

#### 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.<sup>31</sup>

#### SADC Member States with 'dualist' systems

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

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<sup>31</sup> 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 35, 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.

<sup>32</sup> 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).

<sup>33</sup> 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.

<sup>34</sup> *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.<sup>35</sup>

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'<sup>36</sup> 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.<sup>37</sup> 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*.<sup>38</sup>

#### 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.

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<sup>35</sup> 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.

<sup>36</sup> Zimbabwe response to questionnaire, 42.

<sup>37</sup> See below at Section 4.4.

<sup>38</sup> 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.<sup>39</sup> 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.

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<sup>39</sup> 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](http://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 is 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.<sup>40</sup> 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

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<sup>40</sup> 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'.<sup>41</sup>

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.

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<sup>41</sup> 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 form 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).<sup>42</sup>

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).<sup>43</sup> 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.<sup>44</sup> Recently, and controversially, it decided that a prohibition on age discrimination was a 'general principle of Union law', without even

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

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

<sup>44</sup> 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.<sup>45</sup> The power of the ECJ to apply general principles of Union law has been an important element of the ECJ's drive to integration.<sup>46</sup> 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.<sup>47</sup> 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'.<sup>48</sup> 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.<sup>49</sup> 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 ...<sup>50</sup>

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<sup>45</sup> C-144/04, *Mangold* [2005] ECR I-9981.

<sup>46</sup> 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.

<sup>47</sup> 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.

<sup>48</sup> Eg *Ex parte CFU*, above at n 6, 14.

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

<sup>50</sup> *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.<sup>51</sup>

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.<sup>52</sup> 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*).<sup>53</sup> 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 it 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.<sup>54</sup> This also sets a limit to any deference that might be exhibited by the SADC Tribunal to the national courts of SADC Member States.

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<sup>51</sup> *ibid.*

<sup>52</sup> 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.

<sup>53</sup> 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.

<sup>54</sup> 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.<sup>55</sup> 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

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

administrative measure<sup>56</sup> but not simple policy statements, or more factual 'acts'.<sup>57</sup> 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 Protocol<sup>58</sup> and a more primitive system of dispute settlement applicable to disputes under the SQAM Memorandum of Understanding.<sup>59</sup> 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

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

<sup>57</sup> See below at 34.

<sup>58</sup> Annex VI of the SADC Trade Protocol.

<sup>59</sup> 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.<sup>60</sup> 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.<sup>61</sup>

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

<sup>61</sup> 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.<sup>62</sup> 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 disputes 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.<sup>63</sup> 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

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

<sup>62</sup> Bohanes, *ibid*, 6.

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

the fact that EU law is enforced by the European Commission,<sup>64</sup> which stands in for individuals in this respect (there is a mechanism for individuals to request that the Commission take enforcement action).<sup>65</sup> 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,<sup>66</sup> and the Caribbean Court of Justice restricts access to its nationals.<sup>67</sup> 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'.<sup>68</sup> 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.<sup>69</sup>

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<sup>64</sup> Article 258 TFEU.

<sup>65</sup> A form is available at [http://ec.europa.eu/community\\_law/docs/docs\\_your\\_rights/complaint\\_form\\_en.rtf](http://ec.europa.eu/community_law/docs/docs_your_rights/complaint_form_en.rtf).

<sup>66</sup> Article 26, COMESA Treaty; Article 30 EAC Treaty.

<sup>67</sup> Article XXIV CCI Agreement.

<sup>68</sup> 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, *Temhani*, 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.

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

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.<sup>70</sup> 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.'<sup>71</sup> 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).<sup>72</sup> 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'.<sup>73</sup> 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.<sup>74</sup>

<sup>70</sup> *Nyong'o* [2007] EACJ 6 (30 March 2007), 21; *Korouo*, ECOWAS Case No ECW/CCJ/JUD/05/08; (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.

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

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

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

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

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'

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 State 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'.<sup>75</sup> 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.

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<sup>75</sup> 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.<sup>76</sup> 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.<sup>77</sup> 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.

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

<sup>77</sup> 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'.<sup>78</sup> 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

<sup>78</sup> *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.'

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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,

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.<sup>79</sup> 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,<sup>80</sup> 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.'<sup>81</sup> 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

<sup>79</sup> *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.

<sup>80</sup> 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.

<sup>81</sup> 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.<sup>82</sup> 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 ...'.<sup>83</sup> 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*).<sup>84</sup> 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

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

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

<sup>84</sup> *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.<sup>85</sup>

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'.<sup>86</sup> 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.<sup>87</sup>

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.<sup>88</sup> 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

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<sup>85</sup> *Mwotela*, EACJ Reference No 1/2005, quoted in Onoria above at n 70, 160.

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

<sup>87</sup> *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.

<sup>88</sup> Article 52 ICJ Statute.



## 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.<sup>51</sup> 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.

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<sup>51</sup> 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.<sup>92</sup> 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).<sup>93</sup> 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.<sup>94</sup> 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).<sup>95</sup> 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.<sup>96</sup> This rule is reiterated in the SADC Treaty and

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

<sup>93</sup> 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.

<sup>94</sup> 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.

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

<sup>96</sup> 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 binding<sup>97</sup> 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.<sup>98</sup>

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.<sup>99</sup>

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

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

<sup>97</sup> 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.

<sup>98</sup> 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.

<sup>99</sup> *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.<sup>100</sup> 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.<sup>101</sup> '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.

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<sup>100</sup> Article 4(e) of the SADC Treaty.

<sup>101</sup> 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.<sup>102</sup> 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

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<sup>102</sup> 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.

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.<sup>103</sup> 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'.<sup>104</sup> 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

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

<sup>104</sup> 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.<sup>105</sup> 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.<sup>106</sup> 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.<sup>107</sup> A number of such fines have been imposed for failure to comply

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

<sup>106</sup> Article 260 TFEU.

<sup>107</sup> 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.



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

### 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'.<sup>110</sup> 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.<sup>111</sup> 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.

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<sup>108</sup> 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.

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

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

<sup>111</sup> *TCL & TGI v Guyana* [2009] CCI 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.'<sup>112</sup> 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'.<sup>113</sup> 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.<sup>114</sup> 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'.<sup>115</sup> 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

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

<sup>113</sup> IACtHR, Rules of Procedure, Article 69.4 ([www.corteidh.or.cr/reglamento\\_eng.cfm](http://www.corteidh.or.cr/reglamento_eng.cfm)).

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

<sup>115</sup> Rule 74 ensures that the documents relevant to the decision are authentic.

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. ...<sup>116</sup>

The relationship between the two obligations has been described, in a passage that has gained widespread approval,<sup>117</sup> 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).<sup>118</sup>

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

<sup>116</sup> 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.

<sup>117</sup> 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.

<sup>118</sup> *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.<sup>119</sup>

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.<sup>120</sup> 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).<sup>121</sup> 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*,<sup>122</sup> 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.'<sup>123</sup> 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.

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<sup>119</sup> *Enron (Stay)*, *ibid*, para 62.

<sup>120</sup> *Gramara*, above at n 3, 16-19.

<sup>121</sup> In *Marketing Displays International v VR Van Raalte Reclame 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.

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

<sup>123</sup> *Fick*, *ibid*, at 4.

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

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.<sup>120</sup> 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).<sup>121</sup> 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*,<sup>122</sup> 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.'<sup>123</sup> 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.

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<sup>119</sup> *Enron (Stay)*, *ibid*, para 62.

<sup>120</sup> *Gramara*, above at n 3, 16-19.

<sup>121</sup> In *Marketing Displays International v VR Van Raalte Reclame 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.

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

<sup>123</sup> *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 law<sup>124</sup> and the civil law<sup>125</sup> 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.<sup>126</sup> 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'.<sup>127</sup> 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'.<sup>128</sup> 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.<sup>129</sup>

#### 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

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

<sup>125</sup> Angola, the Democratic Republic of Congo and Mozambique.

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

<sup>127</sup> Applicant Head of Argument in *Gramara*, para 21.

<sup>128</sup> Civil Matters (Mutual Assistance) Act 1996 of Zimbabwe: see *Gramara*, above at n 3, 5.

<sup>129</sup> *Gramara*, *ibid*, 5.

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

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 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.<sup>132</sup> 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'.<sup>133</sup> 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'.<sup>134</sup>

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.

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<sup>130</sup> 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.

<sup>131</sup> 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.

<sup>132</sup> 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.

<sup>133</sup> Article 68(2) of the American Convention on Human Rights.

<sup>134</sup> 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).<sup>135</sup>

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'.<sup>136</sup> 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.<sup>137</sup> Treaty practice is also supportive. The EAC Treaty uses the phrase 'the

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<sup>135</sup> 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.

<sup>136</sup> *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).

<sup>137</sup> 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',<sup>138</sup> 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.<sup>139</sup>

#### Observation 11

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

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<sup>138</sup> Article 44 EAC Treaty.

<sup>139</sup> *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'.<sup>140</sup> In part, this was because the judges took their oath of office before their appointing States and received their salaries from these States.<sup>141</sup>

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.<sup>142</sup> Thus, while there are certain basic principles 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.<sup>143</sup> 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

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

<sup>141</sup> *Ibid.*

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

<sup>143</sup> 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.

Statute of the Permanent Court of International Justice.<sup>144</sup> 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.<sup>145</sup> This is generally considered to be an unnecessary restriction, and reduces unnecessarily the pool of available candidates.<sup>146</sup> 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.<sup>147</sup> 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'.<sup>148</sup> The Statute of the International Criminal Court requires that

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

<sup>145</sup> 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.

<sup>146</sup> 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).

<sup>147</sup> 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.

<sup>148</sup> 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';<sup>149</sup> and in total at least nine judges must satisfy the 'criminal law' criteria, and five the 'international law' criteria.<sup>150</sup> Regional human rights courts typically require candidates to have expertise in human rights,<sup>151</sup> the European Court of Human Rights being a notable exception.<sup>152</sup> The ECOWAS Court requires competence in international law,<sup>153</sup> 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.'<sup>154</sup> 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.<sup>155</sup>

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.<sup>156</sup> 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.<sup>157</sup> In this light, the most appropriate solution

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<sup>149</sup> Article 36(3)(b) of the ICC Statute.

<sup>150</sup> Article 36(5).

<sup>151</sup> 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.

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

<sup>153</sup> 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.

<sup>154</sup> Article IV.1 of the CCJ Agreement.

<sup>155</sup> Eg Article 24(1) EAC Treaty.

<sup>156</sup> 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 ...'.

<sup>157</sup> Kate Malleson, '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.<sup>158</sup> 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,<sup>159</sup> 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.<sup>160</sup> 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

<sup>158</sup> Limbach, above at n 152, 17.

<sup>159</sup> See also above at 56.

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

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.<sup>161</sup> 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*.<sup>162</sup>

#### 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

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<sup>161</sup> See above at n 147.

<sup>162</sup> *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.<sup>163</sup> 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).<sup>164</sup>

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.<sup>165</sup> 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(5); 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].

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<sup>163</sup> Mackenzie et al, above at 142, 95-7.

<sup>164</sup> *ibid*, 170 n 165.

<sup>165</sup> *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.<sup>165</sup> 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),<sup>167</sup> but the same rule applies for the ECOWAS Court, where there are fewer judges than members.<sup>168</sup>

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,<sup>169</sup> or nominations are scrutinized by the Judicial Services Commission, or the bar association.<sup>170</sup> In others the process is rather informal. In one SADC Member State the government consults with the

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<sup>165</sup> Article 22 ECHR.

<sup>167</sup> Article 24(1) EAC Treaty.

<sup>168</sup> Article 3(2) ECOWAS Court Protocol.

<sup>169</sup> 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.

<sup>170</sup> 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,<sup>171</sup> in others the government consults with a range of stakeholders, such as the judicial, the law association and law enforcement agencies.<sup>172</sup> 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.'<sup>173</sup> 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

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<sup>171</sup> Mauritius.

<sup>172</sup> Zambia.

<sup>173</sup> 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](http://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.<sup>174</sup> 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.<sup>175</sup>

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

<sup>175</sup> 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.<sup>176</sup> 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.<sup>177</sup> 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.<sup>178</sup>

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

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<sup>176</sup> *ibid*, 148-9.

<sup>177</sup> Malleon, above at n 157, 681.

<sup>178</sup> *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.<sup>179</sup>

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.

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<sup>179</sup> *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.<sup>180</sup> 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.<sup>181</sup>

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.

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<sup>180</sup> 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.

<sup>181</sup> 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.<sup>182</sup> This fund was initially endowed with \$100m, contributed by the governments in agreed proportions,<sup>183</sup> 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.<sup>184</sup> 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,<sup>185</sup> which 'shall not be altered to their disadvantage during their tenure.'<sup>186</sup> 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

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<sup>182</sup> 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.caribbeancourtsofjustice.org/trustees/index.html](http://www.caribbeancourtsofjustice.org/trustees/index.html); and background in H Rawlins, *The Caribbean Court of Justice: The History and Analysis of the Debate* (CARICOM, Georgetown, 2000).

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

<sup>184</sup> Malleon, above at n 157, at 578.

<sup>185</sup> Article XXVIII CCJ Agreement.

<sup>186</sup> Article XXVIII.3 CCJ 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.<sup>187</sup> By contrast, the International Court provides for a renewable term of nine years.<sup>188</sup> 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)).

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<sup>187</sup> Article 25(1) EAC Treaty; Article IX.2 CCI Agreement.

<sup>188</sup> Article 13 ICJ Statute.

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.<sup>189</sup> 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)<sup>190</sup> or of the Tribunal itself, sitting in plenary (the solution adopted by the ECOWAS Court).<sup>191</sup> Given the present difficulties experienced by the Tribunal in maintaining a full bench, the former solution is likely to be more appropriate.

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<sup>189</sup> Zimbabwe has announced that it will withdraw its Tribunal Member.

<sup>190</sup> Article 26(1) EAC Treaty.

<sup>191</sup> 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 5(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.<sup>152</sup> 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.<sup>153</sup>

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<sup>152</sup> 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/](http://www.caribbeancourtsofjustice.org/papersandarticles/).

<sup>153</sup> *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No 2)* [2002] 1 AC 119.

## 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.<sup>194</sup> 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.

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<sup>194</sup> 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.

## 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.<sup>195</sup> The relevant provision of the Vienna Convention, as recognized by Justice Patel in *Gramara*,<sup>196</sup> 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

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

<sup>196</sup> *Gramara*, *ibid*, 9-10.

the UN Charter.<sup>197</sup> 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;<sup>198</sup> and there are other examples.<sup>199</sup> 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.<sup>200</sup> 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.<sup>201</sup> 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.

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<sup>197</sup> 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*, 4<sup>th</sup> ed (The Hague: Martinus Nijhoff, 2004) 731-752.

<sup>198</sup> 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).

<sup>199</sup> 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.'

<sup>200</sup> 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.

<sup>201</sup> *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](http://www.publications.parliament.uk/pa/cm201011/cmbills/106/11106.8-11.html).

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.<sup>202</sup>

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).<sup>203</sup> 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.<sup>204</sup> The result was that South Africa lost rights it otherwise would have had.<sup>205</sup> 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*.

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<sup>202</sup> Information provided by the SADC Secretariat Legal Unit.

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

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

<sup>205</sup> 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.<sup>206</sup>

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.<sup>207</sup> 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.<sup>208</sup> 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.<sup>209</sup> 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.<sup>210</sup>

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.<sup>211</sup> 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'.<sup>212</sup> This is unlikely, but

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<sup>206</sup> 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.

<sup>207</sup> 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).

<sup>208</sup> Zimbabwe's response to questionnaire, 32.

<sup>209</sup> The Legal Opinion by Chibanda Makgalemele & Company, Gaborone (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*, 6<sup>th</sup> 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.

<sup>210</sup> Anthony Aust, *Handbook of International Law*, 2<sup>nd</sup> 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.

<sup>211</sup> 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.'

<sup>212</sup> 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).<sup>213</sup> 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)).<sup>214</sup>

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 14<sup>th</sup> August 2001'.

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

<sup>214</sup> 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.'<sup>215</sup> 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.<sup>216</sup>

This is consistent with the International Court's Advisory Opinion in *Namibia*, discussed above.<sup>217</sup> 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.<sup>218</sup>

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

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<sup>215</sup> 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.

<sup>216</sup> *Air Transport Services Arbitration*, 22 December 1963, 16 *RIAA*, 63.

<sup>217</sup> See above at n 204.

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

<sup>219</sup> 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.<sup>220</sup>

#### 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'.<sup>221</sup> 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.

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<sup>220</sup> See below at 78.

<sup>221</sup> 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.<sup>222</sup> 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.<sup>223</sup> 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

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<sup>222</sup> Articles 34 and 37 SADC Tribunal Protocol. The 2002 Agreement repealed Article 34 and amended Article 37.

<sup>223</sup> 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.<sup>224</sup> 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.<sup>225</sup> 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.

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<sup>224</sup> See above at n 218.

<sup>225</sup> For a recent statement of the principle, citing numerous authorities, see *Barbados/Trinidad (UNCLOS Arbitration)*, 11 April 2006, para 291, available at [http://oca-cpa.org/showfile.asp?fil\\_id=178](http://oca-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

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.



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.

## 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.

## 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.

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LAW SOCIETY  
OF SOUTH AFRICA

OFFICE OF THE CO-CHAIRPERSONS

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28 February 2014

Mr President

REQUEST TO INTERVENE TO ENSURE THAT THE POWERS, ROLE AND  
RESPONSIBILITIES OF THE SADC TRIBUNAL ARE NOT DILUTED

We respectfully draw your attention to the memorandum from the SADC Lawyers Association (SADC LA) which is attached hereto. The Law Society of South Africa (LSSA) wishes to promote the views contained therein.

The LSSA regards this matter as very urgent and therefore, in the interest of our region, requests an opportunity to address you or if not possible, the Honourable Minister of Justice, Mr J Radebe.

Our delegation will include the Management Committee of the Council of the LSSA and the Law Society's representative on the SADC LA Executive.

We look forward to receiving your reply.

Yours faithfully

KATHLEEN MATOLO-DLEPU  
CO-CHAIRPERSON

DAVID BEKKER  
CO-CHAIRPERSON

cc. The Hon JT Radebe, E-mail: [kmaditla@justice.gov.za](mailto:kmaditla@justice.gov.za)

The Law Society of South Africa brings together the Black Lawyers Association, the Cape Law Society, the KwaZulu-Natal Law Society, the Law Society of the Free State, the Law Society of the Northern Provinces and the National Association of Democratic Lawyers in representing the attorneys' profession in South Africa.

FA6



LAW SOCIETY  
OF SOUTH AFRICA

OFFICE OF THE CHIEF EXECUTIVE OFFICER

24 June 2014

The Hon Adv TM Masutha, MP  
Minister of Justice and Correctional Services  
SALU Building 28<sup>th</sup> Floor  
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Pretoria

By e-mail: [kmadilla@justice.gov.za](mailto:kmadilla@justice.gov.za); [LKoasi@justice.gov.za](mailto:LKoasi@justice.gov.za)

Dear Minister

APPLICATION: THE SADC TRIBUNAL

The LSSA extends this letter to you in your capacity as our Minister of Justice. It is done as a gesture of courtesy and in order to inform your office of the motivation and need in this regard.

At the outset we apologise for the fact that we must bring this matter to your attention so soon after your appointment to this office but we believe that it is proper to take you into confidence as soon as possible regarding developments.

The LSSA is an active member of the SADC Lawyers Association, which brings together the law associations of the region's member states. The promotion of the Rule of law is a critical objective of the Lawyers Association, which from time to time inspires interventions by its executive within the borders of member states. Promotion of the independence of the judiciary, democratic process and access to justice are only three of the motivations for such intervention.

The LSSA now intends to bring an application in South Africa, in collaboration with the SADC Lawyers Association and its members, who will follow the same route in other jurisdictions.

The purpose of this application will be the promotion and reinstatement of the SADC Tribunal, to function in terms of the SADC Treaty and in accordance with International Laws.

The SADC Lawyers Association desires the restoration of the Tribunal as an essential tool of access to justice and protector of human rights. The Tribunal must not only adjudicate in matters of Interstate relevance, it must also attend to matters that are brought by the private sector and civil society.

The Law Society of South Africa brings together the Black Lawyers Association, the Cape Law Society, the KwaZulu-Natal Law Society, the Law Society of the Free State, the Law Society of the Northern Provinces and the National Association of Democratic Lawyers in representing the attorneys' profession in South Africa.

*[Handwritten signature and initials]*

The tenure of judges must be confirmed.

The LSSA will, in short, apply for

- Declaratory orders concerning the role of our government's responsible entities in the suspension of the tribunal, termination of tribunal members and the review of its jurisdiction and its protocol
- An order that the responsible entities will undertake the necessary measures to correct violations and refrain from voting on the Tribunal until such time that violations are corrected.
- Ancillary relief

We must emphasise that this application is brought in the public interest and to reinforce our support for the independence of the judiciary in dispensing justice in our region. As indicated by our Co-Chairs, we would like to meet with your department to discuss the matter.

Yours faithfully



---

NIC SWART  
CHIEF EXECUTIVE OFFICER  
Tel: (012) 366 8800  
Fax: 086 677 8419  
Email: [nic@lssa.org.za](mailto:nic@lssa.org.za)





## Brief on the SADC Tribunal

### I. The Southern African Development Community

The Southern African Development Community (SADC) is an African sub-region comprising fifteen countries<sup>1</sup>, and is one of eight (8) Regional Economic Communities (RECs) recognized by the African Union (AU), which form the African Economic Community (AEC). The SADC was established through a series of processes initiated in the 1970s by the so-called Frontline States, which culminated in the signing of the Treaty Establishing the Southern Africa Development Community ("SADC Treaty"). The main objectives of the SADC Treaty are to achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the peoples of Southern Africa and support the socially disadvantaged through regional integration<sup>2</sup>.

### II. Establishment of the SADC Tribunal

The SADC Tribunal (Tribunal) was established in 1992 in terms of Article 9 of the SADC Treaty as one of the eight (8) institutions of SADC to "ensure adherence to and the proper interpretation of the provisions of the SADC Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it."<sup>3</sup>

The rationale for establishing the Tribunal was to strengthen democratic governance, human rights, the rule of law and adherence to the principles of separation of powers within the region. The introduction of the Tribunal, therefore, promised the consolidation of the rule of law within the SADC region and enhanced access to justice for SADC citizens.

At its inception, the scope of the Tribunal's jurisdiction included among others:

- i. The powers to hear disputes between States, and between natural or legal persons and States;
- ii. Exclusive jurisdiction over all disputes between the States and the Community;

<sup>1</sup> The countries comprising the SADC regional economic community are Angola, Botswana, Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.

<sup>2</sup> See [www.sadc.int/about-sadc/overview/history-and-treaty](http://www.sadc.int/about-sadc/overview/history-and-treaty) (Accessed on 14 April 2014).

<sup>3</sup> Article 16 (1) of the SADC Treaty

- iii. Exclusive jurisdiction over all disputes between natural or legal persons and the Community;
- iv. Exclusive jurisdiction over all disputes between the Community and its staff relating to their conditions of employment; and
- v. Jurisdiction to give advisory opinions, which may be requested by the Summit or by the Council.<sup>4</sup>

In fact, the Tribunal provided a vital alternative forum for SADC citizens and juristic persons to seek legal remedies for violations of their rights or of the laws of SADC.

The Tribunal's Members<sup>5</sup> were appointed by the SADC Summit of Heads of State or Government ("SADC Summit") in Gaborone on 18 August 2005. The Members were sworn in in November 2005 and the Registrar of the Tribunal was sworn in in November 2006, paving the way for the Tribunal to commence its operations.

The first case was brought before the Tribunal in 2007 and by 2010 the Tribunal had adjudicated 20 cases. Amongst these cases were those of *Mike Campbell (Pvt) Ltd and 79 others vs. the Republic of Zimbabwe*, which focused on the land reform question in Zimbabwe.

The outcomes of these cases, which had been decided in favour of the petitioner-farmers, triggered the ongoing efforts by the Government of the Republic of Zimbabwe to have the Tribunal disbanded.

### III. Suspension of the SADC Tribunal and Limitation of its Jurisdiction

The SADC Summit of Heads of State or Government ("SADC Summit") held on the 17<sup>th</sup> of August 2010 in Windhoek, Namibia took an unprecedented decision to suspend the SADC Tribunal pending a review of its role, responsibilities and terms of reference<sup>6</sup> by an independent consultant. [ ]

In an extraordinary SADC Summit held in Windhoek, Namibia in May 2011, the SADC Summit decided the following<sup>7</sup>:

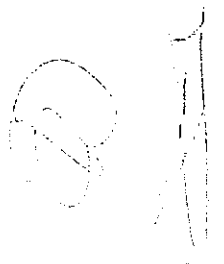
- i. Mandated the Ministers of Justice/Attorneys General to initiate the process aimed at amending the relevant SADC legal instruments to change the jurisdiction of the Tribunal and to submit a progress report at the [ordinary session of] the Summit in August 2011 and a final report for presentation to the Summit in August 2012;
- ii. Not to reappoint members of the Tribunal whose terms of office expired on August 31, 2010;
- iii. Not to replace members of the Tribunal whose terms of office would expire on October 31, 2011;
- iv. Reiterated the moratorium on receiving any new cases or hearings of cases by the Tribunal until the SADC Protocol on the Tribunal has been reviewed and approved.

<sup>4</sup>Articles 15-20 of the SADC Protocol on the SADC Tribunal

<sup>5</sup>The Tribunal Members were the judges of the Court

<sup>6</sup>Communiqué of the 2010 SADC Summit

<sup>7</sup>See [www.mikecampbellfoundation.com](http://www.mikecampbellfoundation.com) (accessed on 14 April 2014)





These decisions effectively put paid to any efforts of lifting the suspension of the Tribunal and further resulted in the non-renewal of contracts for four (4) Members of the Tribunal.

The SADC Summit then sounded the death knell on regional access to justice at the 32<sup>nd</sup> Summit held in Maputo in August 2012 by rendering the SADC Tribunal an interstate court. The 32<sup>nd</sup> SADC Summit in Maputo resolved that "a new Protocol on the Tribunal should be negotiated and that its mandate should be confined to interpretation of the SADC Treaty and Protocols relating to disputes between Member States"<sup>8</sup>, effectively barring SADC citizens from accessing the court and quashing all efforts made by civil society to resuscitate the Tribunal up to that time. !!!?

To be sure, this represented a major regression in the region's quest for upholding human rights and the rule of law for several reasons:

- > It violated the right to access the court and access to justice for SADC citizens;
- > It violated internationally recognized tenets on independence of the judiciary and the doctrine of separation of powers;
- > It violated basic tenets of human rights and the rule of law as enshrined in Article 4 (c) of the SADC Treaty; and
- > The decision was an antithesis of both the Strategic Indicative Plan for the Organ on Politics, Defence and Security (SIPO) and the progressive vision contemplated by the SADC Treaty - namely consolidation of peace and good governance.

In a move, which consolidated the SADC Summit resolutions made since 2009, the SADC Summit held in Lilongwe, Malawi in August 2013 directed the SADC Council of Ministers to draft a new Protocol establishing an interstate Tribunal. Reports<sup>9</sup> indicate that the new protocol is already in advance stages, and that the new protocol will most likely be adopted during the SADC Summit to be held in August 2014 in Zimbabwe.

#### IV. Calls for Reinstatement of the SADC Tribunal and Restoring It to its Original Jurisdiction

The continued suspension of the SADC Tribunal impacts negatively on the rights of SADC citizens to access justice and to effective legal remedies to disputes.<sup>10</sup> As such, it is inevitable that the proposed limitations on the powers of

<sup>8</sup> Article 24 of the Communiqué of the 32<sup>nd</sup> SADC Summit

<sup>9</sup> In March 2014, the SADC Lawyers Association deployed a mission, led by the SADCLA President - Mrs. Kondwa Sakala-Chibiya, to engage SADC Ministers of Justice on the drafting of the new Protocol during a meeting of the SADC Ministers of Justice held in Lilongwe, Malawi.

Meetings had during this mission evinced that:

- i. The timing of the trip to Malawi proved to be late as there was little that could have been done at that time to influence either the decisions or the processes related to drafting a new protocol on the SADC Tribunal; and
- ii. The decision to stay the course of the SADC Summit decision taken in Maputo on the SADC Tribunal is political. Notwithstanding the strength of the legal arguments made by civil society to date, success can only be obtained by continuing to lobby the politicians.

<sup>10</sup> While the SADC Treaty recognizes human rights, democracy and the rule of law as the foundation from which to "achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration" and to "promote common political values, systems and other shared values which are

the Tribunal will negatively impact on the regional integration agenda of SADC as well as dampen investor confidence in the region.

As a matter of course, limiting the *in personam* jurisdiction of the Tribunal not only affects ordinary citizens having disputes with SADC States, but also affects the business community engaged in business with SADC and its institutions as well as SADC employees where labour disputes arise in the course of their employment. Furthermore, it creates a legal quagmire with regard to the disposition of the cases that are still pending before the Tribunal.

Moreover, the proposed dilution of the jurisdiction of the SADC Tribunal will go against the jurisdictional trend that is prevailing on the African continent with regard to regional and continental courts. Both the ECOWAS Community Court of Justice and the East Africa Court of Justice are directly accessible by individuals. The African Court of Justice and Human Rights allows individuals and NGOs to file cases against Member States that have deposited a declaration allowing individuals and NGOs with observer status before the African Commission on Human and Peoples' Rights to access the Court. Therefore, a blanket ban on access to the SADC Tribunal by individuals and other non-state actors is a negation of the implementation of the principles and objectives of the SADC Treaty and the Constitutive Act of the African Union.

While there have been several credible and valiant attempts aimed at resuscitating the Tribunal, all – including the below-listed – have so far failed:

- i. Courtesy Calls, Press Statements and Open Letters: the SADC Lawyers' Association, International Commission of Jurists Africa Division, Southern African Litigation Centre, SADC Council of NGOs and other SADC civil society organizations have consistently undertaken courtesy visits on high-level SADC officials, issued press statements, and written open letters on the continued suspension of the SADC Tribunal since 2010 to no avail;
- ii. Communication before the African Commission<sup>11</sup>: Zimbabwean farmers, Luke Tembani and Benjamin Freeth, through legal counsel<sup>12</sup>, filed Communication 409/2012 at the African Commission on Human and Peoples' Rights ("Commission") challenging the SADC Member States and the SADC Summit of Heads of State or Government and the SADC Council of Ministers' failure to ensure access to the SADC Tribunal as violating Articles 7<sup>13</sup> and 26<sup>14</sup> of the African Charter.

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*transmitted through institutions which are democratic, legitimate and effective*<sup>11</sup>, it is evident that SADC continues to fail to gain real traction in consolidating regional economic and social integration by and large due to the continued flagrant disregard of the Rule of Law, which encourages impunity and lack of leadership accountability in the region.

<sup>11</sup> The Commission has an obligation to protect the rights and freedoms guaranteed in the African Charter on Human and Peoples' Rights. The Commission is empowered, among other things, to receive and consider other communications from individuals and organizations alleging that a State Party to the Charter has violated one or more of the rights guaranteed therein pursuant to Article 55 of the Charter.

<sup>12</sup> Legal Counsel was Norman Tjombe of Namibia.

<sup>13</sup> Article 7(1)(a) provides that:

"Every individual shall have the right to have his cause heard. This comprises: (a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by convention, laws, regulations and custom in force."

In its decision, the Commission found no violation of Articles 7 and 26 of the African Charter and found no Charter obligation on the Respondent States to guarantee the independence, competence and institutional integrity of the SADC Tribunal.

The commission interpreted Article 7 as read with Article 26 of the African Charter and decided that the rights of individuals to access courts and to an effective remedy only existed at national level.<sup>15</sup>;

- iii. Request for an Advisory Opinion from the African Court – following the 2012 Maputo SADC Summit decision directing the SADC Council of Ministers to draft a new protocol rendering the SAC Tribunal an interstate court, the Pan African Lawyers Union (PALU) and the Southern African Litigation Centre (SALC) filed a request for an Advisory Opinion at the African Court on Human and Peoples' Rights ("African Court") on whether the decisions made, and actions taken, by the SADC Summit of Heads of State or Government were consistent with SADC, AU and international human rights obligations.

The African Court declined to consider the request because the African Commission was already seized of a similar issue through Communication 409/2012.

## V. Conclusion

The information above is a summary of the background information to this proposed litigation.

## VI. Annexures

1. Annexure 1 – Treaty Establishing the Southern African Development Community;
2. Annexure 2 – Protocol on the Tribunal and Rules of Procedure Thereof;
3. Annexure 3 – Communiqué of the 49<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples' Rights;
4. Annexure 4 – Opinion of the Government of the Republic of Zimbabwe on the Execution and Enforcement of Judgments of the SADC Tribunal of 31 August 2009;
5. Annexure 5A – Communiqué of the Extraordinary SADC Summit held in Windhoek, Namibia on 20 May 2011;

<sup>14</sup> Article 26 of the African Charter provides that:

"State Parties to the present Charter shall have the duty to guarantee the independence of the courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter."

<sup>15</sup> Using the decision of the African Commission, and in a bid to apply pressure on the SADC leadership in advance of the 2014 SADC Summit in Zimbabwe, the SADC Lawyers' Association - together with its institutional members - plans to institute simultaneous national suits challenging the denial of access to, and effective remedies from, the SADC Tribunal due the continued suspension, and limited jurisdiction, of the SADC Tribunal arising from the consecutive decisions taken by the SADC Summit of Heads of State or Government since 2009.

6. Annexure 5B – Report of the World Trade Institute Advisors of 6 March 2011;
7. Annexure 6 – Communiqué of the 30<sup>th</sup> Jubilee SADC Summit; ✗
8. Annexure 7 – Communiqué of the 32<sup>nd</sup> SADC Summit held in Maputo, Mozambique on 18 August 2012; ✓
9. Annexure 8 – Communiqué of the 33<sup>rd</sup> SADC Summit held in Lilongwe, Malawi on 17 – 18 August 2013;
10. Annexure 9 – Decision of the African Commission on Communication 409/12: *Luke Tembani et al v Angola et al.*



FA 7

From: Mabokano Maphuti [mailto:MMabokano@justice.gov.za] On Behalf Of Ministry  
Sent: 25 June 2014 09:14 AM  
To: Fiona Kedijang  
Cc: Monageng Confrence; Lekgetho Nomsa  
Subject: RE: SADC TRIBUNAL

Dear Ms Kedijang

The above matter has reference.

On behalf of the Minister of Justice and Correctional Services, T M Masutha, MP (Adv.), this serves to acknowledge receipt of your correspondence, contents of which have been noted.

Kindly be advised that the matter is receiving Minister's attention.

Kind Regards  
Ms Maphuti Mabokano

From: Kgasi Lerato  
Sent: 24 June 2014 04:45 PM  
To: Ministry  
Cc: Monageng Confrence; Lekgetho Nomsa  
Subject: FW: SADC TRIBUNAL

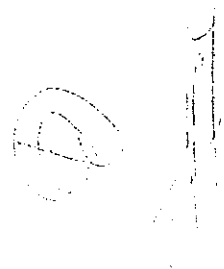
From: Fiona Kedijang [mailto:fiona@lssa.org.za]  
Sent: 24 June 2014 03:49 PM  
To: Madiitla Kgomotso; Kgasi Lerato  
Subject: SADC TRIBUNAL

Good day

Please receive the attached and acknowledge receipt.

Kind regards

*Fiona Kedijang*  
PA to CEO  
Law Society of South Africa  
Tel: Direct: +27 (0)12 366 8817 • Cell: 083 611 1373 • Fax: +27 (0) 86 216 7461  
P O Box 36626, Menlo Park, 0102, Docex 82, Pretoria  
E-mail: [fiona@lssa.org.za](mailto:fiona@lssa.org.za) [www.lssa.org.za](http://www.lssa.org.za)



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Incorporated

FAE

Reg No 2003/03651/L 21

# Mothle Jooma Sabdia

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VAT Registration Number: 4330197726

To His Excellency Mr J G Zuma  
The President of the Republic of South Africa

Address Union Buildings  
Private Bag X 1000  
PRETORIA  
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Email [delsev@po.ooov.za](mailto:delsev@po.ooov.za); [mavism@po.ooov.za](mailto:mavism@po.ooov.za)

Our Ref MR. T.A. MOTHLE/LOUISE / TAM4399

Date 8 August 2014

CONFIDENTIALITY CAUTION. If you have received this communication in error please note that it is intended for the addressee only, is privileged and confidential and dissemination or copying is prohibited. Please notify us immediately by telephone and return the original message to the above address at our cost.

Dear Honourable President,

RE: REQUEST TO INTERVENE TO ENSURE THAT THE POWERS, ROLE AND RESPONSIBILITIES OF THE SADC TRIBUNAL ARE NOT DILUTED

1. We confirm that we act on behalf of the Law Society of South Africa ("LSSA").
2. We address this letter to you pursuant to our client's letter to yourself dated 28 February 2014, annexed hereto for ease of reference.

Directors: Thipe Mothle, Ebrahim Jooma, Shiraz Sabdia Senior Associates: Roy Stocker, Victor Short, Wanda Donk  
Associates: Adele Van Der Merwe, Nicolene Komar Professional Assistants: Anzel Vorster, Azraa Janse van Vuuren,  
Ilana Moraka, Michelle O'Connell, Mohammad Mamod, Morongoe Khomo, Sian Butterworth, Teboho Makwati, Telana van  
Niekerk, Tshapo Kgomommu, Zenzele Mdluli Office Manageress: Hanlie Howe Also at: Second Floor, West Tower,  
Nelson Mandela Square, Maude Street, Sandton, Johannesburg, 2196, PO Box 785553, Sandton, 2146, Tel: (011) 881  
5684, Fax: (011) 881 5611

Trusted • Committed • Empowered

3. The LSSA is an affiliate of the SADC Lawyers Association ("SADC LA"). The LSSA and all other affiliates of SADC LA act in the public interest with regards to legal matters affecting the citizens of the respective countries. Concomitantly SADC LA is a collective representation of these interests within the SADC community.
4. On 20 May 2011 the SADC Member States passed a resolution to suspend the operation of the SADC Tribunal.
5. In addition and through SADC LA, our client understands that a protocol with the purpose of amending the Tribunal's, jurisdiction will be tabled at the upcoming Summit. We advise that our client, SADC LA and its affiliates are in agreement that the aforementioned resolution and the proposed protocol is an infringement to the right of access to justice (guaranteed by the SADC Treaty) of all citizens within SADC.
6. We have been informed that the proposed protocol intends limiting the jurisdiction of the SADC Tribunal by inter alia depriving individual citizens of the existing right to access to the Tribunal for relief against any Member State.
7. We submit that the decision to suspend the Tribunal and any proposed resolution to support the protocol, affects all citizens of the Member States including the citizens of South Africa. Respectfully, any decision which curtails the rights of citizens should be actively and strongly challenged.
8. We are not in possession of the agenda of the Summit, or the proposed protocol and we advise that the aforementioned submissions are made in this context.



9. Notwithstanding and should the aforementioned assumptions be correct, we are instructed to request that you, in accordance with the spirit and purpose of our Constitution and our rule of law, undertake to object to the proposed protocol and to seek a postponement of the issue pending further investigation, consultation and representation by interested parties within each Member State.
10. We also are instructed to request that you urgently provide us with the following documents:
- 10.1 The Agenda for the Summit meeting to be held on 17 and 18 August 2014; and
- 10.2 All or any proposed protocol suspending the SADC Tribunal and its ability to entertain claims lodged by individuals against Member States.
11. Kindly forward your response to this letter at the following email address, [thipem@mis-inc.co.za](mailto:thipem@mis-inc.co.za), before Wednesday 13 August 2014, failing which we are instructed to approach a Court with jurisdiction on an urgent basis for an order in the terms stipulated in paragraph 9 above.

Yours faithfully

MOTHLE JOOMA SABDIA INCORPORATED  
PER: T A MOTHLE



M | J | S

Incorporated

Reg No 2025/006615/21

AA9

Mothle Jooma Sabdia

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[www.mjs-inc.co.za](http://www.mjs-inc.co.za)

VAT Registration Number: 4330197726

To THE HONOURABLE ADV TM MASUTHA, MP  
Minister of Justice and Correctional Services

Address SALU Building 28<sup>th</sup> Floor  
316 Thabo Sehume Street  
PRETORIA  
0001

Email Kmaditla@justice.gov.za; LKgasi@justice.gov.za

Our Ref MR. T.A. MOTHLE/LOUISE / TAM4399

Date 2 September 2014

CONFIDENTIALITY CAUTION. If you have received this communication in error please note that it is intended for the addressee only, is privileged and confidential and dissemination or copying is prohibited. Please notify us immediately by telephone and return the original message to the above address at our cost.

Dear Minister,

**RE: REQUEST TO INTERVENE TO ENSURE THAT THE POWERS, ROLE AND RESPONSIBILITIES OF THE SADC TRIBUNAL ARE NOT DILUTED**

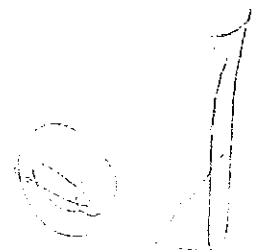
1. We act on behalf of the Law Society of South Africa ("LSSA").
2. We address this letter to you pursuant to our client's letter to yourself dated 24 June 2014, annexed hereto for ease of reference, as well as an email from Adv Stemmet from the Department of International Relations which refers our query to your Department.

**Directors:** Thipe Mothle, Ebrahim Jooma, Shiraz Sabdia **Senior Associates:** Roy Stocker, Victor Short, Wanda Donk  
**Associates:** Adele Van Der Merwe, Nicolene Komar **Professional Assistants:** Anzel Vorster, Azraa Janse van Vuuren,  
Ilana Moraka, Michelle O'Connell, Mohammad Mamod, Morongoe Khomo, Sian Butterworth, Teboho Makwali, Telana van  
Niekerk, Tshupo Kgomommu, Zenzele Mdluli **Office Manageress:** Hanlie Howe **Also at:** Second Floor, West Tower,  
Nelson Mandela Square, Maude Street, Sandton, Johannesburg, 2196, PO Box 785553, Sandton, 2146, Tel: (011) 881  
5684, Fax: (011) 881 5611

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3. The LSSA is an affiliate of the SADC Lawyers Association ("SADC LA"). The LSSA and all other affiliates of SADC LA act in the public interest with regards to legal matters affecting the citizens of the respective countries. Concomitantly SADC LA is a collective representation of these interests within the SADC community.
4. In addition and through SADC LA, our client understands that a protocol with the purpose of amending the Tribunal's, jurisdiction was tabled at the 34<sup>th</sup> Summit held on 17-18 August 2014 at Victoria Falls Zimbabwe. We have been informed that the protocol intends limiting the jurisdiction of the SADC Tribunal by inter alia depriving individual citizens of the existing right to access to the Tribunal for relief against any Member State.
5. We advise that our client, SADC LA and its affiliates are in agreement that the aforementioned resolution and the protocol is an infringement to the right of access to justice (guaranteed by the SADC Treaty) of all citizens within SADC.
6. We are not in possession of the proposed protocol, but we have been reliably informed that the protocol was adopted and our President voted in favour of same, however we advise that the aforementioned submissions are made in that context.
7. We accordingly request that you please provide us with answers to the following queries:
  - 7.1. Since our client's aforementioned letter to your office, there has unfortunately been no response to their courtesy letter and we would like to know if in the interim you have concluded consultations with other interested parties and/or stakeholders prior to advising the Honourable President of the Republic?

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- 7.2. In light of the favourable resolution taken to adopt the protocol, kindly confirm whether our President voted in favour of the aforementioned amendment and if so, his reasons for same in light of the spirit and purpose of the Constitution of the Republic of South Africa?
- 7.2. Kindly provide us with dates wherein this matter is tabled for debate in the National Assembly as well as the National Council of Provinces as per section 231 of our Constitution.
- 7.3. Further, our client would like to urgently consult with your representatives in order to canvas the issue raised and will appreciate if the Honourable Minister would provide us with alternative dates wherein we can consult with you and/or your officer in relation to the protocol.
8. We in accordance with the spirit and purpose of our Constitution and our rule of law, request that our Honourable President postpones tabling the issue in the National Assembly and the National Council of Provinces pending further investigation, consultation and representation by interested parties within the Republic.
9. Should you fail to respond to our letter by Friday 10 September 2014, we shall make an application to the relevant court with jurisdiction to provide us with the relevant assistance.
10. Kindly forward your response to this letter at the following email address, [thipem@mis-inc.co.za](mailto:thipem@mis-inc.co.za).

Yours faithfully

MOTHLE JOOMA SABDIA INCORPORATED  
PER: T A MOTHE

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FAIO  
FAII

Jackey Mothle

From: Thipe Mothle  
Sent: 20 August 2014 12:57 PM  
To: Jackey Mothle  
Subject: FW: SADC/LSSA/GOVERNMENT OF SOUTH AFRICA

Follow Up Flag: Follow up  
Flag Status: Completed

Fyi.

From: Stemmet, PA : Office : Chief State Law Adviser [mailto:StemmetA@dirco.gov.za]  
Sent: Wednesday, August 20, 2014 10:29 AM  
To: Thipe Mothle  
Subject: RE: SADC/LSSA/GOVERNMENT OF SOUTH AFRICA

Dear Mr Mothle

I attaché hereto the Communiqué of the 34<sup>th</sup> Summit of Heads of State and Government of SADC that was held at Victoria Falls from 17-18 August 2014. According to Paragraph 18, Summit adopted the Protocol on the Tribunal.

As regards your question on the Government's position on the Protocol, kindly note that this matter falls within the mandate of the Department of Justice and Constitutional Development, and it is advised that you approach that Department in this regard.

It should, however, be noted that the Protocol is not binding on South Africa unless having been ratified by South Africa and having entered into force.

Regards

Adv Andre Stemmet  
Senior State Law Adviser (International Law)  
Department of International Relations and Cooperation  
460 Soutpansberg Avenue  
Rietondale  
Pretoria  
Tel: 012-351 0842  
Email: [stemmetpa@dirco.gov.za](mailto:stemmetpa@dirco.gov.za)

From: Thipe Mothle [mailto:ThipeM@mjs-inc.co.za]  
Sent: 18 August 2014 05:54 PM  
To: Stemmet, PA : Office : Chief State Law Adviser  
Subject: FW: SADC/LSSA/GOVERNMENT OF SOUTH AFRICA

FAIO

Dear Sir/Madam

Kindly note that we have been forwarded your contact details in response to our letters addressed to the Presidency. For ease of reference we have attached all the letters which outline our role and queries.

Upon appreciation of the matter kindly inform us of the following:

1. Is the issue of the SADC Tribunal's jurisdiction on the agenda at the current Summit meeting being held in Zimbabwe? And further;
2. What is our Government's stance in relation to the proposed protocol regarding the Tribunal's jurisdiction.

Kindly confirm receipt and we await your response.

Regards

Thipe Mothle  
Director  
Mothle Jooma Sabdia Incorporated

Telephone +27 12 362 3137  
Mobile 082 890 8305  
Fax (SA Only) 086 694 4252  
Email [thipem@mjs-inc.co.za](mailto:thipem@mjs-inc.co.za)  
Web [www.mjs-inc.co.za](http://www.mjs-inc.co.za)

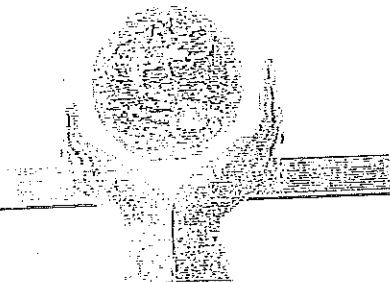
Docex 235 Pretoria  
Ground Floor, Duncan Manor, Cnr. Jan Shoba (Duncan) and Brooks Street, Brooklyn, Pretoria, 0181, [Directions](#)  
PO Box 11147, Hatfield, Pretoria, 0028

M J S Incorporated

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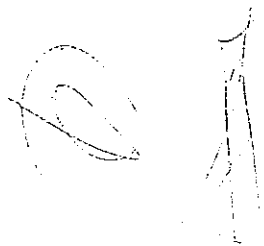
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Handwritten signature or initials in the bottom right corner of the page.

FA 12

Jackey Mothle

From: Nic Swart <nic@lssalead.org.za>  
Sent: 19 August 2014 08:04 PM  
To: Thihe Mothle  
Cc: Jackey Mothle  
Subject: Fwd: Final Version of the Petition on the New Protocol on the Tribunal  
Attachments: SADC Tribunal Petition.docx; ATT00001.htm; (Unofficial Copy) New Draft Protocol on the SADC Tribunal.pdf; ATT00002.htm

Follow Up Flag: Follow up  
Flag Status: Completed

Dear Thihe  
Please note below.  
Regards  
Nic

Nic Swart  
Chief Executive Officer  
Law Society of SA  
Director LEAD

Sent from my iPhone

Begin forwarded message:

From: "Emilia Siwingwa" <Emilia@sadcla.org><mailto:Emilia@sadcla.org>>  
To: "Paula Caetano" <paulacaetano11@gmail.com><mailto:paulacaetano11@gmail.com>>, "Stephen Msechu" <stephenm@tls.or.tz><mailto:stephenm@tls.or.tz>>, "arnold.tsunga@icj.org" <mailto:arnold.tsunga@icj.org>>  
<arnold.tsunga@icj.org><mailto:arnold.tsunga@icj.org>>,  
"dziechimbga@gmail.com" <mailto:dziechimbga@gmail.com>>  
<dziechimbga@gmail.com><mailto:dziechimbga@gmail.com>>,  
"Mulukam@salc.org.za" <mailto:Mulukam@salc.org.za><mailto:Mulukam@salc.org.za>>  
Cc: "abied@sadc-cngo.org.bw" <mailto:abied@sadc-cngo.org.bw><mailto:abied@sadc-cngo.org.bw>>, "ditlhakeb@gmail.com" <mailto:ditlhakeb@gmail.com>>  
<ditlhakeb@gmail.com><mailto:ditlhakeb@gmail.com>>, "adane@sadc-cngo.org.bw" <mailto:adane@sadc-cngo.org.bw><mailto:adane@sadc-cngo.org.bw>>,  
"ceo@tls.or.tz" <mailto:ceo@tls.or.tz><mailto:ceo@tls.or.tz>>, "Nic Swart" <mailto:ceo@tls.or.tz><mailto:ceo@tls.or.tz>>,  
"agura@tls.or.tz" <mailto:agura@tls.or.tz><mailto:agura@tls.or.tz>>, "Nic Swart" <mailto:agura@tls.or.tz><mailto:agura@tls.or.tz>>,  
<nic@lssalead.org.za><mailto:nic@lssalead.org.za>>, "sj@pholo.co.za" <mailto:sj@pholo.co.za>>  
<sj@pholo.co.za><mailto:sj@pholo.co.za>>, "ddeya@lawyersofafrica.org" <mailto:ddeya@lawyersofafrica.org>>  
<ddeya@lawyersofafrica.org><mailto:ddeya@lawyersofafrica.org>>,  
"SKinyunyu@lawyersofafrica.org" <mailto:SKinyunyu@lawyersofafrica.org>>  
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"tmoipolai@lawsociety.org.bw" <mailto:tmoipolai@lawsociety.org.bw>>  
<tmoipolai@lawsociety.org.bw><mailto:tmoipolai@lawsociety.org.bw>>,  
"rsteinmann@lawsocietynamibia.org" <mailto:rsteinmann@lawsocietynamibia.org>>  
<rsteinmann@lawsocietynamibia.org><mailto:rsteinmann@lawsocietynamibia.org>>, "Barbara Whittle" <mailto:rsteinmann@lawsocietynamibia.org>>  
<barbara@lssa.org.za><mailto:barbara@lssa.org.za>>, "hopec@laz.org.zm" <mailto:hopec@laz.org.zm>>  
<hopec@laz.org.zm><mailto:hopec@laz.org.zm>>, "corlett@hurisa.org.za" <mailto:corlett@hurisa.org.za>>  
<corlett@hurisa.org.za><mailto:corlett@hurisa.org.za>>

"Gilbert@freedomhouse.org<mailto:Gilbert@freedomhouse.org>"  
<Gilbert@freedomhouse.org><mailto:Gilbert@freedomhouse.org>>,  
"william@capelawsoc.law.za<mailto:william@capelawsoc.law.za>"  
<william@capelawsoc.law.za><mailto:william@capelawsoc.law.za>>,  
"lutendo@mrsinc.co.za<mailto:lutendo@mrsinc.co.za>" <lutendo@mrsinc.co.za><mailto:lutendo@mrsinc.co.za>>,  
"makanatsa@sadcla.org<mailto:makanatsa@sadcla.org>"  
<makanatsa@sadcla.org><mailto:makanatsa@sadcla.org>>, "Chantelle de Sousa"  
<chantelle@sadcla.org><mailto:chantelle@sadcla.org>>,  
"emilia.siwingwa@gmail.com<mailto:emilia.siwingwa@gmail.com>"  
<emilia.siwingwa@gmail.com><mailto:emilia.siwingwa@gmail.com>>,  
"kschibiya@iconnect.zm<mailto:kschibiya@iconnect.zm>"  
<kschibiya@iconnect.zm><mailto:kschibiya@iconnect.zm>>  
Subject: Final Version of the Petition on the New Protocol on the Tribunal

Dear All,

We have arrived at the close of the business day and I would now wish to share the document, which we will take to the SADCLA President for her signature. Thank you all once again for your support, and the feedback, suggestions and information that you have provided throughout the course of the day.

Meanwhile, attached please also find the unofficial copy of the new Protocol on the Tribunal, courtesy of ICJ, who have also informed us that Angola, Botswana, Lesotho, Mauritius, Seychelles, Swaziland and Zambia are the countries that did not sign the protocol during the 34th SADC Summit. In our view, Angola, Botswana, Swaziland and Zambia probably did not sign because the respective Heads of State sent their representatives to the Summit; so it would be useful for us to look into the reasons why Lesotho, Mauritius and Seychelles opted not to sign so that we can use them as entry points for future advocacy strategies, and to see whether any of the remaining countries could also be useful in this regard. Otherwise, we will share a signed version of the petition once signed and we shall keep you posted on the response, if any, as well as progress on ongoing litigation and strategies (joint or otherwise). Thank you for your continued support. Kind regards, Emilia.

----- Original Message -----

From: "Paula Caetano" <paulacaetano11@gmail.com><mailto:paulacaetano11@gmail.com>>

Sent: 8/19/2014 10:54:47 AM

To: "Stephen Msechu" <stephenm@tls.or.tz><mailto:stephenm@tls.or.tz>>

Cc: "Emilia Siwingwa" <Emilia@sadcla.org><mailto:Emilia@sadcla.org>>, abied@sadc-cngo.org.bw<mailto:abied@sadc-cngo.org.bw>, ditlhakeb@gmail.com<mailto:ditlhakeb@gmail.com>, adane@sadc-cngo.org.bw<mailto:adane@sadc-cngo.org.bw>, ceo@tls.or.tz<mailto:ceo@tls.or.tz>,  
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sj@pholo.co.za<mailto:sj@pholo.co.za>, ddeya@lawyersofafrica.org<mailto:ddeya@lawyersofafrica.org>,  
SKinyunyu@lawyersofafrica.org<mailto:SKinyunyu@lawyersofafrica.org>,  
gtrapence@yahoo.co.uk<mailto:gtrapence@yahoo.co.uk>,  
tmoipolai@lawsociety.org.bw<mailto:tmoipolai@lawsociety.org.bw>,  
rsteinmann@lawsocietynamibia.org<mailto:rsteinmann@lawsocietynamibia.org>,  
barbara@lssa.org.za<mailto:barbara@lssa.org.za>, hopec@laz.org.zm<mailto:hopec@laz.org.zm>,  
corlett@hurisa.org.za<mailto:corlett@hurisa.org.za>,  
Gilbert@freedomhouse.org<mailto:Gilbert@freedomhouse.org>,  
william@capelawsoc.law.za<mailto:william@capelawsoc.law.za>,  
lutendo@mrsinc.co.za<mailto:lutendo@mrsinc.co.za>, makanatsa@sadcla.org<mailto:makanatsa@sadcla.org>,  
"Chantelle de Sousa" <chantelle@sadcla.org><mailto:chantelle@sadcla.org>>,  
emilia.siwingwa@gmail.com<mailto:emilia.siwingwa@gmail.com>,  
kschibiya@iconnect.zm<mailto:kschibiya@iconnect.zm>

Subject: Re: Update: Signed Petition on the SADC Tribunal

Update received with thanks.

Cheers,



On Tue, Aug 19, 2014 at 10:44 AM, Stephen Msechu  
<stephenm@tls.or.tz><mailto:stephenm@tls.or.tz><mailto:stephenm@tls.or.tz>> wrote:  
Dear Emilia,

We acknowledge receipt of your update and we will be waiting for the list of countries that have opted out.

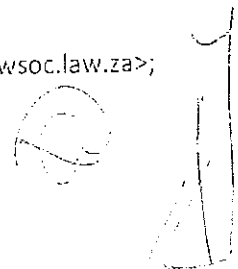
Regards,  
Stephen Msechu  
Program Officer-Advocacy, Research and Publication, Tanganyika Law Society (TLS) Plot No. 391 | Chato  
Street | Regent Estate  
P.O. Box 2148, Dar es Salaam, Tanzania; Tel: +255 22 2775313<tel:%2B255%2022%202775313>; Mobile: +255 777  
62 62 94; E-mail: stephenm@tls.or.tz<mailto:stephenm@tls.or.tz><mailto:emmanuel@tls.or.tz> | | Follow us on  
Twitter: [ZA102637858] <https://twitter.com/TanzaniaLawyer> | Like us on facebook: [ZA102637861]  
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From: Emilia Siwingwa [mailto:Emilia@sadcla.org<mailto:Emilia@sadcla.org>]  
Sent: Tuesday, August 19, 2014 10:32 AM  
To: abied@sadc-cngo.org.bw<mailto:abied@sadc-cngo.org.bw><mailto:abied@sadc-cngo.org.bw>;  
ditlhakeb@gmail.com<mailto:ditlhakeb@gmail.com><mailto:ditlhakeb@gmail.com>; adane@sadc-  
cngo.org.bw<mailto:adane@sadc-cngo.org.bw><mailto:adane@sadc-cngo.org.bw>;  
ceo@tls.or.tz<mailto:ceo@tls.or.tz><mailto:ceo@tls.or.tz>;  
agura@tls.or.tz<mailto:agura@tls.or.tz><mailto:agura@tls.or.tz>;  
nic@lssalead.org.za<mailto:nic@lssalead.org.za><mailto:nic@lssalead.org.za>;  
sj@pholo.co.za<mailto:sj@pholo.co.za><mailto:sj@pholo.co.za>;  
ddeya@lawyersofafrica.org<mailto:ddeya@lawyersofafrica.org><mailto:ddeya@lawyersofafrica.org>;  
SKinyunyu@lawyersofafrica.org<mailto:SKinyunyu@lawyersofafrica.org><mailto:SKinyunyu@lawyersofafrica.org>;  
paulacaetano11@gmail.com<mailto:paulacaetano11@gmail.com><mailto:paulacaetano11@gmail.com>;  
gtrapence@yahoo.co.uk<mailto:gtrapence@yahoo.co.uk><mailto:gtrapence@yahoo.co.uk>;  
tmoipolai@lawsociety.org.bw<mailto:tmoipolai@lawsociety.org.bw><mailto:tmoipolai@lawsociety.org.bw>;  
rsteinmann@lawsocietynamibia.org<mailto:rsteinmann@lawsocietynamibia.org><mailto:rsteinmann@lawsocietyn  
amibia.org>; stephenm@tls.or.tz<mailto:stephenm@tls.or.tz><mailto:stephenm@tls.or.tz>;  
barbara@lssa.org.za<mailto:barbara@lssa.org.za><mailto:barbara@lssa.org.za>;  
hopec@laz.org.zm<mailto:hopec@laz.org.zm><mailto:hopec@laz.org.zm>;  
corlett@hurisa.org.za<mailto:corlett@hurisa.org.za><mailto:corlett@hurisa.org.za>;  
Gilbert@FreedomHouse.org<mailto:Gilbert@FreedomHouse.org>;  
william@capelawsoc.law.za<mailto:william@capelawsoc.law.za><mailto:william@capelawsoc.law.za>;  
lutendo@mrsinc.co.za<mailto:lutendo@mrsinc.co.za><mailto:lutendo@mrsinc.co.za>



Cc: makanatsa@sadcla.org<mailto:makanatsa@sadcla.org><mailto:makanatsa@sadcla.org>; 'Chantelle de Sousa'; emilia.siwingwa@gmail.com<mailto:emilia.siwingwa@gmail.com><mailto:emilia.siwingwa@gmail.com>; kschibiya@iconnect.zm<mailto:kschibiya@iconnect.zm><mailto:kschibiya@iconnect.zm>  
Subject: Update: Signed Petition on the SADC Tribunal

Dear Colleagues,

Thank you for timely responding to the call to sign on to the petition on the SADC Tribunal, as circulated last week.

As previously reported, the SADC Lawyers' Association attended the open sessions of the 34th SADC Summit of Heads of State and Government from 17-18 August 2014 in Victoria Falls, Zimbabwe. Please be informed that, as expected, the new Protocol on the Tribunal was adopted, which bars access by citizens. However, to enter into force, the new Protocol requires:

1. Ten (10) signatures; and
2. States to deposit Instruments of Ratification with the SADC Executive Secretary.

We are reliably informed that some countries opted out of signing the Protocol yesterday and will advise you of the list once obtained.

In this regard, we amended the petition to suit the change in circumstances, particularly with a view to continue lobbying the States that did not sign the new Protocol. Therefore, please indicate whether you have any objection to the attached petition before the close of the business day today.

For your information and records, we have also attached the Communique of the 34th SADC Summit.

Thank you.

Kind regards,  
Emilia.

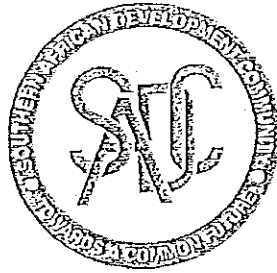
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This message has been scanned for viruses and dangerous content by MailScanner<<http://www.mailscanner.info/>>, and is believed to be clean.

--  
Kind Regards,

Paula Caetano  
Executive Director  
Malawi Law Society  
P.O.Box 1712  
Blantyre  
Malawi  
(O)+265 1 821 043  
(F)+265 1 824 635  
mls@sdnp.org.mw<mailto:mls@sdnp.org.mw><mailto:mls@sdnp.org.mw>\*

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COMMUNIQUE  
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.

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 2<sup>nd</sup> 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

Handwritten signature and initials in the bottom right corner of the page.

IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)

CASE NO:

In the matter between:

THE LAW SOCIETY OF SOUTH AFRICA

Applicant

and

THE PRESIDENT OF THE REPUBLIC OF  
SOUTH AFRICA

First Respondent

THE MINISTER OF JUSTICE OF  
THE REPUBLIC OF SOUTH AFRICA

Second Respondent

THE MINISTER OF INTERNATIONAL RELATIONS  
AND CO-OPERATION OF THE REPUBLIC  
OF SOUTH AFRICA

Third Respondent

---

CONFIRMATORY AFFIDAVIT

---

I, the undersigned,

**MAKANATSA MAKONESE**

do hereby make oath and state that:-

1.

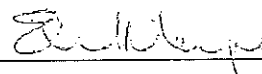
- 1.1 I am a representative of the Applicant. In the SADCLA I hold the designation of CEO/ Executive Secretary. Because of my position I bear personal knowledge of the operations of SADC and the SADCLA as well as the members of SADCLA.

20  
00 12 20

1.2 The facts herein stated are within my personal knowledge are both true and correct.

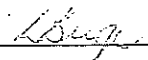
2.

I have read the founding affidavit of XOLANI MAXWELL BOQWANA in this matter together with annexures and confirm that it is both true and correct insofar as it pertains to me.



MAKANATSA MAKONESE

THUS SIGNED AND SWORN TO BEFORE ME at *Pretoria* on this *17<sup>th</sup>* day of *February* 2015 the deponent having acknowledged that he knows and understands the contents of this affidavit, that the deponent has no objection to taking the prescribed oath, that the oath which the deponent has taken in respect thereof is binding on the deponent's conscience, and that the contents of this affidavit are both true and correct.



COMMISSIONER OF OATHS

ELIZABETH BURGER  
COMMISSIONER OF OATHS  
Ex-Officio - Attorney of the High Court of SA  
13 Timbavati  
302 Rotsvygie Street  
La Montagne  
Pretoria