripartite Agreement concluded between SADC, the East African Community and Common Market for Southern and Eastern Africa (COMESA), there should at least be similar laws forming part of Community law!

We, the former President and members of the Tribunal consider that these three decisions of Council endorsed by Summit are not only extraordinary in the circumstances but are also illegal and ultra vires and in contravention of Articles 4(c) and 6(1) of the SADC Treaty in that they violate the principles of "*human rights, democracy and the rule of law*" and are "*likely to jeopardise the sustenance of its (SADC) principles, the achievement of its objectives and the implementation of the provisions of the Treaty*". We consider that these three decisions have also been made in bad faith.

After all, what is the point of commissioning an independent review, as SADC did, having extensive consultations with all relevant stakeholders, including Tribunal members, both before and after its findings are published; having its preliminary recommendations discussed at a workshop of Senior Legal Officials in February 2011 Swakopmund, Namibia, which was attended also by members of the Tribunal who took an active part in the proceedings, amended and finally translated into final recommendations; having those recommendations thoroughly examined anew in lengthy discussions with both Senior Legal Officers and members of the Tribunal, amended anew and unanimously approved by Senior Law Officials at their meeting held in April in Swakopmund, Namibia which preceded that of Ministers of Justice/Attorneys, before the review itself is questioned anew in its fundamental elements by the Ministers of Justice/Attorneys General who are now mandated by Summit to conduct their own partisan review!

If the Tribunal was legally constituted and did not lack jurisdiction and its decisions are binding on all SADC Member States, as the Ministers of Justice/Attorneys General acknowledged, why did the latter reopen anew the debate and express serious concern about the scope of jurisdiction of, and the law applied by, the Tribunal instead of deciding about the appropriate action to take against Zimbabwe for non-compliance with the judgments of the Tribunal in



2008 and 2010 respectively, an important issue which has always been ducked and postponed since 2009 for reasons best known to themselves and has not yet been decided- vide cases of William Campbell and Fick, already cited.

Surely, if the Ministers of Justice/Attorneys General had serious reservations about those two issues mentioned above, what was the point of the exercise in the first place i.e. the review of the independent consultant, chosen by the Ministers of Justice/Attorneys General themselves, relating to the role, responsibilities and terms of reference of the Tribunal, the organisation of the workshop and the meetings of Senior Law Officials and Ministers of Justice/Attorneys General held in Swakopmund, Namibia which indeed all required a mobilisation of scarce resources, energy and money? It is significant that some 62,000 US dollars had been spent by the Tribunal in relation to the two meetings held in Swakopmund in February and April 2011 and attended by its members and officials!

Moreover, if the Ministers of Justice/Attorneys General know better, as decided by Summit, why did they not carry out their own review in 2010?

It is significant that, at the meeting of the Ministers of Justice/Attorneys General in April 2011 in Swakopmund, the Republic of Zimbabwe had expressed a reservation that the Tribunal should not have jurisdiction in matters between persons and Member States, but should be confined to giving preliminary rulings on matters referred to it by national Courts. The Republic of Botswana had also expressed a reservation similar to the one made by the Republic of Zimbabwe. If the Ministers of Justice/Attorneys General had a problem with individual access and human rights, which is bad enough, Council subsequently really stuck the knife in, and Summit twisted it.

Council now recommended in May 2011 that the Review of the Ministers of Justice/Attorneys General should not only determine the scope of the jurisdiction of the Tribunal but also define the relationship between -

- (a) the Tribunal and national courts; and

(b) SADC law and the national law in individual SADC Member States.

Those recommendations were accepted by Summit.

The workshop, for its part, had recommended as follows:

- 1) *"The existing normative and institutional framework for human rights in the SADC structure should be strengthened further by expanding the human rights provisions to include clear references and links to relevant international instruments..."*
- 2) *"The competence of the Tribunal to receive and determine human rights cases emerging from SADC Member States must also be expressly reaffirmed in the relevant treaties".*

Now, Article 7(1) of the Protocol provides that the Tribunal shall elect a President for a term of three years. I was appointed President of the Tribunal on 27 November 2008 so that my term of office would normally run out on 27 November 2011.

Before the Council meeting in August 2010 held in Windhoek, Namibia, there was a specific item put on the agenda by the SADC Executive Secretary to the effect that the three regular members of the Tribunal and the one non-regular member, who were specifically mentioned by their names, namely Justices Pillay, Kambovo and Tshosa and Justice Chomba respectively should be re-appointed, presumably since their term of office was going to run out at the end of the month of August. Council made no decision on the matter, arguing that this particular item should first have been discussed and approved by the Ministers/Attorneys General, which it was not.

The same item relating to the re-appointment of the four members of the Tribunal was nevertheless put on the agenda of the meeting of Summit in August 2010 by the Executive Secretary and Summit decided, in essence, that, pending the review of an independent consultant relating to the role, responsibilities and terms of reference of the Tribunal, the issue of the re-appointment of members whose term of office expired on 31 August 2010 would be deferred and that, in the interval, those four members should remain in office and could hear pending cases but not new ones.

The four of us thus remained in office as President and members of the Tribunal, in spite of the expiry of our term of office and had the legitimate and reasonable expectation that, at the end of the review, our term of office would be renewed. The Tribunal, however, was unable to hear since August 2010 any of the four pending cases, as it was starved of funds and the Tribunal's requests for extra funding to the SADC Secretariat fell on deaf ears. Through lack of funds, we could not also hear an application questioning the decision of Summit in August 2010 that the Tribunal should not hear any new cases and thus deny access to justice to litigants!

The review of the independent consultant took place and his final report was examined first by the Senior Legal Officials in April 2011. One of their recommendations to the Ministers of Justice/Attorneys General was to the effect that the latter should recommend to Summit that the reappointment and replacement of the Members of the Tribunal be finalised in accordance with the Protocol. The Ministers of Justice/Attorneys General endorsed that recommendation but added that such reappointment and replacement should be finalised, *"having due regard to their recommendation...to review and amend the relevant SADC legal instruments (e.g. the Treaty and the Protocol on the Tribunal)"*. We consequently really thought at that time that we were cruising to four more years as members of the Tribunal, in the light of no indication to the contrary.

Then came a bolt out of the blue, namely the extraordinary decision of Council endorsed by Summit, indicated already at (1) above, not to reappoint the members of the Tribunal whose term of office expired on 31 August 2010, nor to allow them to remain in office, pending the review of the Ministers of Justice/Attorneys General in 2012. No reason was given for this decision which was taken behind closed doors and behind the back of those members.

It is significant that although Summit noted that *"there is need not only to reappoint the members whose term of office expired in August 2010, but also to replace those members whose term of office will expire on 31 October 2011"* (emphasis added), it nevertheless endorsed the recommendation of Council not to approve the reappointment and replacement of the members of the