

SADC LAW JOURNAL

VOLUME ONE 2011

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GUIDE TO CONTRIBUTORS

The Editorial Board welcomes contributions on all aspects of Southern African Development Community (SADC) law or legal themes of relevance to the SADC legal fraternity.

Contributions should be sent electronically to the Editor-in-Chief (editor@sadclawjournal.org), the Managing Editor (IsabellaSkeffers@yahoo.com), or the Associate Managing Editor (Ashimizo.Afadameh-Adeyemi@uct.ac.za).

Submissions are to comply with the following requirements:

- All contributions are to be in English.
- Submissions need to be original, unpublished work. The Editorial Board may under exceptional circumstances accept an article that has already been published elsewhere, provided that the author provides the Board with a letter from the publisher permitting the publication and reverting the copyright to the SADC Law Journal Trust (SADCLJ Trust).
- All authors whose contributions are to be published in the *SADC Law Journal* (SADCLJ) by the submission thereof ipso facto waive copyright as author in favour of the SADCLJ Trust.
- Electronically sent contributions should be submitted in the form of an attachment in any version of MS Word.
- The Editorial Board accepts articles, shorter notes on any relevant legal issue, case comments, and book reviews.
- Articles should normally be between 6,000 and 12,000 words, while notes and case reviews can be between 1,500 to 3,000 words. Book reviews should not exceed 3,000 words.
- The SADCLJ House Style Guide is available on the SADCLJ website at www.sadclawjournal.org.
- Once a contribution has been accepted for publication, authors need to cooperate with the language editor and comply with his/her deadlines.

The Editorial Board will submit all articles to referees who will determine the desirability of their publication. Articles will be submitted to referees without disclosing the name of the author. The content review process usually takes about six weeks. Authors will be informed of the result of the content review. Submissions will then be subjected to a technical/language review, with feedback to authors.

The closing date for submissions for the 2012 edition is 31 October 2011.

Authors of new publications are encouraged to submit them for review, but are not entitled to solicit reviews from reviewers of their choice or to influence the decision of the Editorial Board on whom to approach for such a review.

FOREWORD

I am delighted to welcome the publication of the *SADC Law Journal* which is solely dedicated to the legal aspects of regional integration in the Southern African Development Community (SADC). While there is a great deal of scholarly writing on the economic and political aspects of regional integration in SADC, there is a shortfall of legal writing on such integration. This initiative fills in an important gap and is consequently laudable. As President of the SADC Tribunal (Tribunal), I understand the vital role that scholarly legal academic writing plays in shaping the jurisprudence of any legal regime. I am confident that the *SADC Law Journal* would carve out a niche for itself in this regard.

The inauguration of the *SADC Law Journal* is timely; it comes at an appropriate time when several questions have been raised about the mandate and jurisdiction of the Tribunal. There have also been some misconceptions about the role of the Tribunal in strengthening regional integration in SADC. It is important to note that the success of regional integration in SADC greatly depends on the extent to which the Tribunal ensures that the SADC Treaty, SADC Protocols and other SADC norms are properly interpreted. In this regard, the *SADC Law Journal* would serve as a platform for disseminating the Tribunal's interpretation of various aspects of such Treaty, Protocols and other norms.

In the long run, the *SADC Law Journal* would serve as a forum for enlightening the public as to the importance of the Tribunal in the process of strengthening regional integration in SADC. We, at the Tribunal, also believe that the *SADC Law Journal* will be an important tool in creating greater awareness about the Tribunal and its activities not only in the southern African region, but also at the international level, and providing readers with latest developments in the evolving area of the SADC body of laws.

I consider that the *SADC Law Journal* should serve as a platform where prominent scholars and distinguished legal practitioners alike can share their views on various aspects of the SADC Treaty, SADC Protocols and other SADC norms. The wealth of knowledge and experience of these scholars and legal practitioners should help shape the legal discourse on regional integration and examine core legal issues in the SADC integration process.

Such issues should not, in my opinion, necessarily be limited to areas that have been brought before the Tribunal for interpretation, but should also extend to other areas that fall within the SADC body of laws. To this end, the *SADC Law Journal* should publish innovative articles in the following areas, among others: the mandate, jurisprudence, and authority of the Tribunal; evaluation of the SADC Treaty, SADC Protocols and other SADC subsidiary legislation; the relationship between SADC, other African regional communities and

FOREWORD

the African Union; comparative studies between SADC and other regional integration bodies; rule of law, democracy, human rights and trade issues within the context of regional integration in SADC and the harmonisation of national laws within such context. It is gratifying to note that those areas are in fact the focus of the Journal's endeavours.

In terms of quality of the *SADC Law Journal*, the Editorial Board and International Advisory Board consist of highly renowned international scholars and officials. With the quality of such scholars and officials, I am convinced that only the best academic writings will be published in the *SADC Law Journal*. As Chairperson of the SADC Law Journal Trust and President of the Tribunal, I feel privileged, together with my colleagues of the Tribunal, to be associated with this landmark enterprise.

I, therefore, enjoin all stakeholders in the SADC regional integration process to throw their full weight and support behind the *SADC Law Journal* and make it an enduring success.

Last but not least, in my capacity as Chairperson of the SADC Law Journal Trust, I will fail in my duties if I do not place on record the valuable assistance given by the Konrad-Adenauer-Stiftung and its Director, Dr Anton Bösl, in ensuring the ongoing publication of the *SADC Law Journal* as a viable process.



Justice Ariranga G Pillay
President of the SADC Tribunal

L'AVANT-PROPOS

Je suis très ravi d'annoncer la publication de la Revue Juridique de la SADC – The SADC Law Journal – dont l'objectif principal sera consacré aux aspects juridiques de l'intégration régionale dans la Communauté de Développement de l'Afrique Australe (la SADC). En effet, alors qu'il y a assez de recherches et publications sur les aspects politico-économiques de l'intégration régionale en Afrique Australe, c'est tout à fait le contraire quant à ses aspects juridiques. La mission principale de la Revue de la SADC est donc de combler ce vide. En tant que Juge-Président du Tribunal de la SADC, je suis conscient du rôle que peuvent jouer les recherches et publications académiques dans le développement de tout système juridique. Je suis donc confiant que la présente Revue contribuerait dans ce sens.

L'inauguration de la Revue Juridique de la SADC vient au moment opportun. Ceci parce que cette inauguration coïncide avec le moment où beaucoup de questions se posent à propos du mandat et compétence du Tribunal de la SADC. Il y a eu aussi des interrogations concernant le rôle de ce tribunal dans le processus d'intégration régionale dans la SADC. Par ailleurs, il est à noter que l'intégration politico-économique dans notre région ne peut réussir sans le respect des instruments juridiques fondamentaux de la SADC, e.g. le Traité de la SADC et ses Protocoles et autres normes juridiques du droit communautaire de la SADC. Le rôle primordial du Tribunal de la SADC est donc de garantir l'état de droit et le respect des instruments juridiques haut-mentionnés. La présente Revue servira donc comme une tribune facilitant les débats scientifiques et académiques et ensuite la dissémination de la jurisprudence du Tribunal. A long terme, le rôle de cette revue est d'éduquer et informer le public quant à l'importance et rôle du Tribunal dans le processus d'intégration régionale dans la SADC.

Nous sommes donc convaincus que la Revue Juridique de la SADC sera un outil important de conscientiser le public aussi bien dans la région qu'au niveau international quant à l'évolution et développement des normes juridiques dans la SADC. Nous considérons donc que la présente Revue servira de plate-forme aux académiciens et praticiens pour débattre des problèmes relatifs aux différents aspects juridiques du droit communautaire de la SADC. Ainsi donc, la richesse intellectuelle de ces érudits et praticiens contribuerait à façonner un débat juridique en matière d'intégration régionale aussi bien qu'à identifier les défis principaux juridiques concernant le processus d'intégration régionale dans la SADC.

A mon avis, la Revue Juridique de la SADC devra couvrir non seulement des questions juridiques et affaires ayant été déjà traitées par le Tribunal, mais aussi et surtout les autres problèmes juridiques qui ressortissent du droit communautaire de la SADC. Les recherches et publications de la présente revue devrait donc mettre l'accent sur les domaines suivants : le mandat,

L'AVANT-PROPOS

la compétence et la jurisprudence du tribunal de la SADC ; l'évaluation et analyse juridique du traité de la SADC, ses protocoles additionnels et autres instruments juridiques subsidiaires ; les études comparées sur les rapports entre la SADC et autres organisations intergouvernementales régionales de même nature ainsi que l'Union Africaine ; le respect de l'état de droit et des droits de l'homme dans la SADC ; l'harmonisation des systèmes juridiques nationaux de la région ainsi que les aspects juridiques relatifs au commerce au niveau de l'Afrique Australe.

Concernant la qualité de la Revue Juridique de la SADC, il est important de noter que le Comité de Rédaction aussi bien le Comité international Consultatif sont composés de d'érudits de renommée internationale. Par conséquent, grâce à ces deux Comités, je suis confiant que la présente Revue ne publierait que de meilleurs travaux de recherches académiques. En tant que Président du Trust de la présente revue et Juge-Président du Tribunal de la SADC, je suis vraiment privilégié, ensemble avec mes collègues du Tribunal, d'être associé à cette initiative louable.

Je saisis donc cette occasion pour appeler toutes les parties concernées par et engagées dans l'intégration régionale à soutenir les efforts et travaux de cette nouvelle revue, unique dans ce genre. Grâce à votre soutien, la Revue Juridique de la SADC réussira dans sa noble mission.

En fin et surtout, en ma qualité de Président du Trust de la Revue Juridique de la SADC, je remercie infiniment la Konrad-Adenauer-Stiftung (KAS) et son Représentant Régional en Namibie et Angola, Dr. Anton Bösl, pour leur assistance, présente et future, sans laquelle la publication de cette nouvelle revue ne serait pas possible.

Je vous remercie.



Justice Ariranga G Pillay
Le Président Du Tribunal de la SADC

PRÓLOGO

Estou deleitado a dar as boas vindas à publicação da Revista Jurídica da SADC (SADC Law Journal) que é exclusivamente dedicada aos aspectos jurídicos da integração regional na Comunidade para Desenvolvimento da África Austral (SADC). Embora hajam bastantes escritas douts sobre os aspectos económicos e políticos da integração regional na SADC, há uma falta de artigos jurídicos sobre tal integração. Esta iniciativa preenche uma lacuna importante e é consequentemente laudável. Como Presidente do Tribunal da SADC (Tribunal), entendo o papel vital que escrita erudita académica desempenha na formação da jurisprudência de qualquer regime jurídico. Neste aspecto estou confiante que a Revista Jurídica da SADC irá esculpir um nicho para si mesma.

A inauguração da Revista Jurídica da SADC é oportuna; acontece numa altura adequada quando se têm levantado várias questões sobre o mandato e a jurisdição do Tribunal. Também têm havido interpretações incorrectas acerca do papel do Tribunal no fortalecer da integração regional na SADC. É importante notar-se que o sucesso da integração regional na SADC depende muito até que ponto o Tribunal garante que o Tratado da SADC, os Protocolos da SADC e outras normas da SADC sejam adequadamente interpretados. Neste aspecto, a Revista Jurídica da SADC serviria como uma plataforma para disseminar a interpretação de vários aspectos de tal Tratado e de tais Protocolos e doutras normas pelo Tribunal.

A longo termo a Revista Jurídica da SADC serviria como um fórum para informar o público sobre a importância do Tribunal no processo de fortalecer a integração regional na SADC. Nós, no Tribunal, também acreditamos que a Revista Jurídica da SADC será um instrumento importante para criar uma maior consciência acerca do Tribunal e das suas actividades não só na Região da África Austral mas também a nível internacional e proporcionar aos leitores e às leitoras os últimos desenvolvimentos na área do código de leis da SADC, à medida que estas evoluem.

Considero que a Revista Jurídica da SADC deveria servir como uma plataforma onde tanto eruditos(as) proeminentes como juristas ilustres podem compartilhar os seus pontos de vista sobre vários aspectos do Tratado da SADC, dos Protocolos da SADC e doutras normas da SADC. A riqueza do conhecimento e da experiência destes(as) eruditos(as) e juristas deveriam contribuir para moldar o discurso jurídico sobre a integração regional e examinar as questões jurídicas centrais no processo de integração na SADC.

Na minha opinião tais questões não deveriam necessariamente ser limitadas a áreas que forem trazidas perante o Tribunal para serem interpretadas mas deveriam também estenderem-se a outras áreas que caíam dentro do corpo de leis da SADC. Para este fim, a Revista Jurídica da SADC deveria

PRÓLOGO

publicar artigos inovadores nas áreas seguintes, entre outras: o mandato, a jurisprudência e a autoridade do Tribunal; avaliação do Tratado da SADC, dos Protocolos da SADC e doutra legislação subsidiária; a relação entre a SADC, outras comunidades regionais Africanas e a União Africana; estudos comparativos entre a SADC e outras comunidades de integração regional; Estado de Direito, democracia, direitos humanos e questões de comércio dentro do contexto de integração regional na SADC e a harmonização de leis nacionais dentro de tal âmbito. É gratificante notar que estas áreas são de facto o foco dos empenhos da Revista.

Em termos de qualidade da Revista Jurídica da SADC, o Conselho Editorial e o Conselho Consultivo Internacional consistem de eruditos(as) e funcionários(as) internacionais altamente célebres. Com a qualidade de tais eruditos(as) e funcionários(as), estou convencido que somente serão publicados na Revista Jurídica da SADC os melhores artigos académicos. Como Presidente da Fundação Particular ('Trust', em inglês) da Revista Jurídica e Presidente do Tribunal, sinto-me privilegiado, juntamente com os meus e as minhas colegas do Tribunal, estar associado com este ponto de referência.

Portanto, intimo que todas as partes interessadas no processo de integração da região da SADC contribuam sem reservas com a sua parte e com o seu apoio a favor da Revista Jurídica da SADC e que façam dela um sucesso duradouro.

Finalmente, na minha capacidade de Presidente da Fundação da Revista Jurídica da SADC, eu falharei nos meus deveres se não colocar no registo a assistência valiosa dada pela Konrad-Adenauer-Stiftung e pelo o seu director, o Dr. Anton Bösl, ao garantirem a publicação contínua da Revista Jurídica da SADC como um processo viável.



Juíz do Supremo Tribunal Ariranga G Pillay
Presidente do Tribunal da SADC

EDITORIAL

It is a great privilege to welcome readers to the first issue of the *SADC Law Journal*, a great opportunity in the development and articulation of Community-wide law and jurisprudence.

Since its inception in 1992, the Southern African Development Community (SADC) has continued to accumulate a growing body of norms underpinned by its founding Treaty. Such SADC law includes various Protocols, jurisprudence developed by the SADC Tribunal, and other norms.

This *Journal* aims to disseminate and articulate such SADC law in the context of regional integration. The *Journal* is not concerned with laws in individual SADC jurisdictions. It will focus on the following broad themes:

- Harmonisation of national laws in the context of SADC regional integration
- The relationship between SADC, the African Union and other African regional communities
- Comparative analysis of legal developments in SADC and other regional integration bodies
- Human rights issues within the context of SADC regional integration
- The jurisprudence, mandate and the authority of the SADC Tribunal, including commentaries on the Tribunal's decisions
- Analysis and evaluation of the SADC Treaty, Protocols and other norms, and
- Review of relevant books and other literature.

We shall also include texts of relevant SADC norms from time to time.

The *Journal* will be published once a year. The target audiences are academics, researchers, policymakers and students of regional integration. This is a peer-reviewed journal.

The first issue contains a varied and interesting collection of articles on a multitude of topics by leading scholars, researchers and students of regional integration. They include Emeritus Professor Gerhard Erasmus's contribution, "Is the SADC trade regime a rules-based system?", which highlights the importance of developing a rules-based trade regime in SADC in the context of the global debate on the subject. This contribution is followed by Professor Clement Ng'ong'ola's article, "Replication of WTO dispute settlement processes in SADC", which describes and discusses Annex VI of the Protocol in the SADC Treaty. Ms Precious Ndlovu's commentary, "Campbell v Republic of Zimbabwe: A moment of truth for the SADC Tribunal", revisits the landmark decision. In "Regional trade integration strategies under SADC and the EAC: A comparative analysis", Dr Henry Mutai examines the key legal provisions on trade liberalisation as found in the constitutive legal instruments of the two regional organisations. Dr Dunia Zongwe's article, "Conjuring systematic risk

EDITORIAL

through financial regulation by SADC central banks”, analyses the Model Central Bank Law adopted by the SADC Committee of Central Bank Governors. In the first of a two-part article (Part II to follow in the second issue of this Journal), “Enhancing access to South African social security benefits by SADC citizens: The need to improve bilateral arrangements within a multilateral framework”, Professor Marius Olivier critically reflects on cross-border access to social security benefits in the context of long-standing migration in the SADC region and the need for a human rights approach to the facilitation of movement. In “Reinvigorating African values for SADC: The relevance of traditional African philosophy of law in a globalising world of competing perspectives”, Mr Clever Mapaure seeks to show an Africology of legal philosophy in the context of critical values underlying the regional integration project in southern Africa. The article entitled “Drugs and violent crime in southern Africa” by Mr Charles Goredema is an analysis of experiences in the region over the past two decades. It discusses the links between the trafficking of illicit drugs and violent crime. The final article in this issue is a commentary entitled “SADC Protocol on Gender and Development: Road map to equality?” by Dr Mulela Munalula. In her commentary, Dr Munalula highlights some critical issues and laments the slow pace of the Protocol’s implementation, and the enduring battle against traditional attitudes as barriers to the mainstreaming of gender equality in the SADC region.

Besides the above articles, we are including in this first issue the text of the SADC Protocol on Tribunal and Rules of Procedure Thereof, and an explanatory note by Prof. Werner Scholtz on the review of the role, functions and terms of reference of the SADC Tribunal. The issue also includes a review by Ms Trudi Hartszenberg of the publication entitled *Trade Policy: A Handbook for African Parliamentarians*. Finally, there are two case reviews: the first, by Mr Ashimizo Afadameh-Adeyemi, looks at *Barry Gondo & 8 Others v The Republic of Zimbabwe*; and the second, by Mr Olufolahan Adeleke, tackles *United Republic of Tanzania v Cimexpan (Mauritius) Ltd, Cimexpan (Zanzibar) Ltd & Ajaye Jogoo*.

This journal has come into being as a result of the inspiration and support given by a number of people and institutions. I sincerely wish to pay tribute to some of them, in particular His Excellency Judge President Ariranga G Pillay (Judge President of the SADC Tribunal and Chairperson of the SADC Law Journal Trust), Professor Nico Horn (former Dean of Law of the University of Namibia and a member of the SADC Law Journal Trust), Dr Anton Bösl (Country Representative for Angola and Namibia of the Konrad-Adenauer-Stiftung), Mr Charles Mkandawire (Registrar of the SADC Tribunal), and Mr Mabvuto Hara (former Chair of the SADC Lawyers’ Association).

We are also greatly indebted to the SADC Tribunal for their encouragement and support, and to the Konrad-Adenauer-Stiftung for the kind sponsorship of this first issue of the Journal. We are equally grateful to the Justices of the

EDITORIAL

SADC Tribunal, the SADC Lawyers' Association, leading scholars, international officials who have kindly agreed to serve on the SADC Law Journal Trust, the International Advisory Board, and the Editorial Board.



Evance Kalula
Editor-in-Chief

L'EDITORIAL

En tant que Rédacteur-en-chef, je suis très heureux et privilégié de vous présenter la nouvelle Revue Juridique de la SADC – The SADC Law Journal. La naissance de la Revue Juridique de la SADC doit être considérée comme une étape très importante dans l'histoire du droit communautaire de l'Afrique australe. La présente Revue contribuera à développer et articuler ce droit ainsi qu'à articuler et analyser la jurisprudence du tribunal de la SADC.

Depuis sa création en 1992, le droit communautaire de la Communauté de Développement de l'Afrique Australe (la SADC) continue à se développer et évoluer. Les principales sources de ce droit sont notamment : le traité de la SADC, Protocoles additionnels, la jurisprudence développée par le Tribunal de la SADC, et autres normes juridiques.

L'objectif primordial de la présente Revue est donc de disséminer et analyser le droit communautaire de la SADC, surtout dans les domaines de l'intégration régionale. Cependant, il est nécessaire de noter que cette Revue ne traitera pas des questions relatives aux lois purement nationales. Les domaines suivants seront couverts par la présente revue :

- L'harmonisation des lois nationales relatives au processus d'intégration régionale ;
- Les relations et rapports entre la SADC, l'Union Africaine et autres organisations interétatiques en Afrique ;
- L'étude et analyse comparées entre Le droit communautaire de la SADC et autres organisations régionales de même nature ;
- Les problèmes et questions relatifs au respect et protection des droits de l'homme dans le contexte d'intégration régionale dans la SADC ;
- La jurisprudence, le mandat et la compétence du tribunal de la SADC, aussi bien les commentaires et analyses des décisions du Tribunal de la SADC ; et
- L'analyse critique des livres et autres publications relatives à l'intégration régionale.

De temps en temps, le Comité de Rédaction publiera quelques instruments ou documents juridiques du droit communautaire de la SADC.

La Revue Juridique de la SADC sera publiée une fois par an. Le public ciblé par la présente Revue est notamment : les universitaires (académiciens), les chercheurs, les politiciens, étudiants d'université, et ou toute personne, naturelle ou physique, intéressée par l'intégration régionale dans la SADC.

La Revue Juridique de la SADC est reconsidérée de pair.

Ce premier numéro de la Revue Juridique de la SADC contient des articles variés et intéressants sur des questions relatives au droit communautaire de la

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SADC. Ces articles sont publiés par des érudits, des professeurs d'université, des chercheurs, et étudiants universitaires. Dans le premier article, *'Is the SADC trade region a rule-based system ?'*, Professeur Emérite Gerhard Erasmus souligne l'importance de développer un système commercial régional basé sur des règles et normes juridiques bien définies. Le deuxième article est titré : *'Replication of WTO disputes settlement process in Southern African Development Community'*. L'auteur de cet article, Professeur Clement Ng'ong'ola, analyse l'Annexe VI du Protocole de la SADC qui traite de la résolution des différends commerciaux entre les états membres de la SADC. Autre article est intitulé *'Campbell v Republic of Zimbabwe: A moment of truth for the SADC Tribunal.'* Cet article, écrit par Mme Precious Ndlovu, fait un commentaire approfondi sur cette importante décision du Tribunal de la SADC. Dans *'Regional trade integration strategies under SADC and the EAC : A comparative analysis'*, Dr. Henry Mutai fait une étude comparée sur les politiques et régimes juridiques relatifs aux libéralisations commerciales entre la SADC et la Communauté Economique des Etats de l'Afrique de l'Est (EAC). Dr. Dunia Zongwe, dans son article, *'Conjuring systematic risk through financial regulation by SADC central banks'*, fait un analyse sur les lois régissant les banques centrales (nationales) en Afrique australe et propose un modèle de loi approprié à cet égard. L'autre article est écrit par Professeur Marius Oliver: *'Enhancing access to South African social security benefits by SADC citizens: The need to improve bilateral arrangements within a multilateral framework.'* Dans la première partie de cet article (la deuxième sera publiée dans le numéro suivant de la présente Revue), l'auteur réfléchit sur l'accès transfrontalier aux avantages de la sécurité sociale en Afrique Australe. Mr. Clever Mapaura, dans son article intitulé : *'Reinvigorating African values for SADC : The Relevance of traditional african phylosophy of law in a globalising world of competing perspective,'* essaie de démontrer l'importance des valeurs et systèmes juridiques africains dans le processus d'intégration régionale en Afrique australe. Dans *'Drugs and violent crimes in Southern Africa'*, Mr. Charles Goredema analyse les rapports et relations entre le trafic des drogues et la criminalité en Afrique australe au cours des deux dernières décennies. Finalement, le dernier article de ce numéro est un commentaire sur le *'SADC Protocol on Gender and Development'* par Dr. Mulela Munalula. Dans ce commentaire, l'auteur analyse l'implémentation de cet instrument juridique et observe que les progrès sur ce point sont très lents.

En plus des articles haut-cités, le Comité de Rédaction a inclus dans ce premier numéro le texte intégral du Protocole de la SADC l'Emancipation et Développement de la Femme (*the SADC Protocol on Gender and Development, 2008*). Dans ce même numéro, le Prof. Werner Scholtz passe en revue la révision du mandat, rôle, compétence et fonctions du Tribunal de la SADC. Egalement, Mme Trudi Hartzenberg écrit un commentaire sur une nouvelle publication titrée : *'Trade Policy : A Handbook for African Parliamentarians'*. In fine, deux affaires du Tribunal de la SADC sont analysées, viz. L'affaire Barry Gondo et als contre la République du Zimbabwe et l'affaire United Republic

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of Tanzania contre Cimexpan (Mauritius) Ltd, Cimexpan (Zanzibar) Ltd & Ajaye Jogoo. Ces affaires sont analysées, respectivement, par Mr. Ashimizo Afadameh-Adeyemi et Olufolahan Adeleke.

La Revue Juridique de la SADC est née grâce aux efforts et inspirations de certaines personnes et organisations. Je saisis donc cette opportunité pour remercier les personnes et institutions suivantes :

- Son Excellence Le Juge-Président du Tribunal de la SADC en même temps Chairperson du Trust de la Revue Juridique de la SADC, Monsieur Ariranga G Pillay ;
- Prof. Nico Horn, Ancien Doyen de la Faculté de Droit, Université de la Namibie, membre du Trust de la Revue Juridique de la SADC ;
- Dr. Anton Bösl, Représentant du Konrad-Adenauer-Stiftung (KAS) en Namibie et Angola ;
- Monsieur Charles Mukandawire, Le Greffier du Tribunal de la SADC ; et
- Monsieur Mabvuto Hara, Ancien Président de l'Association des Avocats en Afrique Australe.

Nous sommes également très reconnaissants du soutien morale et financier de la part du KAS. Sans ce soutien, la publication de ce numéro n'aurait pas été possible. Nous remercions aussi tous les juges du Tribunal de la SADC, l'Association des Avocats de la SADC, ainsi que les académiciens et universitaires qui ont accepté de servir comme membres du Comité de Rédaction et du Comité Consultatif International de la présente Revue.

A tout et chacun, je dis merci et vous souhaite une lecture fructueuse !



Evance Kalula
Rédacteur-en-Chef

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É um grande privilégio dar as boas vindas aos leitores e às leitoras da primeira edição da Revista Jurídica da SADC, uma grande oportunidade na evolução e na articulação da lei e da jurisprudência da comunidade inteira.

Desde o seu começo em 1992, a Comunidade para Desenvolvimento da África Austral (SADC) continua a acumular um crescente código de normas sustentadas pelo Tratado de fundação. A tal lei da SADC inclui vários protocolos, jurisprudência desenvolvida pelo Tribunal da SADC e por outras normas.

Esta revista tem o intuito de disseminar e articular a tal lei da SADC no contexto de integração regional. A revista não se preocupa com leis em jurisdições individuais na SADC. O seu foco será nos seguintes temas gerais:

- Harmonização de leis nacionais no contexto da integração regional na SADC;
- A relação entre a SADC, a União Africana e outras comunidades regionais Africanas;
- Análises comparativas da evolução jurídica na SADC e noutras comunidades de integração regionais;
- Questões relacionadas com os direitos humanos dentro do contexto da integração regional da SADC;
- A jurisprudência, o mandato e a autoridade do Tribunal da SADC, incluindo comentários sobre as decisões do Tribunal;
- Análise e avaliação do Tratado, dos Protocolos e doutras normas da SADC;
- Rever livros e outra literatura pertinentes.

De vez em quando também iremos incluir textos de normas pertinentes na SADC. A *Revista* será publicada uma vez por ano. As audiências alvo são académicos(as), pesquisadores(as), decisores políticos e estudantes de integração regional. Esta é uma revista sujeita a revisões por críticos com posições equivalentes ('peer-review', em inglês).

A primeira edição contém uma colecção variada e interessante de artigos sobre um grande número de tópicos por eruditos(as), pesquisadores(as) e estudantes proeminentes de integração regional. Estes incluem a contribuição do Professor Emérito Gerhard Erasmus, "O regime de comércio da SADC é um sistema baseado em regras?", a qual realça a importância de desenvolver um regime de comércio baseado em regras na SADC, no contexto do debate global sobre o assunto. Esta é seguida pelo artigo pelo Professor Clement Ng'ong'ola, "Replicação dos processos de solução de controvérsias da OMC na SADC", o qual descreve e discute o Anexo VI do Protocolo no

Tratado da SADC. O comentário da Senhora Precious Ndlovu, “*Campbell vs a República do Zimbabwe*: Um momento de verdade para o Tribunal da SADC, visita novamente a decisão que marca um ponto de referência. No artigo “Estratégias de integração de comércio regional sob a SADC e a EAC (Comunidade da África Oriental): Uma análise comparativa”, o Dr Henry Mutai examina as provisões jurídicas chave para a liberalização do comércio que se encontram nos instrumentos jurídicos constitutivos das duas organizações regionais. O artigo pelo Dr Dunia Zongwe, “Conjurando o risco sistémico através de regulação financeira pelos bancos centrais da SADC”, analisa a Lei Modelo do Banco Central adoptada pelo Comité dos Governadores dos Bancos Centrais da SADC. Na primeira parte dum artigo em duas partes (a segunda parte a aparecer na segunda edição desta *Revista*), “Aumentando o acesso aos benefícios de previdência social Sul-Africanos por cidadãos da SADC: A necessidade de melhorar acordos bilaterais dentro dum quadro multilateral”, o Professor Marius Olivier reflecte duma maneira crítica sobre o acesso transfronteiriço a benefícios de previdência no âmbito de migração de longa data na região da SADC e a necessidade duma abordagem vinculada em direitos humanos para a facilitação de movimento. No “Revigorando valores Africanos para a SADC: A relevância da filosofia de lei Africana tradicional num mundo globalizado em que existem perspectivas concorrentes”, o Senhor Clever Mapaure tenta demonstrar uma Africologia de filosofia jurídica no contexto dos valores críticos subjacentes ao projecto de integração regional na África Austral. O artigo sobre “Drogas e crime violento na África Austral”, pelo Senhor Charles Goredema, é uma análise de experiências na região durante as duas últimas décadas. Discute as ligações entre o tráfico de drogas ilícitas e o crime violento. O artigo final nesta edição é um comentário sobre “O Protocolo da SADC sobre Género e Desenvolvimento: roteiro para a igualdade?” pela Dra. Mulela Munalula. No seu comentário a Dra. Munalula realça algumas questões críticas e lamenta o vagaroso passo de implementação, e a longa luta contra atitudes tradicionais como barreiras à integração da igualdade de género na região da SADC.

Além dos artigos acima, incluímos também nesta primeira edição o texto do Protocolo da SADC sobre Género e Desenvolvimento, 2008, e uma nota explanatória pelo Professor Werner Scholtz sobre o comentário do papel, das funções e dos termos de referência do Tribunal da SADC. Esta edição também inclui um comentário pela Sra. Trudi Hartszenberg sobre a publicação intitulada *Política de Comércio: Um Manual para Parlamentares Africanos*. Finalmente, apresentamos uma revisão de dois casos: a primeira, pelo Sr. Ashimizo Afadameh-Adeyemi, examina o caso Barry Gondo e 8 Outros vs A República do Zimbabué; a segunda, pelo Sr. Olufolahan Adeleke, aborda o caso A República Unida da Tanzânia vs Cimexpan (Maurícias) Ltd, Cimexpan (Zanzibar) Ltd e Ajaye Jogoo.

O lançamento desta revista deve-se à inspiração e ao apoio dum número de pessoas e instituições. Desejo sinceramente prestar homenagem a algumas,

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particularmente a Sua Excelência Juiz Presidente Ariranga G Pillay (Juiz Presidente do Tribunal da SADC e Presidente da Fundação Particular da Revista Jurídica da SADC), ao Professor Nico Horn (anteriormente o Decano de Lei na Universidade da Namíbia e um membro da Fundação Particular da Revista Jurídica da SADC), ao Dr. Anton Bösl (Representante da Konrad-Adenauer-Stiftung em Angola e na Namíbia), ao Charles Mkandawire (o Secretário do Tribunal da SADC) e ao Senhor Hera (anteriormente Presidente da Associação de Advogados da SADC).

Estamos também muito reconhecidos ao Tribunal da SADC| pelo seu encorajamento e apoio e à Fundação Konrad-Adenauer-Stiftung pelo seu generoso patrocínio para esta primeira edição da Revista. Estamos igualmente gratos aos Juizes Supremos do Tribunal da SADC, à Associação de Advogados da SADC, estudiosos(as) proeminentes, funcionários(as) internacionais que generosamente concordaram servir na Fundação Particular da Revista Jurídica da SADC, ao Conselho Consultivo Internacional e ao Conselho Editorial.



Evance Kalula
Redator-Chefe

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Is the SADC trade regime a rules-based system?¹

Gerhard Erasmus*

Introduction

What is the meaning of *rules-based trade*? What are the consequences if an international trade regime is defined as a *rules-based* one? Does it matter whether trade within the Southern African Development Community (SADC) is conducted on the basis of rules or not?

This article discusses these questions in the context of the global debate about rules-based trade and its purported merits, the features of the SADC trade regime, and recent developments around the SADC Tribunal. It will start off by clarifying the meaning of *rules-based trade*. The final part assesses SADC's trade instruments and member states' trade-related practices in the light of criteria generally accepted as indicating rules-based trade. The conclusions will explain why the author considers it important to respect legal principles when it comes to how trade is conducted in southern Africa.

What is *rules-based trade*?

International agreements, including trade agreements, are “governed by international law”.² This does not mean that each and every international agreement contains ‘hard’ obligations and clear enforcement mechanisms, or that a particular trade arrangement will be rules-based simply because the matter is governed by a treaty of some description. International agreements reflect the intention of the parties to it. In a particular instance, this intention may be to establish a form of interaction or cooperation which is not governed by definite rules or enforceable obligations.

The notion of *rules-based trade* as used in the present article refers to trade arrangements between states governed by international agreements which contain specific obligations regarding outcomes and practices. The parties have to comply with these obligations to ensure certainty and predictability,

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1 This article is based on research done for the Trade Law Centre for Southern Africa (tralac).

2 Article 2(1)(a), Vienna Convention on the Law of Treaties.

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and transparency is a prerequisite. The substantive content of such trade rules can normally be distilled from the basic principles of the World Trade Organisation (WTO) – such as those relating to the most-favoured nation and national treatment, or those dealing with market access – or other multilateral disciplines applicable to trade-related conduct involving the movement of goods and services across borders. Regional trade arrangements (RTAs) involving WTO member states may of course contain WTO plus obligations, but must respect those multilateral rules that apply to free trade areas (FTAs) and customs unions. Rules-based trade arrangements display, in this author's view, certain substantive as well as formal qualities; for RTAs these are summarised at the end of this section.

Sovereign states are free to conclude international agreements – on trade or whatever subject matter so chosen – and to establish international organisations to promote their interests or to perform certain functions on their behalf. They may endow such organisations with the institutions required to undertake the intended tasks and to exercise the powers granted to them through the founding treaty.

When it comes to international trade and the promotion of regional integration, the governments involved have to decide some additional issues. How will they, for example, ensure non-discriminatory treatment and put a stop to non-tariff barriers in the markets of the other states parties to the agreement? What are the implications of treaty obligations for the parties' citizens? How will their national policies be affected? What happens in case of non-compliance? The answers to these questions should be provided for in the legal instruments in question, which are mostly in the form of treaties establishing international organisations to implement specific trade arrangements. As a general observation, the more comprehensive the trade arrangement and the more advanced the integration process, the stronger the need for appropriate institutions with supranational powers.

As states embark on the road of deeper regional integration, the need for effective harmonisation of policies, reliable outcomes and firmer legal arrangements will increase. Fragmentation would follow if individual member states are free to follow different approaches and apply different rules with regard to substantive issues governed by the treaty in question. Such freedom would undermine the very purpose of the exercise. Member states should not be permitted to invoke their national 'policy space' or enforce domestic jurisdiction in instances where the matter concerned is regulated by the applicable legal instrument, and some entity should speak on behalf of the collective when necessary.

RTAs are not always cast in perfectly lucid terms. Lack of legal clarity is often encountered, making such arrangements less effective. Uncertainty, unpredictability, non-compliance, non-transparency and a lack of remedies

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will undermine the benefits to be gained. Private firms and traders are the most likely to be negatively affected. Investors will also shy away from markets where they do not enjoy the protection of the law and cannot enforce their rights.

One lesson to be learned is that effective trade arrangements require legal instruments which reflect with sufficient degree of precision the intention of the parties with regard to the method of implementation and compliance. The obligations which the members have accepted should be clear in order to ensure that the intended results are achieved. Legal formulations count. Vague formulations and wide discretions undermine legal certainty and are, in fact, anathema to rules-based trade. If interpretation becomes an issue, there should be an independent forum to rule on the correct interpretation or application of the legal instrument at stake. If the particular arrangement is truly rules-based, the rulings of this forum will, as a rule, be binding on the parties involved.

Regional integration arrangements may go beyond the reach of RTAs. They may seek to achieve a higher degree of economic integration based on, for example, the harmonisation of their policies or the adoption of similar policies.³

Technically, RTAs come in the form of FTAs, customs unions or common markets. Several reasons have been given for why countries negotiate RTAs:⁴

First, they can obtain the traditional gains of trade. Second, countries use legally binding agreements to strengthen domestic policy reform. Third, countries hope to increase their multilateral bargaining power in this way. Fourth, free-trade arrangements can often guarantee access to markets. Fifth, for some countries the possibility of strategic linkages is important. The sixth reason is that countries may be able to benefit from the multilateral and regional interplay by emphasizing their interest in bilateral negotiations at critical points in the multilateral negotiations.

There are multilateral rules on RTAs⁵ which must be respected when WTO member states form such arrangements. They constitute a multilateral legal framework and another reason why RTAs are rules-based. RTAs are not open ended configurations where member states are free to pursue whatever trade and commercial policies they deem fit. The WTO rules applicable to RTAs stipulate how the members must conduct their preferential *inter se* arrangement and how they must respect the rights of third parties.

3 Goode, Walter (Ed.). 2007. *Dictionary of trade policy terms* (Fifth Edition). Cambridge: Cambridge University Press, p 359.

4 Whalley, John, cited in Goode (2007:359–360).

5 In the form of Article XXIV of the General Agreement on Tariffs and Trade (GATT), and the Enabling Clause and Article V of the General Agreement on Trade in Services (GATS).

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When the members of an RTA are also members of the WTO, as is the case with the members of SADC,⁶ a general distinction is to be drawn between their external (multilateral) and their internal legal obligations. The former type of obligation relates to the requirements of Article XXIV in the General Agreement on Tariffs and Trade (GATT), and the Enabling Clause⁷ – if the particular arrangement comprises only developing countries and has been notified under this Clause – and Article V in the General Agreement on Trade in Services (GATS). RTAs are exceptions to the most-favoured-nation rule and have to comply with the applicable requirements of both GATT and GATS. In addition, the WTO has to be notified when RTAs are launched.⁸ In principle, WTO members may also invoke the WTO's dispute settlement procedure in order to ensure compliance with the applicable rules.⁹

The internal rules of RTAs refer to the obligations contained in their own legal instrument and apply between or amongst members themselves. Between the internal and external dimensions there are certain linkages. An FTA, for example, requires rules of origin in order to identify the source of the goods entitled to the preferential treatment granted in terms of the particular free trade agreement. This requirement is linked to GATT Article XXIV, which in turn requires that substantially all trade is to be covered by the FTA in question. The content of these rules of origin is for the FTA parties to determine internally. Their content, i.e. how strict, liberal or simple they are, will obviously impact on the general success of the trade arrangement in question.

By way of a summary, the following can be listed as features of a rules-based RTA:

- It should be established and should function in terms of a properly drafted international legal instrument which should be in force for all the member states.
- Where additional legal instruments such as protocols are added to the overall arrangement, they should be coherent and consistent, and should apply generally.

6 The exception is Seychelles, which is still negotiating accession to the WTO.

7 The Enabling Clause – “The Decision of the GATT Contracting Parties of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries” – provides in the relevant part for less strict rules that are available to developing nations when forming RTAs. Eventually, however, the spirit behind the exception to the most-favoured-nation clause has to be respected. The member states are also required to inform the WTO about their particular RTA and its internal arrangements.

8 The SADC FTA was notified to the WTO under GATT Article XXIV, on 2 August 2004; notification available at www.wto.org/english/tratop_e/region_e/status_e.xls; last accessed 25 March 2011.

9 See e.g. Turkey – Textiles, Appellate Body Report, WT/DS34//AB/R, adopted 19 November 1999.

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- The obligations of the members should be clear and be respected, and implementation should be monitored.
- Disputes regarding the interpretation and application of the legal instruments should be resolved through an independent adjudicative process. Judgments should be binding on the parties concerned. An appeal procedure will improve the legitimacy and integrity of the dispute settlement system.
- The implementation of decisions by the adjudicative body should be ensured through effective procedures. Compliance with such decisions should be monitored.
- The relationship between national and community law should be clear. There should be legal instruments at national level to empower national courts to give effect to community rules and judgements where necessary.
- The rights of private parties should be catered for and should be protected.
- The arrangement should have the necessary institutions. They should be endowed with the powers and independence required to be effective and to act on behalf of the collective.

The fear of a loss of sovereignty

Political leaders and officials often caution against trade arrangements overstepping their boundaries, especially when regional institutions endeavour to exercise the powers necessary to ensure respect for community law. Such governments are reluctant to enforce the international agreements in question or comply with the rulings of regional courts and tribunals. The reasons are not always clearly articulated, but the loss of governmental 'policy space' and state sovereignty is frequently mentioned.

In the context of freely concluded agreements, the fear that RTAs will irreversibly jeopardise national sovereignty is not convincing. It is an act of sovereignty to conclude international agreements, to establish trade arrangements with neighbouring countries, and to do this on the basis of reciprocity. There are good reasons why governments consider such arrangements to be mutually beneficial. African regional organisations have been established by the sovereign governments of their member states. The real problem is not the existence of such supranational structures: it is the subsequent unwillingness of member states to respect the applicable legal instruments, to comply with obligations, and to provide for effective domestic measures to implement the relevant rules and rulings.

The benefits of rules-based trade and integration require that the applicable legal instruments are taken seriously and that the mutually agreed rules are respected. As regional integration within a particular configuration moves ahead, it becomes necessary to adjust and augment the legal dimension of

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such integration. An obvious example concerns the difference between an FTA and a customs union. A customs union is technically and legally more advanced than an FTA, and has a single customs territory and common external tariff which bind its members. The participating governments are not free to adopt and implement unilateral tariff changes or exclusive trade policies. Thus, a certain degree of a state's 'sovereignty' will be curtailed once it decides to join a customs union.

The loss-of-sovereignty fear rings quite hollow in the light of the many official plans on deepening integration in Africa. Existing regional economic communities want to accept more onerous obligations. This is also the policy of the African Union. Most African regional economic communities have decided to become customs unions and even common markets.¹⁰ The whole continent is divided into regional economic communities and, eventually, all African states should be linked in this manner – at least in terms of the political rhetoric.

SADC adheres to a similar agenda, which extends well beyond the target of achieving an FTA. These ambitions are set out in SADC's Regional Indicative Strategic Development Plan (RISDP) of 2003. Although it is not a legally binding agreement, it enjoys political support. The Plan plots an integration agenda that includes the targets of having an FTA by 2008, a customs union by 2010, a common market by 2015, and an economic union by 2018.

The implications of the rules required to accommodate this level of ambition should be understood before they are adopted. They will have to be taken seriously and have to be implemented, both internally and vis-à-vis third parties.

Some sovereign powers will be affected when regional economic integration is pursued, but that comes with the nature of the enterprise. The effects will be felt by all member states, including the most powerful.

The debate about sovereignty and when to protect it is a universal one. In times of economic hardship, there is a greater temptation for politicians to rediscover the ideals of sovereignty. Nevertheless, it remains a legitimate question to ask – as the WTO's 2004 Sutherland Report indeed does – whether countries and governments in a global economy are not –¹¹

10 The East African Community (EAC) and the Common Market for Eastern and Southern Africa (COMESA) are said to be customs unions already. SADC wanted to become a customs union in 2010, but postponed the decision at the eleventh hour.

11 Sutherland, Peter, J Bhagwati, K Botchwey, N FitzGerald, K Hamada, JH Jackson, C Lafer & T de Montbrial. 2004. *The future of the WTO: Addressing institutional challenges in the new millennium*. Geneva: World Trade Organisation, paragraph 109.

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... obliged to subjugate some level of domestic prerogative to international rules and disciplines? If so, is that a gain or loss to the well-being of societies?

This Report then goes on to observe the following:¹²

Sovereignty is one of the most used and also misused concepts of international affairs and international law. The word is often repeated more or less as a 'mantra' without much thought about its true significance. In fact, the word covers a large range of every complex ideas[,] sometimes relating to the role of states in international organizations, other times relating to internal divisions of power (such as in a federal state), or the degree of government authority towards its citizens. ...

Acceptance of almost any treaty involves a transfer of a certain amount of decision-making authority away from states, and towards some international institution. Generally this is exactly why 'sovereign nations' agree to such treaties. They realize that the benefits of cooperative action that a treaty enhances are greater than the circumstances that exist otherwise. Indeed, the Appellate Body has commented¹³ as follows: "The WTO agreement is a treaty – the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the WTO Agreement."

What, then, is *sovereignty*? The *sovereignty* of the state is an original building block of the Law of Nations. It typically requires respect for territorial integrity and for the rule that treaties cannot bind a state unless it has given its consent to be bound. It is important to emphasise the converse as well: it is an act of sovereignty to become party to an international agreement or a member of an international organisation. This has additional implications: states cannot invoke their national law or constitution as a justification for not respecting their international obligations. If that were possible, there could be no international law. Moreover, a change of government in a particular country will not affect the binding nature of existing agreements to which that state is a party. States are the subjects of public international law – not governments.

States cannot prosper in isolation. Economic development is very directly linked to the ability to trade and being integrated into regional and the global economies. Reciprocal obligations have to be respected, inter alia to prevent beggar-thy-neighbour consequences. Contemporary challenges to governments such as climate change, environmental catastrophes and disease respect neither geographical borders nor sovereignty.

¹² (ibid.:paragraphs 110 and 111).

¹³ Japan – Alcoholic Beverages II, p 16, Dispute Settlement Reports (DSR) 1996: 1, p 97 at 108 (WTO documents: WT?DS8/AB/R,WT/DS10/AB/R, WT/DS11/AB/R).

These are some of the reasons why some degree of scepticism may be warranted when confronted by claims about how sovereignty is suddenly being undermined by an RTA.

Examples of rules-based trade

There are many useful insights to be gained from the experience of the WTO, the European Union (EU) and other RTAs with regard to the implementation of their legal regimes. Space and time do not allow a more comprehensive discussion here of these organisations and the abundant literature about them. Examples such as the North American Free Trade Agreement (NAFTA), the Mercado Común del Sur (MERCOSUR, the Southern Common Market) and RTAs in Asia cannot be examined here. The objective with the present article is more modest: to contribute to the debate by discussing the record of SADC's implementation of its legal instruments on trade.

There are also several other African regional economic communities which can be studied, but they often encounter the same problems faced by SADC – particularly with respect to the implementation of legal instruments and the enforcement of trade rules. Comparative analyses of the case law of other regional community courts in Africa¹⁴ are instructive as they explain many generic legal issues and challenges faced by African regional judicial bodies.¹⁵ All regional trade and integration arrangements have to deal with the powers of regional institutions, the effect of their decisions, and dispute resolution. The same basic logic applies to all of them. In Africa these challenges are more acute.

While this author does not argue that African trade arrangements should copy the EU,¹⁶ it has to be recognised that the EU is the most advanced form of regional integration. One of its strengths is that it is clearly a rules-based regime. In the famous *Van Gend & Loos* decision,¹⁷ the European Court of Justice had to interpret the effects of a particular provision in the European Community (EC) Treaty within the territory of the member states, and whether the nationals of those states could lay claim to individual rights which national courts had to protect. The technical issue was whether they could challenge, in domestic courts, a national tariff increase on the ground that it violated

14 The Court of Justice of the Economic Community of West African States, the East African Court of Justice, and the Court of Justice of the Common Market for Eastern and Southern Africa.

15 For more on these questions and related topics, see Opong, RF. [Forthcoming]. "Legal aspects of economic integration in Africa".

16 The EU was born out of specific political conditions after World War II, and has adopted a unique formula regarding the path of peaceful integration and the powers of its supranational institutions.

17 Case 26/62, 1963, ECR 1.

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Article 12 of the EC Treaty. The Court said the following as regards what was then the European Economic Community (EEC) Treaty:¹⁸

The objective of the EEC Treaty, which is to establish a **Common Market**, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states ... This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed by sovereign rights, the exercise of which affects member states and also their citizens. ...

In addition the task assigned to the Court of Justice ... to ensure uniform interpretation of the Treaty by national courts and tribunals, confirms that the states have acknowledged that Community Law has an authority which can be evoked by their nationals before those courts and tribunals. The conclusion to be drawn from this is that the Community constitutes a **new legal order** of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community. [Emphases added]

This judgment signifies the existence of a special legal order brought about by the then EEC Treaty. This legal order is rules-based and enforceable within and between the member states, i.e. on the national and supranational levels. On the interstate level, this function is performed by the European Court of Justice, a Community institution. The Treaty may, in applicable instances, also be invoked by individuals. The rationale for this state of affairs is found in the very nature of the legal arrangement which the members decided to establish and which they have refined and expanded over time. For the EU, the European Court of Justice performs a typical adjudicative function and its jurisprudence has become an integrative force within the Community.¹⁹

When the member states of RTAs are WTO members as well, as most of them are, they have to deal with one particular aspect of the rules-based trade context: complying with the multilateral requirements for RTAs. For the

18 (ibid.).

19 As the process of integration deepened over time, the EU's legal framework also changed and evolved to higher levels. On 1 December 2009, the Treaty of Lisbon entered into force. It amended the current EU and EC Treaties, without replacing them. It provides the EU with the legal framework and tools it needs to meet future challenges and to respond to citizens' demands.

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purpose of the present discussion, the WTO serves as a useful yardstick since its multilateral trade regime displays unique legal and institutional features. In comparing the old GATT and the new WTO, commentators have drawn attention to the latter's 'rules-based' nature. *Rules-based* became the buzzword for encapsulating the essential difference between the two regimes and for describing the basic features of the WTO system. It is worthwhile reminding ourselves of the gist of multilateral rules-based trade, and how the concept has become a global measurement for conducting trade across borders.

Compared with the WTO, GATT had a weak institutional and legal basis. GATT was not an international organisation in the true sense.²⁰ Its system of rights and obligations for trade in goods was set out in a number of legal texts negotiated in 1947. However, diplomacy and power relationships largely determined how disputes got settled. The outcome of the Uruguay Round changed this, and brought about fundamental change. New multilateral agreements were concluded to include trade in services as well as the trade-related aspects of intellectual property rights.

The most dramatic change occurred with the adoption of the Understanding on Rules and Procedures Governing the Settlement of Disputes. This amounted to a completely new and updated dispute settlement system. The old GATT did not provide for a proper adjudicative dispute settlement system. The situation worsened after 1979 when a number of limited-membership agreements on non-tariff measures – the so-called *codes* that emerged after the Tokyo Round negotiations of 1973–1979²¹ – were adopted, with their own dispute settlement procedures. All of this changed under the WTO's Dispute Settlement Understanding (DSU). It provides for a single set of rules covering all disputes which may arise under any of the WTO agreements. These agreements constitute a 'single undertaking', and all members are bound by their provisions.²² An appeals procedure has been added, as has the possibility of compensation for injury in one sector by taking action in another sector. Unilateral action to settle disputes is banned.

In the words of the DSU, the new dispute settlement arrangement "is a central element in providing security and predictability to the multilateral trading system."²³ What we now have is a system that prohibits unilateral acts by member countries to redress what they see as a violation of obligations, or a nullification or impairment of benefits, under any of the WTO agreements. The new arrangement also has a comprehensive set of institutions to oversee

20 The International Trade Organization (Havana) Charter was never adopted.

21 Croome, John. 1999. *Guide to the Uruguay Round Agreements*. The Hague: Kluwer Law International, p 2.

22 The only exception constitutes the WTO's plurilateral agreements.

23 Article 3.2, DSU.

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the implementation of dispute settlement. The Dispute Settlement Body (DSB) is the WTO General Council, functioning for this purpose under a different name. The DSB has full authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of the implementation of rulings and recommendations, and authorise suspension of concessions and obligations.²⁴

Another important – and, in the view of many, most significant – difference between the GATT and WTO dispute settlement rules is the change introduced into the decision-making procedures. One commentator put it as follows:²⁵

Under the GATT, key decisions depended on consensus agreement to move ahead. This meant that if a party to a dispute was unwilling to have a panel established, or objected to its membership or terms of reference, or did not accept the panel's conclusions, it could refuse its support and thereby block the achievement of consensus and progress. Crucially, the consensus requirement has been turned around by the WTO rules, and progress cannot be blocked unless there is consensus to do so. Thus[,] if a panel has been requested, the DSB must establish it at latest at the meeting following that at which the request was first on the agenda, “unless the DSB decides by consensus not to establish a panel.”²⁶ Such consensus is improbable, since the requesting country is unlikely to change its views unless the dispute has been settled ... A panel report shall be approved by the DSB unless appealed or the DSB decides by consensus not to adopt it. In the case of an appeal, the Appellate Body's report must again be adopted by the DSB unless there is consensus agreement in the DSB not to do so. These provisions effectively removed the opportunities that existed under the GATT procedures for blocking the multilateral dispute settlement process. Combined with the system of deadlines introduced to govern how the dispute is handled under the WTO, the new consensus rule should ensure that the whole dispute settlement procedure moves forward in the future more rapidly and automatically than in the past.

John Jackson, who has studied the WTO and GATT over many years, has observed that the new WTO institutional framework is one with profound implications:²⁷

It embraces the so-called single-package idea, which encourages every nation to accept the entire package. This is in contrast to results under prior rounds, such as the Tokyo Round, where nations could pick and choose among the

24 Article 2.1, DSU.

25 Croome (1999:23).

26 Article 6.1, DSU.

27 Jackson, John H. 1998. “Designing and implementing effective dispute settlement procedures: WTO dispute settlement – Appraisal and prospects”. In Krueger, Anne O (Ed.). *The WTO as an international organization*. Chicago: University of Chicago Press, p 162.

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series of protocol agreements (a process called “GATT a là carte”) ... The key attribute of the new procedures ... is ‘automaticity’. No longer will it be feasible for a nation to block the results of a dispute settlement procedure.

Jackson has called the new WTO arrangement a “rule-orientated” system. This is –²⁸

... a system that gives guidance in a way of predictable and generally stable rules to millions of entrepreneurs around the world. Such guidance is very necessary for investment decisions, market opening decisions, technological decisions, and so forth. In economists’ terms, this is a system that will reduce the so-called risk premium for some of those decisions.

Dispute settlement in the WTO also entails a unified procedure. As the same author notes, –²⁹

[t]he previous system was fragmented, with eight or ten different dispute settlement processes. This change has very great implications, particularly for enhancing public understanding, including high government officials’ understanding of the system.

How does the SADC regime rate as a rules-based system?

The following should be investigated in order to determine how SADC rates as a rules-based arrangement:

- The SADC legal instruments
- Member states’ practice as regards the implementation of SADC legal instruments
- Domestic implementation and enforcement of SADC legal instruments, and
- Developments around the SADC Tribunal.

The SADC Treaty provides for an international organisation with legal personality and the “capacity and power to enter into contract, acquire, own or dispose of immovable property and to sue and be sued”.³⁰ This provision does not empower SADC to enter into international agreements on behalf of its member states.

The Preamble to the Treaty says the members are aware that “the principles of international law [govern] relations between states”. Under the “General

28 (ibid.:163).

29 (ibid.:164).

30 Article 3, Consolidated Text of the Treaty of the Southern African Development Community as Amended (hereafter *the Treaty*).

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Undertakings” listed in Article 6, it is stated that member states “shall take all steps necessary to ensure the uniform application of this Treaty”³¹ as well as “all necessary steps to accord this Treaty the force of national law”.³² The latter has far-reaching implications for bolstering a rules-based regime. The literal meaning of Article 6(5) is that the Treaty needs to be given effect within the member states – which will require legislation. This means that legal and natural persons should then be able to invoke the Treaty in domestic courts. This is not happening because members have not respected these provisions. How can this state of affairs be explained?

Part of the operational difficulty with SADC is that compliance with international obligations is not being properly monitored and no penalties exist for non-compliance. The Secretariat should perhaps adopt and implement a strategy to give effect to another obligation in Article 6, i.e. that member states “shall co-operate with and assist institutions of SADC in the performance of their duties”. When doing so, the Secretariat may recall a specific duty of each member, namely that they –³³

... shall respect the international character and responsibilities of SADC, the Executive Secretary and other staff of SADC, and shall not seek to influence them in the discharge of their functions.

Furthermore, these officials and the members of the Tribunal –³⁴

... shall not seek or receive instructions from any Member State, or from any authority external to SADC. They shall refrain from any action incompatible with their positions as international staff responsible only to SADC.

The Treaty does provide for sanctions against members that “persistently fail, without good reason, to fulfil obligations assumed under this Treaty”, or when they “implement policies which undermine the principles and objectives of SADC”.³⁵ The Zimbabwe saga and that country’s failure to comply with the SADC Tribunal’s rulings on its human rights violations have revealed the weakness in this arrangement. The Summit was not prepared to act against Zimbabwe; instead, it decided to appoint a consultant to investigate the jurisdiction and terms of reference of the Tribunal. In the meantime, until the results are known, the functioning of the Tribunal has been suspended and the terms of the Judges (Members) have not been renewed.³⁶

31 Article 6(4), Treaty.

32 Article 6(5), Treaty.

33 Article 17(1), Treaty. .

34 Article 17(2), Treaty.

35 Article 33(1), Treaty.

36 These decisions were taken at the Summit of 16–17 August 2010, held in Windhoek. The relevant part of the Summit decision reads as follows: “A study shall be undertaken and completed within six months of the Summit meeting of August 2010,

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However, there is no political will to enforce the provisions on sanctions against members who violate their obligations under the Treaty. The Summit consists of the Heads of State or Government, and is SADC's supreme policymaking institution. However, unless provided otherwise in the Treaty, Summit decisions are taken by consensus,³⁷ giving the member in violation of its obligations a veto over any sanctions. This is a major flaw in the system.

Another important indication of the intention to establish a rules-based system – at least on paper – is found in the provisions of Article 16 of the Treaty, which deals with the SADC Tribunal. This Article provides 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.

Moreover, the decisions of the Tribunal are final and binding.³⁸

These basic provisions in the Treaty have been translated into a detailed Protocol on the Tribunal and Rules of Procedure Thereof. The Protocol binds all SADC member states, as Article 16(2) of the Treaty now clearly confirms.³⁹ Its jurisdiction is quite wide. Article 14 of the Protocol on the Tribunal deals with the “Basis of Jurisdiction”, and provides 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: the interpretation and application of the Treaty; 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.

Article 15 deals with “Scope of Jurisdiction”. It determines that the Tribunal has jurisdiction over disputes between member states and between natural or legal persons and member states. When natural or legal persons bring an action against a member state, local remedies first need to be exhausted, unless such parties are unable to proceed under the domestic jurisdiction. Where a dispute is referred to the Tribunal by any party, the consent of other parties to the dispute is not required.

to review the role and responsibilities of the Tribunal. The Committee of Ministers of Justice/Attorneys General shall involve Members of the SADC Tribunal in the study; and the outcome of the study shall be presented by the Committee of Ministers of Justice/Attorneys General at an Extraordinary Summit”. The specific terms of reference for this study were subsequently formulated by the Secretariat and also included indications to make proposals on how to strengthen the Tribunal.

37 Article 10, Treaty.

38 Article 16(5), Treaty.

39 Agreements to amend this Protocol were adopted in 2002, 2007 and 2008. See also Article 15(1) of this Protocol.

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Why has this progressive language not resulted in more impressive outcomes? On paper, these are strong indications of an intention to establish a rules-based system. About 16 matters have been brought before the Tribunal since it started to function in 2005. However, no trade disputes have been heard: all cases dealt with either human rights violations (decided in terms of Articles 4(c) and 6 of the Treaty) or staff issues.⁴⁰ Why have there not been any trade disputes?

Part of the explanation is that the texts of certain important legal instruments of SADC are not up-to-date. This applies in particular to Annex VI to the Trade Protocol, which provides for a Panel procedure for the settlement of trade disputes. It is based on the WTO dispute settlement example. The rules with respect to several aspects of this procedure are outstanding. This lacuna applies to both the Protocol on Trade in Goods as well as the proposed Protocol on Trade in Services. It means that trade disputes, should they be brought, cannot be settled through the Panel procedure of Annex VI.

It is striking that practical aspects of regional integration, i.e. matters such as technical barriers to trade, non-tariff barriers, unfair trade practices, standards, transit, tariff classification or rules of origin, have not yet generated any disputes, whether by governments or other parties. Why is this so? It seems that both political and practical factors are part of the answer. There is simply not sufficient awareness or the factual conditions are lacking to support this type of regional integration reality. It is almost as if the legal arrangements are not perceived to constitute binding and enforceable law which can be implemented before national and regional courts. Most SADC members have no domestic legal arrangements on trade remedies, for example.⁴¹ Another important reason must be that the SADC Treaty – and, therefore, SADC law – has not been made part of the law of the land in member states, as Article 6 of the Treaty requires.⁴² Another factor could be that trade disputes are perceived as interstate disputes, although there have not yet been any efforts by private parties to test this assumption. Another factor has to do with history and diplomatic tradition: African governments do not litigate against each other on trade issues.

The exact nature of the relationship between the Tribunal and national courts, the effect of SADC law within the member states, and the enforcement of rulings of the Tribunal are not clear. SADC law and practice cannot mature unless these matters are clarified. Against this background, the outcome of

40 This is provided for by Article 19 of the Protocol on the Tribunal.

41 South Africa is an exception.

42 This writer has not studied the national legal systems of the 15 SADC member states in sufficient detail to be able to assess the extent of formal incorporation of SADC legal instruments. However, discussions with officials and enquires indicate that this is still a neglected area.

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the Summit study could play a major role. These questions form part of its mandate.

Article 32 of the Protocol on the Tribunal is of particular importance and needs to be quoted in full. It deals with the enforcement and execution of Tribunal judgments and provides as follows:

1. 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.
2. Member States and institutions of the Community shall take forthwith all measures necessary to ensure execution of decisions of the Tribunal.
3. 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.
4. Any failure by a Member State to comply with a decision of the Tribunal may be referred to the Tribunal by any party concerned.
5. If the Tribunal establishes the existence of such failure, it shall report its finding to the Summit for the latter to take appropriate action.

Here again, little progress can be reported. In order to be able to give domestic effect to rulings of the Tribunal within member states via the procedure of registration, it will be necessary to adopt the necessary national legislation. However, the Tribunal is not a typical foreign domestic court: its judgments concern public international law. There may be serious constitutional obstacles to the domestic application of its judgments as they are about the application of international agreements. International agreements are not, as a rule, directly applicable within the domestic systems of most SADC member states, especially not in those with a common law tradition where a dualist approach to the incorporation of treaties applies.

Conclusion

The previous part of this article tells a story of high ambition (on paper) and a poor record with regard to implementation. In the light of this picture, is SADC a rules-based system or not?

SADC should be treated as rules-based and a deliberate effort should be made to ensure respect for its rules. This is because its legal instruments provide for a rules-based system – which the Tribunal has confirmed in respect of certain aspects. The region is entitled to and needs the benefits and certainty of rules-based trade, more effective integration, and the application of the rule of law when it comes to cross-border commerce and investment. The fact that SADC was established in terms of certain multilateral rules and was notified under GATT Article XXIV only adds to this argument. The question marks are

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not about the formal legal dimension: it is mostly about poor implementation and insufficient monitoring of compliance.

The discussion above shows that SADC member states neglect their legal obligations, that legal instruments are incomplete, that judgments by the Tribunal are often not respected, and that there is insufficient awareness about the various SADC instruments and how to enforce them. These instruments provide for rights and remedies, but their potential is underutilised. The domestic incorporation of the SADC Treaty and Protocols is an urgent priority. If this requires technical assistance of a particular kind, then it must be planned for. This is not an impossible task.

In order to change the existing state of affairs, politicians and officials should be lobbied (to the extent that this might be useful), the business community should take up this cause, the legal profession should become more actively involved in litigation involving trade rules, and law schools should look at their curricula. More can be done to improve the monitoring of compliance through the Secretariat. And most importantly, the Tribunal should be strengthened and used more extensively. Experience elsewhere has shown that it is through the development of the jurisprudence about implementing community law that the momentum necessary for effective integration and the protection of trade-related rights is generated and maintained. These rights are also the rights of individuals and legal persons: as a rule, governments do not trade: they make the most of the rules, but it is the private sector which trades and risks their investments.

Is rules-based trade a good thing for African RTAs? When trade between states is not conducted on the basis of rules, power considerations and unpredictability will enter the equation. The certainty, legal remedies and transparency typical of rules-based arrangements will be absent. The position of private traders and investors will be negatively affected and other ills such as corruption will become more widespread. These considerations apply to developing countries too: their citizens and consumers will suffer.

Under conditions of poverty, vulnerability and the absence of rights, the negative consequences will most probably be more severe in developing nations. African RTAs need rules-based trade and effective measures to guarantee compliance.

Is the fact that SADC's members are either developing or least developed countries a relevant consideration when it comes to the choice as to how trade should be conducted?⁴³ Are governments justified in ignoring the rules

43 South Africa is in a sui generis position. It is, by way of political affiliation and policy choices, part of the developing world. It has recently been invited to join Brazil, Russia, India and China (the BRIC group). In 1995, however, it did join the WTO

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of the game because rules-based trade is too onerous and a drain on scarce resources which could otherwise have benefitted the poor and needy? Is lack of technical capacity an issue?

It cannot be denied that the multilateral trade system is about many sophisticated rules which are often difficult to comply with. They may require complex institutions in order to ensure implementation. Many poor nations do not have the domestic structures to enforce all the intellectual property rights enjoyed by companies in developed countries. The implementation of sanitary and phytosanitary (SPS) measures and technical standards, also in terms of being able to export, require laboratories and scientists.

These are the typical challenges associated with poverty and underdevelopment, but the answer does not lie in flouting basic legal norms. When corrupt officials confiscate vehicles and merchandise at a border post because they claim the importer's documentation is not in order,⁴⁴ the problem is not lack of capacity. Basic rules on trade facilitation and measures against corruption are a major part of the answer to these dilemmas. This is true of many of the implementation issues to be corrected if we want to ensure that SADC is an effective trade regime that will benefit the people in the member states. Indeed, lack of capacity was never raised as a reason why Zimbabwe refuses to respect the judgments of the SADC Tribunal.

The solution for some of these problems may be easier to implement at the regional level. Regional integration may provide several of the more immediate answers and prevent duplication. A regional standards body can serve a number of countries.⁴⁵ Donors can structure their development assistance so to assist more directly the implementation – with active local support – of such efforts.

The way forward will be a more secure one if undertaken along the road of respect for the rule of law, while pursuing the benefits of rules-based trade and regional integration.

as a developed country. Developing country status in the WTO is based on self-selection. For least-developed countries, international economic criteria have been adopted and are used in the United Nations and other international organisations. It should also be noted that SADC has been notified to the WTO under GATT Article XXIV and not the Enabling Clause, which has less strict requirements for RTAs that comprise only developing countries.

44 This was the complaint in one of the cases before the SADC Tribunal.

45 The SADC Accreditation Service structure is an example.

Replication of WTO dispute settlement processes in SADC

Clement Ng'ong'ola*

Abstract

This paper discusses the substantial reproduction of the dispute settlement mechanism of the World Trade Organisation (WTO) in Annex VI of the Protocol on Trade in the Southern African Development Community (SADC). The paper suggests that the misgivings which this reproduction initially aroused should be set aside. The WTO rules and procedures copied by SADC provide a greater assurance that decisions taken will be implemented. The paper calls for the review and strengthening of provisions – which appear to have been hastily copied into Annex VI from the WTO mechanism – relating to the adoption, implementation, and surveillance of decisions implemented in SADC. The paper also calls for the clarification of other aspects of Annex VI, such as the restriction on forum shopping, in so far as it may restrict recourse to WTO dispute settlement; the authorisation of the establishment of a panel without input from a political body such as the Committee of Ministers responsible for Trade (CMT); and the award of litigation costs even in cases where there may not have been any abuse of the process. It is also suggested that the review of the mandate of the Tribunal sanctioned by the Summit of Heads of State and Government could usefully include the bifurcated jurisdiction of the Tribunal, requiring Rules of Procedure and a distinct modus operandi for the exercise of its original jurisdiction on most matters, and Working Procedures copied from the WTO for the exercise of appellate jurisdiction on trade matters.

Introduction

Article 32 of the 1996 Protocol on Trade of the Southern African Development Community (SADC) initially provided for the resolution of disputes arising from the interpretation and application of the Protocol in a peculiar manner: consultations began the process; these were followed by referring the matter to a panel of trade experts if consultations did not produce an agreement; and, as a last resort, the matter could be referred to the SADC Tribunal.¹ This procedure resembled in outline the process described in Articles XXII

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1 Constituted and empowered in terms of Article 32 of the SADC Treaty to settle any dispute arising from the interpretation or application of the Treaty and the interpretation, application or validity of Protocols or other subsidiary instruments made under the Treaty which cannot be settled amicably.

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and XXIII of the 1947 General Agreement on Tariffs and Trade (GATT). As the Protocol on Trade was about to be implemented, Article 32 was amended to provide for dispute resolution in the manner specified in a new Annex VI, added to the Protocol in 2000.² Annex VI apparently attempted to replicate some of the reforms and changes to GATT dispute settlement reflected in the Understanding on the Rules and Procedures Governing the Settlement of Disputes (DSU) of the World Trade Organization (WTO), without the provisions on appellate review. In August 2007, both Annex VI to the Protocol on Trade³ and the Protocol on the SADC Tribunal⁴ were amended to confer upon the Tribunal jurisdiction over appeals from panel decisions.

SADC is probably the only regional integration arrangement in Africa to attempt to replicate WTO processes for the resolution of trade disputes. This paper examines the consequences of this unique approach to the resolution of trade disputes. SADC's approach is as yet untested, since no trade dispute has so far been processed in terms of either the original or the amended Annex VI. The invocation of the procedure, however, is now more likely after the launch in 2008 of the SADC Free Trade Area (FTA), a major aspect of SADC's regional integration agenda.⁵

The WTO, on the other hand, has had more than a decade of experience with the implementation of the DSU. Some would argue that this has largely been a successful experiment.⁶ Notwithstanding several shortcomings, which are now well-known in the light of the review of the DSU mandated by the 2001 Doha Ministerial Declaration,⁷ the WTO is noteworthy for its robust and fairly effective dispute settlement. What can SADC learn from the WTO's

2 Articles 5 and 9 of the Amendment Protocol on Trade in SADC, 7 August 2000.

3 Agreement Amending Annex VI to the Protocol on Trade Concerning the Settlement of Disputes between Member States of SADC, 17 August 2007.

4 Agreement Amending the Protocol on the Tribunal, 17 August 2007.

5 See statement by Dr TA Salomao, Executive Secretary of SADC, on the occasion of the launch of the SADC FTA, at the Sandton Convention Centre, Johannesburg, South Africa, on 17 August 2008; available at <http://www.sadc.int/index/save/page/206>; last accessed 14 January 2011.

6 See some of the essays in Yerxa, R & B Wilson (Eds). 2005. *Key issues in WTO dispute settlement: The first ten years*. Cambridge: Cambridge University Press; and Janow, M, V Donaldson & A Yanovich (Eds). 2008. *The WTO: Governance, dispute settlement and developing countries*. New York: Juris Publishing Inc.

7 In paragraph 30 of the WTO, Ministerial Declaration, Ministerial Conference, Doha, 9–14 November 2001, WT/MIN(01)/DEC/W/1, members agreed to conduct "negotiations on improvements and clarifications of the Dispute Settlement Understanding", to be based on "work done thus far as well as any additional proposals". For a review of participation by African member states in these negotiations, see Ng'ong'ola, C. 2008. "Africa's contributions to dispute settlement negotiations in the World Trade negotiations: An appraisal". *Southern Africa Trade Research Network (SATRN) Working Paper No. 8*.

experience, and what can the WTO itself learn from the adaptations proposed in SADC? These themes or issues will be discussed after looking at the WTO dispute settlement process and the elements adopted by SADC.

Core features of WTO dispute settlement

The DSU has 27 substantive provisions dealing with, among other issues, the scope of the system, administrative arrangements, objectives and informing principles, and the main steps of the process. The dispute settlement mechanism may be described as integrated, intergovernmental, compulsory and quasi-judicial. It is a mechanism that builds upon the principles and procedures for dispute settlement that evolved under GATT. The emphasis under GATT, as in the DSU, is on reaching a negotiated, mutually acceptable solution, as opposed to adversarial adjudication, identifying a breach, and imposing damages for loss caused by the breach. The process seeks to preserve the balance of rights and obligations that are acquired principally through negotiations, rather than to determine such rights and obligations.

An integrated, intergovernmental and compulsory process

Article 1.1 indicates that the DSU applies to disputes between WTO members arising from and relating to their rights and obligations in the so called covered agreements. Appendix 1 to the DSU identifies the covered agreements as the Marrakesh Agreement Establishing the WTO; all the obligatory, multilateral trade agreements referred to in the Annexes to the WTO Agreement; and any of the optional, plurilateral trade agreements included within the scope of the DSU by a decision of the parties thereto. It is partly because of this extensive coverage of most trade agreements that the DSU is commonly regarded as establishing an integrated dispute settlement mechanism.⁸

The delineation of the scope of the DSU in reference to the covered agreements also ensures that only WTO members – the parties to the covered agreements – are entitled to access the system directly. It is an intergovernmental dispute settlement process. Private traders and other non-governmental actors affected by rights and obligations arising from the covered agreements need to persuade host member states to initiate action under the process.

The DSU can also be described as establishing a compulsory or mandatory mechanism for WTO members. Firstly, a defending party is not required to

8 Article 1.2 and Appendix 2 of the DSU, however, provide special or additional rules and procedures to be preferred and applied to disputes arising in identified areas or sectors of WTO law. Article 1.2 further indicates that, in the event of conflict between these special rules and the general rules and procedures in the DSU, the special rules generally prevail.

consent to the processing of a complaint against it.⁹ Secondly, Article 23.1 states that members “shall have recourse to, and abide by, the rules and procedures of this Understanding” when they seek redress for violations of obligations in the covered agreements or for the “nullification or impairment” of benefits arising thereunder. Article 23.2 further asserts that “members shall not make a determination” on these issues except through recourse to the DSU. The DSU process, therefore, is the first – and probably the only – mechanism WTO members can employ to address issues in the covered agreements.

A quasi-judicial process

The channelling of disputes through member states’ governments ensures that the WTO dispute settlement process is not insulated from political influence. This is one element that leads to the characterisation of the process as *quasi-judicial*. Arrangements for the administration of the DSU described in its Article 2 reinforce this. Article 2.1 establishes a Dispute Settlement Body (DSB) and gives it authority to supervise the various stages of the process. The General Council of the WTO, composed of representatives of all the member states, convenes as appropriate to discharge the functions of the DSB.¹⁰ Thus, WTO members, through their representatives in the General Council, appear to have extraordinary powers over the disposal of disputes – unlike politicians, civil servants or legislators in most domestic legal systems governed by liberal democratic constitutions and traditions.

The ability of WTO members to influence the process and outcome of WTO dispute settlement is, however, circumscribed by some ingenious rules on decision-making. Article 2.4 of the DSU, for example, requires members in the DSB to generally follow the practice of taking decisions by consensus. A footnote to the provision indicates that the DSB is deemed to have decided by consensus if no member present at the relevant meeting formally objects to the proposed decision. This is the concept of *positive consensus*, which is also observed in the WTO General Council.¹¹ It was also a notorious feature of dispute settlement under GATT. It effectively secured for GATT members, including the parties to a dispute, the right to veto unwanted or unfavourable decisions.¹² The ‘negative’ or ‘reverse consensus’ rule is now prescribed for

9 Compare Article 36(2) of the Statute of the International Court of Justice, under which states parties may enter into a special agreement accepting the jurisdiction of the court, or declare that they recognise the jurisdiction of the court as compulsory ipso facto, without a special agreement.

10 Article IV.3, WTO Agreement. Article 2.2 of the DSU enjoins the DSB to inform other relevant WTO Councils and Committees of developments in disputes relating to covered agreements for which they are responsible.

11 Article IX.1, WTO Agreement.

12 It would appear that GATT members were initially not too eager to block or veto unwanted or unfavourable decisions. Not many panel reports were apparently blocked before 1980, but the numbers increased appreciably between 1986 and 1994. See

the taking of decisions in the DSB on matters such as the establishment of panels, adoption of panel and Appellate Body reports, and the suspension of concessions. Proposals tabled before the DSB on these issues are obliged to be accepted or adopted unless the DSB decides by consensus not to do so.¹³ It is almost impossible to muster consensus in the DSB to disavow a proposed decision because there is always at least one member in favour of the proposal, i.e. the party that sponsors the proposal, or that is favoured by the decision to be adopted. Decisions to be taken applying the negative or reverse consensus approach in the DSB are now, invariably, made automatically.

Adherence to GATT 1947 principles

One principle informing dispute settlement in the WTO is “adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947”.¹⁴ These Articles essentially implored parties to attempt to resolve disputes through “private” or “inter-party” consultations, and if that did not yield a satisfactory solution, through “institutionalised processes”. In terms of Article XXIII, a complaint could be lodged and a dispute would arise if non-compliance or violation of obligations in the covered agreements was harmful to another party. Strangely, Article XXIII of GATT also suggested that a dispute could arise even if “nullification or impairment” of benefits was not due to a violation of obligations. In other words, a complaint could be lodged if such nullification or impairment arose from the application of measures not inconsistent with GATT, or from the “the existence of any other situation”.¹⁵

Wiess, F. 1989. “Dispute settlement in the GATT: The current debate”. In Butler, WE (Ed.). 1989 *The use of force in international law*. Dordrecht: Kluwer Academic Publishers, p 235; Castel, JG. 1989. “The Uruguay round and improvements to the GATT dispute settlement rules and procedures”. *International and Comparative Law Quarterly*, 38(4):839–840; World Trade Organization, 1995. *GATT Analytical Index: Guide to GATT law and practice, Vol. 2* (Updated Sixth Edition). Geneva: WTO, Table V, pp 771–787; and Hudec, R. 1993. *Enforcing international trade law: The evolution of the modern GATT legal system*. New Hampshire: Butterworth Legal Publishers, especially Chapter 10, pp 199–270.

13 See Articles 6.1, 16.4, 17.14, and 22.6 of the DSU.

14 Article 3.1 begins with an affirmation that members are obliged to adhere to such principles.

15 It was apparently necessary to provide for non-violation complaints in order to dissuade contracting parties from attempting to negate the benefits of negotiated tariff concessions through non-tariff barriers and other policy measures that were not anticipated and regulated by GATT; India – Patent Protection for Pharmaceutical and Agricultural Chemical Production, WT/DS50/AB/R, 19 December 1997, AB-1997-5, Appellate Body Report, paragraphs 38, 39 and 41. Nonetheless, non-violation complaints were rare under GATT and obviously difficult to prove. Violation of an obligation, on the other hand, led to an assumption of nullification or impairment of benefits, and violation complaints could, therefore, be more readily sustained. Article 3.8 of the DSU retains this presumption of nullification and impairment of

Application of rules of public international law

In addition to the application of GATT principles and procedures, Article 3.2 of the DSU suggests that uncertain provisions in the covered agreements should be clarified in dispute settlement “in accordance with customary rules of interpretation of public international law”. It is now standard practice in WTO dispute settlement to apply Articles 31 and 32 of the Vienna Convention on the Law of Treaties of 1969 as codifications of the customary international law rules on this issue. The general rule of interpretation in Article 31(1) of the Convention requires that a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. The application of this rule has added a touch of legal sophistry to WTO dispute settlement, with which some of the political overseers of the process in the DSB may not be comfortable. There have been complaints in some quarters of surprising jurisprudence in panel and Appellate Body reports, which some members would seek to correct if the negative or reverse consensus principle were not applicable.

Additional informing principles and core objectives

Article 3 of the DSU, the general provisions clause, lists other core objectives and informing principles of WTO dispute settlement in addition to those outlined above. Paragraph 2 of the Article proclaims that the system “is a central element in providing security and predictability to the multilateral trading system”. By clarifying the covered agreements, dispute settlement also seeks to preserve the rights and obligations of members reflected in those agreements. It is not the objective of dispute settlement to vary the rights and obligations in the covered agreements. Outcomes of WTO dispute settlement, therefore, always need to be consistent with the rights and obligations in the covered agreements. Paragraph 3 of Article 3 declares that the prompt settlement of “violation complaints” is essential to the effective functioning of the WTO and the maintenance of “a proper balance between the rights and obligations of members”. Paragraph 4 states that recommendations or rulings of the DSB will seek to achieve a satisfactory settlement of the matter in accordance with the rights and obligations conferred by the DSU and the covered agreements. Paragraph 5, referring to methods of dispute settlement, reiterates that “all solutions to matters formally raised” are obliged to be consistent with the covered agreements and “shall not nullify or impair benefits accruing to any member under those agreements”, nor impede the attainment of the objectives of those agreements. Paragraph 9 declares that provisions of the DSU “are without prejudice to the rights of members to seek

benefits from non-compliance with obligations, while Article 26 provides additional rules for processing non-violation complaints.

authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement”.¹⁶

The message of these paragraphs is that members’ rights and obligations in the WTO are determined in negotiations, not in litigation, and negotiators have the final say in the interpretation of those rights. Dispute settlement organs in the WTO do not have a final or an exclusive mandate in the interpretation of WTO legal texts. This is another unique feature of WTO dispute settlement that might be surprising to legal professionals familiar with the constitutional separation of powers in national legal systems.

Paragraphs 7 and 10 of Article 3 provide that another core objective of WTO dispute settlement is to secure a “positive solution” to a dispute, consistent with the covered agreements, and preferably a “mutually acceptable solution”. If this cannot be achieved, the entire process in the WTO will be guided by one desired outcome: the withdrawal of measures found to be inconsistent with the covered agreements. Remedies such as compensation and withdrawal or suspension of concessions may be awarded in WTO dispute settlement, but these are temporary, and designed only to facilitate a positive solution to the dispute.

The main stages of WTO dispute settlement

At least three main phases of dispute settlement are discernible from the DSU. The first involves the search for a negotiated solution, through consultations or recourse to good offices, conciliation or mediation. The second phase involves adjudication or a formal determination of the violation of obligations or the nullification or impairment of benefits. This second phase is conducted by a panel in the first instance, and by an Appellate Body on appeal. The third phase is concerned with the implementation of the adjudicating body’s decision. This involves adoption of the decision, implementation by the member concerned, surveillance of the implementation by the DSB, and the imposition of temporary remedies for non-implementation. Implementation may also require recourse to various modes of dispute settlement. There are time frames for all the main stages of WTO dispute settlement, but the setting thereof, and the manner in which they are applied, seem to acknowledge that settling disputes or enforcing decisions in this area of international economic relations is inherently challenging.

16 This provision echoes Article IX.2 of the WTO Agreement, which gives the Ministerial Conference and the General Council “exclusive authority” to adopt interpretations of the WTO Agreement and the multilateral trade agreements, through decisions passed by a three-quarters majority of the members.

Consultations

The WTO dispute settlement process starts with the lodging of a formal request for consultations. There is an obligation to attempt a consultation before any other action is pursued under the process.¹⁷ A request for consultations is to be in writing and should give the reasons for such request, “including identification of the measures at issue and an indication of the legal basis for the complaint”.¹⁸ This serves to inform the member concerned as well as to distil the legal issues and the substance of subsequent proceedings, should there be no settlement of the matter.¹⁹

Article 4.3 stipulates that a request for consultations should, unless otherwise mutually agreed, elicit a response within 10 days after its receipt, and consultations should commence within a period of not more than 30 days. A complaining party may proceed to request the establishment of a panel to adjudicate the dispute if there is no reply or if consultations do not commence within these time frames. According to Article 4.7, a complaining party may also request the establishment of a panel if consultations fail to settle the dispute within 60 days after the receipt of the original request. The request for a panel may also be lodged within the 60-day period if both parties agree that consultations have failed.²⁰

Consultations in WTO dispute settlement are a private matter between the parties concerned, and are confidential. The DSB and other organs of the WTO responsible for the administration of the DSU are not involved, beyond the processing of notifications required at the commencement and conclusion of the process. The DSU does not provide for supervision or monitoring of the actual conduct of the consultations, or for assessment of the mutually satisfactory solutions reached. These are obvious shortcomings at this initial stage of WTO dispute settlement, and those seeking to replicate the process in other settings should be careful to avoid them.

Another controversial aspect of consultations is the restriction on other member states from participating in the process. Article 4.11 provides that a member interested in consultations being undertaken in pursuance of Article XXII.1 of GATT 1994, or corresponding provisions in other covered agreements, may be joined in the consultations if it has a “substantial trade interest” in the

17 Articles 4.2, 4.5, and 4.7. Article 4.2 is comparable to Article XXII of GATT 1947.

18 Article 4.4.

19 India – Patent Protection for Pharmaceutical and Agricultural Chemical Production, Appellate Body Report, WT/DS50/AB/R, paragraph 94.

20 In cases of urgency, including those involving perishable goods, Article 4.8 stipulates that consultations are to commence within a period of 10 days after the receipt of a request, and a request for a panel may be lodged if the consultations fail to produce a solution within a period of 20 days.

matter, and if the member state to which the request for consultations was addressed agrees that the claim of substantial interest is well-founded. In this way, the responding member state can exclude third parties. The complaining member state can also exclude third parties by requesting consultations, not in terms of Article XXII.1 of GATT 1994, but in terms of Article XXIII. A third party prevented from joining ongoing consultations is nevertheless free to request its own consultations as the main or complaining party. Before bringing a case, each member state is expected to exercise its own judgment, in good faith, as to whether it would be fruitful to do so.²¹

Good offices, conciliation and mediation

Resort to good offices, conciliation and mediation by the Director-General of the WTO in his/her ex officio capacity is referred to in at least two provisions as an alternative method of settling disputes, prior to referring the matter to a panel. Firstly, Article 3.12 provides that a developing country seeking to complain against a measure or measures taken by a developed country may invoke the procedure described in the GATT Decision of 5 April 1966 (BISD14S/18). This procedure suggested recourse to the good offices of the Director-General to find a solution, and an expedited panel process if the Director-General was unsuccessful. The second provision on good offices, conciliation and mediation is Article 5,²² which describes the process as voluntary, and as one which can be requested or terminated at any time by any party to a dispute. It is also a confidential process, and without prejudice to the rights of either party in further proceedings under the DSU.

It appears that, under GATT and in the WTO, very little use has been made of good offices, mediation or conciliation by the Director-General.²³ The essence of the process is that the Director-General can only facilitate the search for a mutually satisfactory solution to be agreed upon by the parties. It may well be that, in most trade disputes, the DSU is invoked by parties seeking a more definitive, formal and binding resolution of the matter after exhausting the

21 Article 3.7.

22 Paragraphs 1 and 2 of Article 5 refer to the process as “good offices, conciliation and mediation”, but paragraphs 3, 4, 5 and 6 refer to the process as “good offices, conciliation or mediation”.

23 Article 5 was invoked, apparently for the first time, in a request for mediation by the Philippines, Thailand and the European Commission (EC) “to examine the extent to which the legitimate interests of the Philippines and Thailand were being unduly impaired as a result of the EC’s preferential tariff treatment of canned tuna originating in ACP States”; see WTO, General Council, WT/GC/66, 16 October 2002, and WT/GC/66/Add.1, 16 October 2002. The mediation report by Deputy Director-General Rufus Yerxa was treated as confidential.

non-formal, diplomatic avenues open to them.²⁴ Good offices, mediation and conciliation may serve only to delay the definitive resolution of the matter by a panel.

The panel stage

Aspects of the panel stage of WTO dispute settlement to be noted are the time within which a panel is required to be established, its terms of reference, its composition, the selection of panellists, third party participation, and the conducting of proceedings.

A panel may be established at the first meeting at which a written request is presented to the DSB, if consensus can be achieved in the DSB. If there is no consensus at the first meeting, a panel is nevertheless obliged to be established at the second meeting at which the request appears on the agenda, applying the reverse consensus principle.²⁵

Apart from the request indicating whether consultations were attempted, Article 6.2 stipulates that the request needs to identify the specific measures at issue and provide a brief summary of the legal basis of the complaint. The measures at issue, and the legal basis for the complaint, together referred to as “the matter”,²⁶ are to be sufficiently clear to enable the responding party to prepare its defence. This will also delineate the panel’s mandate. The standard terms of reference incorporated in most requests require the panel “to examine the matter referred to the DSB” in the light of relevant provisions of a covered agreement or agreements cited in the request, and “to make such findings as will assist the DSB in making the recommendations or in giving the rulings” provided for in the cited agreements.²⁷

The composition of a panel is a responsibility shared by the parties to the dispute and the WTO Secretariat. A panel normally comprises three panellists, but the parties can agree to a panel of five within ten days from its establishment.²⁸

24 See Palmeter, D & PC Mavroidis. 2004. *Dispute settlement in the World Trade Organisation: Practice and procedure* (Second Edition). Cambridge: Cambridge University Press, p 86.

25 Article 6.1 of the DSU provides this, using emphatic and imperative language. It says in part that “a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB’s agenda”. If there is no DSB meeting scheduled at which the request may be considered, one shall be convened for that purpose within 15 days of the request, provided that at least 10 days’ advance notice of the meeting is given.

26 Guatemala – Anti-dumping Investigation Regarding Portland Cement from Mexico, WT/DS60/AB/R, Appellate Body Report, 2 November 1998, paragraph 72. The legal basis for the complaint is also referred to as “the claims”.

27 Article 7.1.

28 Article 8.5.

Regulation of WTO dispute settlement processes in SADC

The WTO Secretariat proposes the names of the panellists, which the parties may reject only for “compelling reasons”.²⁹ If there is no agreement on the panellists within 20 days after the date of the panel’s establishment, the Director-General, acting in consultation with the Chairpersons of the DSB and the relevant Council or Committee, may determine the composition if so requested by one of the parties.³⁰ Panellists may be selected from an indicative list maintained by the Secretariat and periodically updated with inputs from members,³¹ or they may be identified in other ways.

It is in keeping with the quasi-judicial nature of WTO dispute settlement that legal or judicial expertise is not the sole or preferred qualification for appointment as a panellist. As under the GATT system, the expectation may have been that panellists would largely be drawn from diplomats and others serving in member states’ delegations in Geneva.³² It is necessary to clarify in this regard that panellists are to serve in their individual capacities and not as government representatives, nor as representatives of any organisation, and members cannot instruct them or seek to influence them with regard to matters before a panel.³³ Unless the parties otherwise agree, citizens of members party to the dispute are not eligible for selection as panellists in cases in which their governments are involved.³⁴ If, however, a developing country is involved in a dispute with a developed country, the developing country can request that at least one of the panellists is to be from a member state which is a developing country.³⁵

As at the consultation stage, a third country with a substantial interest in a matter before a panel is entitled to request to participate in the proceedings.³⁶ The third country, however, need only have a “substantial interest” in the matter, not a “substantial trade interest”.³⁷ Nonetheless, a third party has limited rights of participation in panel proceedings. It has the right to be heard, to make written submissions, and to receive submissions of the other parties to the dispute, but only in reference to the first meeting of the panel.³⁸ A third party wishing to participate fully in the proceedings should consider initiating dispute settlement proceedings as a main party. As far as possible, the same panel may be entrusted with the disposal of disputes involving the

29 Article 8.6.
30 Article 8.7.
31 Article 8.4.
32 Article 8.8.
33 Article 8.9.
34 Article 8.3.
35 Article 8.10.
36 Article 10.
37 (ibid.).
38 Article 10.3.

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consideration of the same matter, and the panel is required to organise the proceedings appropriately.³⁹

Article 12.1 of the DSU provides for the conduct of panel proceedings in accordance with the Working Procedures in Appendix 3 of the DSU. The procedures emphasise timeliness, transparency and confidentiality, and flexibility in the application of technical rules. As soon as practicable and wherever possible, within one week after the composition and terms of reference for the panel have been agreed upon, the panellists and the parties are required to establish a timetable for the disposal of the dispute. The work timetable for the panel starts with the circulation of initial written submissions by the parties. This is followed by the first substantive meeting of the panel, at which the complaining and responding parties will make their presentations. Third parties may also make their presentations at this meeting. The third step is the receipt and circulation of written rebuttals from the parties. The fourth step is the second substantive meeting with the parties, but with no third party involvement. The fifth step is the interim review stage. The panel will first issue to the parties for comments the “descriptive” portions of its interim report, which summarise the facts and the parties’ arguments. After consideration of any comments on the descriptive portions, the panel then issues the full interim report, including findings and recommendations, for review by the parties within a set time period. The sixth step is the production and circulation of the final report to the parties, if changes were required to the full interim report. The last step is the circulation of the final report to WTO members.

In normal cases not regarded as urgent, a panel has a period of six to nine months from the date of its composition to issue the final report to the parties.⁴⁰ The DSB needs to be informed of any likelihood of delay, the reasons for such delay, and an estimate of the additional period required. Time extensions are now not unusual in the WTO, as many cases are complex and involve multiple complainants and third parties.

In the interests of transparency, the Working Procedures require that presentations, rebuttals and statements to the panel are to be made in the presence of the parties; and written submissions, responses to questions and panel reports are to be made available to the parties.⁴¹ At the same time, panels are required to meet in closed session. The parties are present

39 Article 9.

40 Article 12.8 in fact states that, as a general rule, the period from the composition of the panel to the issue of the report “shall not exceed six months”. The period is three months in cases of urgency, including those cases relating to perishable goods. Article 12.9, somewhat unrealistically, states that “[in] no case should the period ... exceed nine months”.

41 Paragraph 10, Working Procedures, Appendix 3.

only when invited.⁴² In addition, the deliberations and documents circulated during the process are confidential.⁴³ Panel reports are to be drafted without the parties, and opinions expressed by individual panellists in panel reports are obliged to be anonymous. However, a party cannot be precluded from disclosing statements of its own positions to the public, and a party that has provided a confidential submission may be requested to provide a non-confidential summary of information contained in its submission.⁴⁴

Appellate review

WTO dispute settlement appears to be less formal, judicial or legalistic in the earlier stages of the process thus far described. On the other hand, the process appears to be more judicial or legalistic at the appeal stage. For purposes of this review, the notable elements of the appeal stage of the process include the composition and mandate of the Appellate Body – the forum responsible for hearing appeals – and the manner in which appeals are to be conducted. These aspects are described in Article 17 of the DSU and in the Working Procedures for Appellate Review, as revised from time to time.⁴⁵

The Appellate Body was established by the DSB in 1995,⁴⁶ as required by Article 17.1, specifically for the purpose of hearing “appeals from panel cases”. It is a standing body, consisting of a total of seven persons, three of whom, called a *division*, are selected to serve in any one case in accordance with internal rules which do not require input from the parties or the WTO Director-General. In accordance with Article 17.2, appointments to the Body are for a term of four years, and are subject to reappointment only once. Article 17.3 indicates that appointees need to be “persons of recognised authority, with demonstrable expertise in law, international trade, and the subject matter of the covered agreements generally”. They are to be “unaffiliated with any government”, but the total composition of the Body is obliged to be “broadly representative of membership in the WTO”. Appointees are also required to observe ethical rules, and to avoid cases creating any conflict of interests, but nowhere does it say that citizens of members are not permitted to serve in appeals involving their countries. These provisions have ensured that the WTO has a professional, independent, and generally highly regarded dispute settlement organ at the appeal stage.

42 Paragraph 2, Appendix 3.

43 Article 14, DSU.

44 Paragraph 3, Appendix 3.

45 For a more recent version of the Working Procedures, see WTO, Appellate Body Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010.

46 See minutes of the DSB meeting held on 10 February 1995, Document WT/DSB/M/1.

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In terms of Article 17.6 of the DSU, an appeal to the Appellate Body “shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel”. The mandate of the Appellate Body is to address such legal issues, and “uphold, modify or reverse the legal findings and conclusions of the panel” as appropriate. The Appellate Body is not mandated to revisit the factual findings in a panel report. The delineation of the Appellate Body’s mandate in this manner has given rise to at least two sets of problems. Firstly, distinguishing matters of fact from legal issues can be exceedingly difficult in some cases.⁴⁷ In such cases, the Appellate Body cannot be precluded from acting as an assessor of some factual matters related to the legal issues. Secondly, the Appellate Body appears to have no mandate under the DSU to refer a case back to a panel for a clearer assessment of the facts of a case to which the law must be applied. Thus, the Appellate Body has found itself assessing or trying some of the facts of a dispute in the process of upholding, modifying or reversing aspects of a panel’s decision. This is what has been termed “completing the analysis” that should have been done by the panel.⁴⁸

Appeals are obliged to be processed timeously, in a transparent manner, and are to adhere to certain strictures on confidentiality. A notice of intention to appeal needs to be filed and circulated within 60 days after the final panel report has been circulated. Within 25 days after the filing of the notice, all submissions by the parties, including third parties, should have been made. As a general rule, there should be an oral hearing within 30 days of the filing of the notice of appeal, and within a period of 60 to 90 days, the Appellate Body should have circulated its report.

The Working Procedures for Appellate Review provide for a meeting of all Appellate Body members for an exchange of views before the division responsible for the appeal finalises its report.⁴⁹ This engenders ‘collegiality’ in the Appellate Body, which minimises the possibility of dissenting opinions and of inconsistent decisions being issued by the same Appellate Body. As part of collegiality, all Appellate Body members are entitled to receive all documents filed in an appeal, and are expected to be available to meet regularly in Geneva to discuss and review aspects of WTO dispute settlement.

Some of the key elements of transparency in appellate review proceedings are that opinions expressed in the Appellate Body Report by individual

47 See EC – Measures concerning Meat and Meat Products (Hormones), WT/DS26/AB/R and WT/DS48/AB/R, Appellate Body Report, 16 January 1998, paragraphs 132 and 133.

48 See, for example, United States (US) – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, Appellate Body Report, 29 April 1996; and Canada – Certain Measures Concerning Periodicals, WT/DS31/AB/R, Appellate Body Report, 30 June 1997.

49 Rule 4, Working Procedures for Appellate Review 2003.

members are anonymous; no ex parte communications with the Appellate Body on matters under consideration are permitted; reports are to be drafted without the parties being present; no party to the dispute is to be given an audience or to be contacted in the absence of the other parties; and, except where otherwise indicated, written communications and documents should be copied to all the parties.⁵⁰ As regards confidentiality, the proceedings and submissions to the Appellate Body are to be treated as confidential, but a party cannot be precluded from disclosing statements of its own position to the public. A party may also be requested to provide a non-confidential summary of the information contained in its written submissions that can be disclosed to the public.⁵¹

Adoption of panel and Appellate Body reports

A legal fiction is maintained in WTO dispute settlement that panels and the Appellate Body present recommendations in their reports which are converted into decisions to be unconditionally accepted by the parties upon the DSB's adoption of a report. It is provided that a panel report is required to be adopted at a DSB meeting to be scheduled within 60 days of the report's circulation, as long as members are given at least 20 days to consider and study the document.⁵² An Appellate Body report is obliged to be adopted within 30 days of its circulation. If necessary, a special meeting of the DSB may be convened for this purpose. According to Article 20, unless the parties otherwise agree, the overall time frames – from the establishment of a panel to the date the DSB considers the report – should not exceed nine months if there is no appeal, or 12 months where an appeal is heard.

All members of the WTO, including the parties to the dispute, are entitled to participate fully in the consideration of a panel or an Appellate Body report for adoption. They can indicate their objections to the report, if any, and have them recorded.⁵³ At the end of the deliberations, however, the negative consensus rule operates to ensure or guarantee adoption of the report. This is why it is legal fiction to describe a report as merely making a recommendation, and to regard the DSB as the body that resolves the dispute.

Implementation of rulings and recommendations

As indicated above, one core objective of WTO dispute settlement is securing a positive solution to the dispute which is consistent with the rights and obligations in the covered agreements. In violation complaints, such a solution

50 Articles 17.10; 17.11 and 18.1, DSU; Rule 19, Working Procedures for Appellate Review 2003.

51 Articles 17.10 and 18.2, DSU.

52 Articles 16.1 and 16.4, DSU.

53 Articles 16.2 and 16.3, DSU.

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entails withdrawing a measure or measures found to be inconsistent with rights and obligations in the covered agreements. A panel or the Appellate Body “should recommend” this solution, and “may suggest” ways in which this may be done.⁵⁴ This is likely to be a difficult and delicate matter. Bringing a measure into conformity with a covered agreement may require executive or legislative action on issues on which the sovereign competence of member states is jealously guarded, and on which the WTO should be loath to dictate. Thus, Articles 21 and 22 of the DSU describe a complex process aimed at persuading and ultimately compelling a member state to comply, and ensuring that its actions are constantly under surveillance in the DSB.

At a DSB meeting convened 30 days after the adoption of a report, the member concerned will be required to inform the DSB of its intentions as regards implementation of rulings and recommendations.⁵⁵ The expectation is immediate or prompt compliance. If it is not practicable to comply immediately, the member concerned is to be given a reasonable period of time (RPT) within which to do so. The RPT may be proposed by the member concerned and approved by the DSB, it may be agreed upon by the parties, or it may be determined through arbitration. A guideline for the arbitrator is that the period should not exceed 15 months from the date of adoption of the panel or Appellate Body report.⁵⁶

Six months after the establishment of the RPT, the issue of the implementation of recommendations and rulings is required to be placed on the DSB agenda, and has to remain on it until the issue is resolved. At least ten days prior to each DSB meeting, the member concerned is obliged to present a written status report on progress made in implementing the ruling and recommendation.⁵⁷

If there is disagreement as to whether measures taken or attempted in compliance with rulings and recommendations are consistent with the covered agreements, the matter is to be referred to dispute settlement. Although, strictly, this is a different matter, the dispute should, wherever possible, be referred to the original panel. The panel is required to report within 90 days of the referral of the matter to it. The actual phrase employed in Article 21.5 is that this type of disagreement is to be resolved “through recourse to these dispute settlement procedures”.

If the member fails to comply with rulings and recommendations within the RPT established, before the expiry of the period, the member may be requested to offer compensation.⁵⁸ Compensation is “temporary” and clearly not intended

54 Article 19.1, DSU.

55 Article 21.3, DSU.

56 Article 21.3(c), DSU.

57 Article 21.6, DSU.

58 Article 22.2, DSU.

as atonement for non-compliance or reparation for loss. It is also described in Article 22.1 as “voluntary” and, if granted, it has to be consistent with the covered agreements. It may be presumed from this that compensation will generally be in the form of trade concessions.⁵⁹

If no satisfactory compensation is agreed upon within 20 days after the expiry of the RPT, the complaining party may request authorisation from the DSB to retaliate – by suspending concessions and other obligations under the covered agreements. The request is to indicate the sector or sectors within which retaliation is sought, and the extent or level of retaliation. Article 22.3 indicates that retaliation should preferably be within the same sector as that in which there was a violation; however, if this is neither practicable nor meaningful, it may be sought in respect of another sector. If there are objections to the selection of the sector or sectors within which to retaliate, or the proposed levels of retaliation, Article 22.6 proposes reference of the matter to arbitration. The arbitration can be conducted by the original panel if its members are available, or by an arbitrator appointed by the Director-General.

Annex VI and settlement of trade disputes in SADC

Annex VI, as amended in 2007, has 22 distinct provisions covering the scope and application of the dispute resolution process, the main stages of the process, and the timelines and parties involved at each stage.

Scope and application of Annex VI

This is addressed in Article 1 of the Annex, which was supplemented by Article 1bis (Ed.’s note: Please check style guide for request to eliminate Latin phrases as far as possible in favour in their English counterparts) in August 2007. Article 1 provides that the rules and procedures in the Annex “shall apply to the settlement of disputes between member states concerning their rights and obligations under” the Protocol. Article 1bis, on forum shopping, provides that if a member state has invoked the rules and procedures of the Annex or any other applicable international dispute settlement mechanism with respect to any matter, that member is not permitted to invoke any another dispute settlement mechanism on the same matter.

59 Shaffer, G. 2003. “How to make the WTO dispute settlement system work for developing countries”. In Shaffer, G, V Musoti & A Qureshi (Eds). *Towards a development-supportive dispute settlement system in the WTO (ICTSD Resource Paper No. 5)*. Geneva: International Centre for Trade and Sustainable Development, p 37. Shaffer refers to only two cases in which compensation was paid: Japan – Taxes on Alcoholic Beverages, Mutually Acceptable Solution on Modalities for Implementation WT/DS8/19, 12 January 1998; and United States – Section 110(5) of the US Copyright Act, Recourse to Arbitration under Article 25 of the DSU WT/DS160/ARB25/1, 9 November 2001.

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An assessment of comparable provisions on the scope of the DSU above led to the characterisation of the WTO mechanism as integrated, intergovernmental and compulsory or exclusive. Articles 1 and 1bis suggest that the mechanism in Annex VI is also intergovernmental, but probably not integrated, compulsory or exclusive. It is a process available only to member states, and in respect of their rights and obligations under the Trade Protocol. Private actors who may be adversely affected by the implementation of the Protocol may not invoke the process other than through member states. The moot point is whether private, non-state actors can have direct recourse to other available SADC dispute settlement processes. Article 32 of the SADC Treaty, for example, initially conferred upon the Tribunal – the body responsible for appellate review under the Annex – jurisdiction over all disputes relating to the interpretation, application or validity of the Treaty, Protocols and other subsidiary instruments. Article 14 of the Protocol on the Tribunal confirmed this. Article 15 of the Protocol on the Tribunal also confirmed that the scope of this jurisdiction included disputes between member states, and between natural or legal persons and member states. When Article 32 of the Protocol on Trade was amended in 2000 to provide for the mechanism in Annex VI, there was no corresponding clarification in Article 32 of the Treaty, or Articles 14, 15, and 18 of the Protocol on the Tribunal that the Tribunal would cease to have original jurisdiction over the interpretation or application of the Protocol on Trade, and over disputes between natural or legal persons and member states in respect of that Protocol. In theory, therefore, Annex VI does not describe the only mechanism for resolving trade disputes. It is partly for this reason that the mechanism in Annex VI is not described as proposing an integrated dispute settlement process. SADC, in fact, has a bifurcated dispute settlement mechanism: the Tribunal has original jurisdiction over some matters and, seemingly, only appellate jurisdiction over trade matters, although Article 32 of the SADC Treaty and Articles 14 and 15 of the Protocol on the Tribunal would, on the face of it, appear to suggest otherwise.

The purported prohibition of forum shopping in Article 1bis of Annex VI is also not without ambiguity. It is implicitly acknowledged in this provision that disputes arising under the Protocol on Trade between SADC member states could conceivably be regarded as disputes falling within the jurisdiction of other dispute settlement mechanisms. All SADC member states party to the Protocol on Trade, for example, are members of the WTO; some SADC members also belong to the Common Market for Eastern and Southern African States (COMESA); while others are members of the Southern African Customs Union (SACU). A trade dispute under the SADC Protocol on Trade could, thus, equally be a WTO, COMESA or SACU dispute. Article 1bis appears to give such parties a choice as to what dispute settlement mechanism to invoke. Article 1bis further suggests that the choice of a particular mechanism is in effect irrevocable or irreversible. This is consistent with Article 24(3) of the Protocol on the Tribunal, which declares that decisions and rulings of the Tribunal “shall be final and binding”. But it is not consistent with Article 23

of the DSU, which effectively compels WTO members to invoke the DSU primarily and exclusively for purposes of dispute resolution. As long as a dispute under the Protocol on Trade in SADC could also be regarded as a dispute relating to a covered agreement in the WTO, it would be contrary to WTO law and obligations – besides being ineffective – to prevent a WTO member from invoking the DSU simply because the member had previously attempted to invoke a regional dispute settlement mechanism.

The main stages of dispute settlement in Annex VI

The similarity of the process described in Annex VI to WTO dispute settlement is most apparent in the stages of the process described in the Annex. As the main stages, Annex VI originally provided for –

- consultations
- resort to good offices
- conciliation or mediation
- reference of a dispute to a panel of trade experts
- adoption and implementation of panel recommendations, and
- imposition of remedies of compensation and suspension of concessions.

As noted in the introduction, Agreements amending Annex VI and the Protocol on the Tribunal have added appellate review of panel reports by the SADC Tribunal to the process. Before these steps of the process are outlined, Article 2, in a manner comparable to Article 3 in the DSU, describes cooperation as the underlying principle of the process.

Cooperation

Article 2 provides that SADC member states are obliged to –

- (a) at all times endeavour to agree on the interpretation and application of the Protocol
- (b) make every attempt to arrive, through cooperation, at a mutually satisfactory resolution of any matter that may affect the operation of the Protocol, and
- (c) make use of the rules and procedures in the Annex to resolve disputes in a speedy, cost-effective and equitable manner.

There is a hint, particularly in paragraph (a), that resorting to dispute settlement will not supplant negotiations and agreement among member states as the principal method through which rights and obligations are acquired. As under the DSU, one of the basic aims of dispute settlement is to clarify rights and obligations that would have been settled in negotiations.

Consultations

In terms of Article 3 of Annex VI, consultations may be requested regarding any measure that a member state regards as affecting its rights and obligations

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under the Protocol. The request needs to be in writing, and it has to identify the measures at issue as well as indicate the legal basis of the complaint. The request to the member state concerned is to be copied to the CMT, through the Registrar of the Tribunal, and to all other member states. As under the DSU mechanism, a member state other than the consulting states may request to join the consultations. The requesting member will be allowed to join if it has a substantial trade interest in the matter, and if the responding member state agrees that the claim of substantial interest is well-founded. Consultations are to be attempted within strict time frames.

As under the DSU, consultations are to be a confidential matter, not amenable to supervision by bodies such as the DSB in the WTO or the CMT in SADC. Nevertheless, Article 3(6) of Annex VI enjoins consulting member states to make every attempt to arrive at a mutually satisfactory solution of any matter, and to “(a) provide sufficient information to enable a full examination of how the actual or proposed measure or other matter may affect the operation of this Protocol”, and “(c) seek to avoid any resolution that adversely affects the interests of any other member state under this Protocol”. Thus, Annex VI provides for the monitoring of the outcome of consultations. In the WTO, this is one of the clarifications proposed for the consultations stage in negotiations on the DSU’s reform.

Good offices, conciliation and mediation

Article 4 of Annex VI, on good offices, conciliation and mediation, is essentially a summary of Article 5 of the DSU on the same subject. Article 4 describes *good offices, conciliation* and *mediation* as procedures to be undertaken voluntarily. These procedures are to be confidential, can be requested at any time, and can begin and be terminated at any time. No time frames are suggested for the process.⁶⁰ Good offices, conciliation and mediation under the SADC process may be offered by “the Chairperson of the CMT, or any other member of the CMT designated by the Chairperson who is not a national of a disputing member state ...”.

Panel proceedings

Reference of a dispute to a panel of trade experts is covered in 11 of the 22 provisions in Annex VI,⁶¹ thus suggesting that this is a critical stage in the dispute settlement process. The first issue, covered in Article 5, is requesting the establishment of a panel. A request in writing is to be lodged with the

60 Compare Article 5.4 of the DSU, which provides that when good offices, conciliation or mediation are entered into within 60 days after receipt of a request for consultations, a complaining party must allow a period of 60 days after the date of receipt of a request for consultations before requesting the establishment of a panel.

61 Articles 5 to 15.

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Registrar of the Tribunal, indicating whether consultations have been held, the specific measures giving rise to the complaint, and the legal basis of the complaint in the light of the provisions of the Trade Protocol. A panel so requested has to be established within 20 days from the date of receiving the request.

The Registrar of the Tribunal has been installed as the officer to whom a request for the establishment of a panel is to be addressed. The Registrar replaces the Sector Coordinating Unit, which no longer exists as a SADC administrative organ.⁶² The Registrar is responsible for the initiation of dispute settlement in the first instance, and for servicing the Tribunal at the appeal stage. These roles place the Registrar in an invidious position that might create the impression that the appeal process is corrupt. It would have been better to set the appeal process apart from the panel process, by entrusting administration at the panel stage either to the CMT or to some functionary in the SADC Secretariat. The second criticism of Article 5 is that the CMT – the political organ with oversight over many aspects of the Protocol on Trade – has no role to play in the process. The comparable provision in WTO dispute settlement provides that the DSB is obliged, by reverse or negative consensus, to establish a panel at the second meeting at which the request appears on its agenda. This ensures that the process is a WTO matter. In SADC, the Registrar of the Tribunal might be politically exposed if the establishment of a panel is not a collective decision of the entire organisation, even if a lack of consensus on the matter is cleverly circumvented through reverse consensus.

Articles 6 to 8 of Annex VI deal with the selection of a panel after the receipt of a request. A panel is required to be composed of three panellists, all of whom are to have expertise or experience in international trade, international law, and international economics, or in other matters covered in the Protocol on Trade. If selected, however, they must serve in their individual capacities, and cannot take instructions from or be influenced by any government or organisation. Panellists are to be selected from an indicative roster, initially compiled and subsequently updated by the Registrar of the Tribunal with inputs from member states. Within 15 days of the delivery of a request, disputing member states are required to endeavour to agree on the chair of the panel. Within ten days of the selection of a chair, each disputing member state selects one panellist who is not a citizen of such member state. If there are several complaining member states, they are to jointly select one panellist, who is not a citizen of such member states. Where the parties fail to select a chair or a panellist within the stipulated time period, the matter needs to be referred to the SADC Executive Secretary, who is obliged to select one by lot, within five days, from lists of panellists nominated in the indicative roster. This is an odd

62 Article 3 of the Agreement amending Annex VI to the Protocol on Trade, 2007, replacing the term “Sector Coordinating Unit” with “Registrar of the Tribunal” wherever they appear in Article 5.

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way of breaking an impasse. It somewhat contradicts Article 7(a), which states that all panellists “shall be chosen strictly on the basis of objectivity, reliability and sound judgment”. Apart from this odd element, parties to the dispute notably have considerable latitude in selecting panellists. As in international arbitration, each party chooses at least one panellist, and contributes to the choice of the chair. Under the comparable DSU provision, panellists are to be suggested by the WTO Director-General, and may not be rejected by the parties, except for compelling reasons.

The conduct of panel proceedings is covered in Articles 9 to 15 of the Annex. Article 9 describes the standard terms of reference to be adhered to by the panel if specific terms of reference have not been set. These are to –

- examine the matter referred to in the request, in the light of relevant provisions of the Protocol
- determine whether the matter under dispute has nullified or impaired benefits of the complaining member state under the Protocol
- make findings, as and when appropriate, on the degree of adverse trade effects on any member state of any measure found to be inconsistent with the Protocol or causing nullification or impairment of benefits, and
- recommend bringing into conformity with the Protocol any measure found to be inconsistent with it.

The notable adaptation from the DSU mechanism here is that panels under the SADC process are required to make findings as to the adverse effects of measures complained of. This is likely to be a challenge and to compound what is already an onerous assignment.

Article 10 provides for at least one hearing between the parties and the panel. At this hearing the parties are to be given the opportunity to make initial and rebuttal written submissions. Deliberations, submissions and communications exchanged during the hearing are confidential. This is not consistent with the culture of open or public hearings that now prevails at the Tribunal.⁶³

Article 12 gives third parties enhanced rights to participate in the process. A *third party* is a member state with a “substantial trade interest” in the matter which has duly notified the CMT and the Registrar of the Tribunal of its interest. A third party is entitled to attend all hearings, to make written and oral submissions to the panel, and to receive the written submissions of the disputing member states. As noted earlier, third parties in WTO dispute settlement are entitled only to attend the first meeting between the parties and the panel, and to receive submissions and communications relating to that meeting.

63 See Article 24(1) of the Protocol on the SADC Tribunal, and Rule 45(1) of the Tribunal’s Rules of Procedure.

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Articles 14 and 15 provide for the issue of the panel's report in two stages at the end of the hearing. In the first stage, an initial report is required to be issued within 90 days of the last panellist being selected. The report is to contain findings of fact, a determination of the issues indicated in the terms of reference, and recommendations for the resolution of the dispute. The parties are entitled to comment on the report, and the panel may or may not take these comments into consideration in the preparation of a final report. In the second stage, a final report is to be issued to the parties within 30 days after the presentation of the initial report. Majority and minority opinions are not permitted to disclose the names of the panellists associated with them. Again, this is contrary to the culture obtaining in the Tribunal of issuing dissenting opinions that bear the name of the dissenting Tribunal member.

Appeals from panel reports

As indicated earlier, Annex VI originally did not provide for appeals against decisions in panel reports. This was provided for in 2007, through the insertion of Article 20A in the Protocol on the Tribunal, and Article 15A in Annex VI,⁶⁴ both of which confer upon the SADC Tribunal jurisdiction to consider appeals against panel decisions. Both Articles 20A and 15A stipulate that only a party to a dispute may appeal against a panel report. Third parties have no right of appeal, but they may participate in the proceedings if they have a substantial interest in the matter, and have notified the Registrar of the Tribunal of their interest. Appeals are limited to issues of law and legal interpretation covered in panel reports.

Article 20A is somewhat opaque on the conduct of appeal proceedings. It does not set time frames for the disposal of appeals. Paragraph 7, for example, states that appeals from a decision of a panel established under the Protocol on Trade "shall be dealt with in accordance with that Protocol". The import of this is unclear, as neither the Protocol nor Annex VI initially provided for appellate review.

Article 15A is more specific on some of these issues. Paragraph 2 provides that "the length of the appeal proceedings shall not exceed 90 days". Paragraph 4 further provides for the Tribunal, in consultation with the SADC Executive Secretary, to develop working procedures for appellate review which "shall not be less restrictive" than the Working Procedures of the Appellate Body of the WTO under the DSU. The Working Procedures of the Appellate Body underscore timeliness, confidentiality and collegiality. In effect, Article 15A calls upon the SADC Tribunal to adapt its *modus operandi* on the conduct of

64 Article 5 of the Agreement amending the Protocol on the Tribunal, Lusaka, Zambia, 17 August 2007; Article 10 of the Agreement amending Annex VI to the Protocol on Trade concerning the Settlement of Disputes between the Member States of the Southern African Development Community, Lusaka, Zambia, 17 August 2007.

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proceedings in public and on the issue of dissenting opinions. Unfortunately, this has been suggested at a time when many are calling for greater transparency in the conduct of proceedings in WTO dispute settlement. There should, therefore, be further debate in SADC as to whether transparency might be enhanced by aligning SADC Tribunal Rules with WTO Appellate Body Working Procedures. An additional consideration in this debate is the desirability of a bifurcated jurisdiction for the SADC Tribunal, giving rise to the need for Rules of Procedure for the hearing of most disputes for which the Tribunal has original jurisdiction, and working procedures for the appellate review of panel reports.

Adoption and implementation of panel and appeal decisions

Article 15 provides that a panel's final report is to be transmitted to the CMT for adoption through the Registrar of the Tribunal. But if a party has notified the CMT of its decision to appeal, the report will only be considered for adoption after the appeal. Article 15A does not mention adoption of reports arising from appellate review. However, Article 17 was amended in 2007 to read, in paragraph 2, that "provisions of paragraph 1 and Article 19 shall apply *mutatis mutandis* to decisions taken by the Tribunal pursuant to Article 15A". Paragraph 1 of Article 17 provides for prompt implementation of recommendations in a panel report, or for the implementation of the same within an RPT. Article 18 – on compensation and suspension of concessions or obligations (retaliation) as temporary measures that may be authorised to encourage compliance with panel decisions – was also amended to authorise the imposition of such measures in the implementation of appeal decisions. This means that all the provisions on implementation of panel reports are applicable to the implementation of Tribunal decisions on appellate review. However, none of the adjustments to Articles 15, 17, 18 or 19 refers to or provides for the adoption of Tribunal decisions on appellate review. This gap in the procedure leads to an assumption that a Tribunal report on appellate review, like a panel report, is to be transmitted to the CMT for adoption, which will decide on the matter applying the reverse consensus rule. But is it realistic to assume that the Tribunal's report, like a panel's final report, "shall be adopted by the CMT within 15 days after it is transmitted to the CMT and shall promptly be made public thereafter"?⁶⁵ The Registrar of the Tribunal probably needs clearer guidance on this issue.

As in WTO dispute settlement, the expectation and requirement is that, where a panel and/or the Tribunal recommends that a measure found to be inconsistent with the Trade Protocol should be brought into conformity with the Protocol, the member state concerned is immediately obliged to comply with the ruling or recommendation. If it is impracticable to do so, the member state has to be given a RPT to do so. The RPT cannot exceed six months from the

65 Article 15(4).

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date of the report's adoption. Under the WTO mechanism, a RPT may also be determined by an arbitrator, and the guideline to arbitrators is that such period cannot exceed 15 months. No provision is made in Article 17(1) for resolving disagreements as to what may be a reasonable period in the circumstances of each case. Such disagreements are always likely in this area of international economic relations, and provision should have been made for the expeditious resolution of such disputes by arbitration or other means. In the absence of such a provision, a party will probably be entitled to initiate panel proceedings over the matter – a process that could take some time to conclude.

Article 18(2) of Annex VI, as amended, provides that, if there is no compliance with the ruling or recommendation within the RPT established in terms of Article 17(1), the parties “shall enter into negotiations with a view to developing a mutually satisfactory solution”. If no satisfactory solution is reached within 20 days after the expiry of the RPT, the complaining member state may request authorisation from the CMT to suspend concessions or other obligations of equivalent effect to the level of nullification or impairment. Article 18(1) underscores that compensation and retaliation are temporary measures, available when rulings and recommendations are not implemented within the established RPT. Therefore, when Article 18(2) provides for “negotiation of a mutually satisfactory solution” in the event of non-compliance within the RPT, it is referring to the negotiation of compensation. Article 18 does not explicitly mention compensation, and it does not indicate the form which it may take. Should we assume that, as in the WTO, compensation will be in the form of additional trade concessions, to be accorded on a most-favoured-nation basis? If so, an opportunity was missed to be innovative in the framing of Article 18, and to provide for negotiation and the award of monetary or other compensation as reparation for loss caused by non-compliance.

Article 18(3) provides that the CMT is obliged, by reverse consensus, to authorise the suspension of concessions or obligations within 20 days from the date of receiving the request. As in WTO dispute settlement, this is to be attempted in the same sector as that in which there was nullification and impairment, and other sectors should be targeted if same-sector retaliation is not practicable. Paragraphs 5 and 6 of Article 18 provide for expeditious resolution, by arbitration, of disputes as regards the level of retaliation to be exacted.

Article 19 – on the expenses and costs of dispute settlement in terms of Annex VI – is a fitting provision on which to conclude this discussion on implementation of panel and Tribunal decisions and what may happen to the respondent in the event of non-implementation. Article 19(2) originally proposed that the costs and expenses of panel proceedings “shall be borne in equal parts by the disputing member states or in a proportion as determined by a panel”. In 2007, Article 19 was revised to provide generally that panel and appellate review proceedings in the Tribunal are to be funded from the regular

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SADC budget and from other sources, as may be determined by the CMT. Paragraph 4 stipulates that each “disputing member state shall be responsible for payment of its own costs arising from litigation”. But where a panel (or the Tribunal) determines that –

a disputing member state has abused the process ..., it may require from that disputing member state to pay for the costs reasonably incurred under the circumstances of the particular case by the other disputing member state arising from the litigation.

Developing countries have suggested that the WTO dispute settlement process should adopt the award of litigation costs as a remedy.⁶⁶ With clarification as to what may be regarded as *abuse of the process*, this is one element of the SADC process that could be recommended to the WTO for emulation. The other element is Article 3(6), which provides for sufficient disclosure of mutually satisfactory solutions reached during consultations, so that the effect of measures proposed on other parties and on the operation of the Protocol on Trade can be assessed.

Concluding remarks and observations

The replication of some WTO dispute settlement procedures in Annex VI in 2000 can be criticised as a quixotic experiment, attempted without a profound appreciation of the special needs of a fledgling institution and of the different environment obtaining in the WTO.⁶⁷ It can also be defended on at least two grounds. As regards the first of these, all SADC member states then party to the Protocol on Trade were also members of the WTO. The FTA proposed in the Protocol was due, and had to be assessed for consistency with WTO law. Aligning the dispute settlement provisions of the Protocol with WTO dispute settlement procedures could have contributed to a positive assessment of the FTA. Domesticating WTO dispute settlement could familiarise SADC member states with WTO procedures and prepare them for effective participation in the multilateral process. Recent developments in SADC dispute settlement also suggest that the replication of WTO dispute settlement procedures was fortuitously far-sighted. After the ruling by the SADC Tribunal in the Zimbabwe land seizures case,⁶⁸ which Zimbabwe has failed to observe, the Summit of Heads of State and Government called for a review of the role, functions

66 See WTO Proposal by Mexico in the Negotiations on DSU Reform, Document TN/DS/W/23, 4 November 2002; and proposals by Cuba and others, TN/DS/W/19, 9 October 1992, and TN/DS/W/51/ Rev.1, 13 March 2003.

67 For this type of criticism, see Trade Law Centre for Southern Africa. 2003. “Report of the Round Table Conference on the SADC Protocol on Trade and the trade dispute settlement mechanism” (Unpublished), p 3; Conference held on 19–22 March 2003, in Stellenbosch, South Africa, and hosted by the SADC Secretariat, the German Agency for Technical Cooperation (GTZ), and tralac).

68 *Mike Campbell (Pvt) Ltd & Others v The Republic of Zimbabwe* SADC (T) 2/2007.

and terms of reference of the Tribunal.⁶⁹ Whether the review is well-intended or not, if this had been a trade dispute resolved in terms of Annex VI, the implementation of the decision would probably have been different and certain. It is unlikely that SADC member states will impugn decisions taken locally but under rules and procedures that are adhered to at a multilateral level.

This study therefore concludes that the replication of the WTO dispute mechanism in Annex VI should be embraced. It provides SADC with a more secure platform for the implementation of decisions likely to be politically unpopular. Annex VI should, thus, be revised to improve and strengthen the dispute resolution process.

The first issue is the restriction on forum shopping in Article 1bis. This might not be entirely consistent with the obligations of WTO member states, and will not be recognised in the WTO in respect of a dispute that, within the regional forum, is couched in terms of obligations under the Trade Protocol and, at a multilateral level, in terms of violation of a covered agreement.

At the consultations stage, resort to good offices, conciliation and mediation is often not a popular alternative to consultations or panel proceedings at a multilateral level. It is also not likely to be popular in a regional organisation with only a handful of members who claim to have strong historical and political ties. On the positive side, it should be noted that Annex VI already has one aspect that would be regarded as a desirable clarification of provisions on consultations under the DSU, namely Article 3(6). This Article provides for more detailed reporting and some assessment of the outcome of consultations, which are otherwise supposed to be private and confidential.

At the panel stage, issues in Annex VI that should be re-examined include the designation of the Registrar of the Tribunal as the officer responsible for the establishment of a panel, and the non-involvement of the CMT in this process. It has also been suggested that requiring a panel to make findings on the adverse effects of an offending measure might be more challenging than making an objective assessment of “the matter” referred to a panel. At the multilateral level, the method employed for the selection of panellists has been problematic, leading to calls for a shift from ad hoc panels to a standing body of panellists, similar to the Appellate Body. The method for the selection of panellists in Annex VI is not likely to be problematic, however, since the parties to the dispute have more latitude in the matter. Still, the added value that a standing body of panellists might provide should be considered.

At the appeal stage, the main problem is that appeals lie to an existing Tribunal, with a mandate, composition, rules of procedure and a juridical

⁶⁹ Communiqué of the SADC Summit of Heads of State and Government, 17 August 2010.

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culture that may not comply with expectations regarding the final resolution of international trade law disputes. Thus, the Tribunal needs to develop new Working Procedures which should be similar to those that obtain in the WTO. Perhaps what is required is an appeals body or chamber, distinct from the current Tribunal in terms of its jurisdiction, composition and rules of procedure.

The replication of WTO dispute settlement processes in SADC was perhaps unsatisfactory in respect of the implementation of Tribunal decisions. It has been noted that Annex VI has no provisions on adoption by the CMT of Tribunal decisions, and on subsequent surveillance of implementation by the CMT or any other political organ. Annex VI further has no provisions on determining, through litigation, an RPT for the implementation of a decision, or the sufficiency or legality of measures adopted in compliance with a panel or Tribunal decision. Difficulties encountered in the implementation of the Zimbabwe land seizures case suggest that there should be no gaps at this stage of the process. SADC member states could also be bold and consider remedies that have been mooted in the WTO but are not likely to be agreed upon, such as the standard awarding of litigation costs in situations not involving abuse of process, and the awarding of monetary compensation.

Campbell v Republic of Zimbabwe: A moment of truth for the SADC Tribunal

Precious N Ndlovu*

Abstract

*This article examines whether the SADC Tribunal's mandate and authority have any legal force in light of recent developments. These developments include the Tribunal's ruling in *Campbell v Republic of Zimbabwe*, the subsequent non-compliance by the Zimbabwean Government with the decision, the lack of concrete action taken by Southern African Development Community (SADC) members, and the Summit's decision to review the Tribunal's role. By analysing the *Campbell* ruling, the article shows that the current enforcement measures are inadequate, that the rules dealing with defaulting SADC members lack clarity, and that members use sovereignty to avoid international obligations. As a means of ensuring that the Tribunal upholds its mandate of promoting the rule of law, human rights and democracy, the article recommends that the review of the Tribunal's functions be speedily concluded, that SADC members adopt enforcement measures to address issues of non-compliance, and that members observe their international obligations in good faith.*

Introduction: The Tribunal

Article 9(1)(f) of the Treaty of the Southern African Development Community (hereinafter *the Treaty*) establishes the Tribunal as a SADC institution. Article 16 of the Treaty succinctly spells out the Tribunal's mandate and jurisdiction as follows:

... to ensure adherence to a proper interpretation of the provisions of the Treaty, subsidiary instruments and to adjudicate upon disputes referred to it,¹ [and] [to] give advisory opinions on such matters as the Summit or Council may refer to it.²

The decisions of the Tribunal are intended to be final and binding.³ This places the ultimate interpretation of the Treaty and any of its Protocols squarely within the preserve of the Tribunal.

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1 Article 16(1).

2 Article 16 (4).

3 Article 16 (5).

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Pursuant to Article 16 of the Treaty,⁴ in 2000 the Summit adopted the Protocol on the SADC Tribunal (hereinafter *the Protocol*). Annexed to the Protocol are the Rules of Procedure (hereinafter *the Rules*), which form an integral part of the Protocol.⁵

Since the Tribunal's inauguration, 19 cases have been submitted to its jurisdiction. Of these, 11 have been brought against the Zimbabwean Government, and most of them relate to the country's ongoing land reform programme.⁶

Campbell v Republic of Zimbabwe

The factual background

In October 2007, the first case related to Zimbabwe's agrarian land reform was lodged before the Tribunal in *Campbell v Republic of Zimbabwe*.⁷ In this matter, William Michael Campbell (Pvt) Limited (a company duly registered in terms of the laws of Zimbabwe) and Mike Campbell (in his capacity as manager of the farm) contested the acquisition of their farm by the respondent.

The applicants' farm, together with the farms of many other parties who later joined the proceedings, were compulsorily acquired by the respondent in terms of its land reform programme pursuant to Section 16B of Amendment 17 of the Constitution of Zimbabwe.⁸ Land acquired in this manner vested full title in the state⁹ without compensation to the dispossessed party, except for improvements effected on the land before it was acquired.¹⁰

Moreover, a person whose land has been acquired in terms of Amendment 17 is barred from challenging its acquisition in a court of law; the courts are also expressly prevented from hearing any such challenge.¹¹ However, a person

4 Article 16(2) directs that "the composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed in a Protocol adopted by the Summit".

5 Article 23 of the Protocol provides that "the Rules annexed to this Protocol shall form an integral part thereof".

6 Information available at <http://www.sadc-tribunal.org/pages/decisions.htm>; last accessed 18 November 2010.

7 SADC (T) 2/2007.

8 Amendment No. 17 of 2005. The pertinent provisions of Section 16B are to the effect that all agricultural land identified as being such and required for resettlement or settlement, for example, would be compulsorily acquired by the government.

9 Section 16B(2)(C).

10 Section 16B(2)(b).

11 Section 16B(3)(a).

with an interest or right in the land that has been acquired may challenge the amount of compensation for any improvements made.¹²

Notwithstanding the express ousting of the court's jurisdiction on the matter, the applicants instituted legal proceedings regarding the dispute in the Supreme Court of Zimbabwe, the ultimate court in that country. Before the court handed down its ruling, the applicants had also submitted an application to the SADC Tribunal, contesting the compulsory acquisition of their farm by the respondent.

The interim measure envisaged by Article 28 and Rule 61(2)–(5)

The applicants invoked Article 28 of the Protocol, as read with Rule 61(2)–(5) of the Rules. The Rule in question provides for interim relief aimed at restraining the respondent from removing or allowing the removal of the applicants from their property, and ordering the respondent to take all necessary and reasonable steps to safeguard the occupation by the applicants of the said properties until such time that the dispute has been finally settled. In essence, the applicants sought an interdict to preserve the status quo regarding the agricultural land in dispute until the Tribunal had rendered its final ruling on the matter.

In deciding whether the interim relief could be granted, certain preliminary issues had to be determined, namely whether the Tribunal had jurisdiction over the matter, and whether the application was consistent with Article 28 of the Protocol. As far as the jurisdiction was concerned, the Protocol makes a distinction between the “basis”¹³ and the “scope”¹⁴ of jurisdiction. The *basis* of jurisdiction refers to the subject matter of the dispute, in that the dispute must essentially be concerned with the interpretation and application of the Treaty, the Protocols, and other SADC legal instruments. On the other hand, the *scope* of jurisdiction refers to the parties who are eligible to appear before the Tribunal as parties to a dispute.

With regard to the scope of jurisdiction, Article 15(1) of the Protocol confers upon the Tribunal jurisdiction over all disputes between members, and between natural or legal persons and members.¹⁵ On this point the Tribunal was satisfied that there indeed was a dispute between a natural person (William Michael Campbell) and a legal person (Mike Campbell (Pvt) Limited) and a member state (the Republic of Zimbabwe). The Tribunal concluded that the matter was indeed properly before it.

12 Section 16B(3)(b).

13 Article 14.

14 Article 15.

15 Article 15(1), as amended by Article 6 of the Agreement Amending the Protocol on the Tribunal of 3 October 2002.

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Article 14 of the Protocol enumerates three bases of jurisdiction. Firstly, and in particular, Article 14(a) confers jurisdiction on the Tribunal in matters concerning the interpretation and application of the Treaty. The Tribunal pointed out that, in the present application before it, not only was the relevant provision of the Treaty which required interpretation and application its Article 4, which requires member states to act in accordance with a number of principles, but also that the principles of human rights, democracy and the rule of law were themselves pertinent in this case.¹⁶ Therefore, SADC – both as a collective and in respect of each individual member state – is legally bound to respect and protect the human rights of SADC citizens, and ensure democracy and the rule of law are promoted in its respective member states' territories.

Secondly, the matter before the Tribunal involved agricultural land which the applicants alleged had been alienated by the respondent. Clearly, this was a matter requiring the interpretation and application of the Treaty, thus bestowing jurisdiction on the Tribunal.

And thirdly, the Tribunal found that the applicants could rely on Article 28 and Rule 61, which both empower the Tribunal to grant provisional measures as necessary upon good cause being shown by the party seeking relief. In this process, the Tribunal employed a municipal law four-step criterion that courts utilise for the granting of interdicts. The first question was whether there was a prima facie right for which protection was being sought. The second entailed whether there was an anticipated or threatened interference with that right. Thirdly, there was the question of the presence or absence of an alternative remedy, and fourthly, there was the issue of the balance of convenience in favour of the applicant or a discretionary decision in favour of the applicant that an interdict was the appropriate relief in the prevailing circumstances.¹⁷

The Tribunal was satisfied that, to begin with, there was indeed a prima facie right deserving protection, namely, the right to peaceful occupation and use of the land. Furthermore, the Tribunal found that there was an anticipated or threatened interference with the said right. Finally, it was found that the applicant did not have any alternative remedy. In view of this analysis, the Tribunal concluded that the balance of convenience favoured the applicants as they would suffer prejudice if the interim relief was not granted. Moreover, the respondent would not be prejudiced by granting the relief sought. Indeed, the respondent conceded this point.

16 Article 4 provides that "SADC and its Member States shall act in accordance with the following principles:

...

(c) human rights, democracy and the rule of law."

17 *Gideon Stephanus Theron & Others v The Republic of Zimbabwe* SADC (T) 02/2008; *Douglas Stuart Taylor-Freeme & Others v The Republic of Zimbabwe* SADC (T) 03/2008.

Notably, this was the first time that the Tribunal considered granting an interim measure. Therefore, its use of the domestic law criteria set a crucial precedent which was followed by the Tribunal in subsequent matters brought before it.¹⁸

Accordingly, the Tribunal granted the interim relief and ordered that the respondent refrain from taking steps that would interfere with the peaceful residence on and beneficial use of the applicants' property.¹⁹

Applications to intervene in terms of Article 30 and Rule 70

Following the granting of the interim order in *Campbell*, 77 other parties in *Gideon Stephanus Theron & Others v Zimbabwe*²⁰ submitted urgent applications before the Tribunal to intervene in the proceedings as applicants in terms of Article 30 of the Protocol and Rule 70 of the Rules. The relevant provisions allow a party whose legal interests may affect or be affected by a matter before the Tribunal to submit a written application for permission to intervene.

Similarly, the interveners also sought an interim order against the respondent aimed at preserving the status quo pending the finalisation of the matter by the Tribunal. The interveners contended that the relief granted in *Campbell* was a matter of principle, not unique to the factual scenario of that case. As a result, any other party granted leave to intervene in *Campbell* should also be granted the same interlocutory relief without discrimination.

In considering the interim relief application, the Tribunal employed the four criteria applied in *Campbell*. Thus, the Tribunal found for the applicants and the interim relief was granted.²¹ The terms and wording of the orders were the same as those granted in *Campbell*, and were to the effect that the respondent

18 *Andrew Paul Rosslyn Stidolph & Others v The Republic of Zimbabwe & Another* SADC (T) 04/2008; *Anglesea Farm (Pvt) Ltd & Others v The Republic of Zimbabwe & Another* SADC (T) 06/2008.

19 The relevant excerpt of the interim order stated the following: "[T]he Tribunal grants the application pending the determination of the main case and orders that the respondent shall take no steps, or permit steps to be taken, directly or indirectly, whether by its agents or by its orders, to evict from or interfere with the peaceful residence on and beneficial use of, the farm known as Mount Carmel of Railway 19, measuring 1200.6448 hectares held under Deed of Transfer No. 10301/99, in the District of Chegutu in the Republic of Zimbabwe, by Mike Campbell (Pvt) Limited and William Michael Campbell, their employees and the families of such employees and of William Michael Campbell".

20 SADC (T) 02/2008; SADC (T) 03/2008; SADC (T) 04/2008; SADC (T) 06/2008.

21 However, the Tribunal could not grant the interim relief to all the applicants/intervenors as 3 of the applicants had already been evicted by the respondent at the time that the matter was heard by the Tribunal.

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refrain from interfering with the peaceful residence in, and the beneficial use of, the applicants' properties until the Tribunal adjudicated upon the matter.²²

The Tribunal's findings

In essence, the applicants' claim was that the compulsory acquisition of their lands was in breach of the respondent's Treaty obligations. Therefore, their prayer was that the Tribunal should declare these acquisitions illegal. This claim they based on five grounds, namely that –

- the enactment and implementation of Amendment 17 violated certain provisions of the Treaty
- the acquisitions were done unlawfully, in that the Minister responsible for land resettlement had failed to establish that he had used an objective and reasonable criterion to identify the lands suitable for acquisition in terms of the respondent's land reform programme
- Amendment 17 denied applicants access to courts to contest the acquisitions
- the applicants were victims of racial discrimination since their farms were the only lands to be acquired pursuant to Amendment 7, and
- they had been denied compensation for their farms compulsorily possessed by the respondent.

In response, the respondent submitted, firstly, that the Tribunal should not hear the dispute as it lacked the requisite jurisdiction. Furthermore, the respondent pointed to the agrarian reform having been conducted on a 'willing buyer–willing seller' basis. The respondent added that the fact that the lands acquired belonged to white farmers had to be attributed to the country's colonial history, which had resulted in the majority of fertile land being owned by those farmers. Therefore, the respondent stated that the land reform should be seen as a legitimate means to achieving an equally legitimate end aimed at correcting colonial land imbalances. The contention that the applicants' farms were the prime targets was unfounded, maintained the respondent, because land had also been acquired from black farmers with large tracts of property. In addition, the land reform programme had been prompted by the immense demand for land from the government. On the matter of compensation, the respondent contended that it had been provided for in Amendment 17. Finally, the respondent claimed the applicants had not been denied access to the courts; on the contrary, the respondent stated that the parties could utilise judicial review.

22 It must be noted that two subsequent separate applications, albeit unsuccessful, were also made seeking to intervene in the proceedings in *Albert Fungai Mutize & Others v Campbell & Others* SADC (T) 08/2008 and *Nixon Chirinda & Others v Campbell & Others* SADC (T) 09/2008.

The issues in contention

In determining the issues, the Tribunal grouped them under four headings. These were the Tribunal's jurisdiction to hear the matter; the denial of the applicants' right to access to domestic courts in Zimbabwe; racial discrimination against the applicants; and the question of compensation for the lands acquired.

Jurisdiction

The Tribunal, as one of the institutions established by the Treaty, is tasked with the responsibility of ensuring adherence to, and the proper interpretation of, the Treaty's provisions and the subsidiary instruments, and to consider such disputes as may be submitted to it. Article 14(a) of the Protocol confers the Tribunal with jurisdiction over disputes brought in accordance with the Treaty. The Tribunal reasoned that, for the present case, such was the basis and scope of the jurisdiction of the Tribunal.

The respondent argued that the applicants had not exhausted local remedies – a precondition necessary to trigger the Tribunal's jurisdiction²³ – particularly since the first and second applicants (Mike Campbell (Pvt) Limited and Michael William Campbell) had instituted legal proceedings in Zimbabwe's Supreme Court, contesting the validity of the acquisition of their farm by the respondent.²⁴ As the Supreme Court had not handed down its judgement by the time the applicants brought their case before the Tribunal, the respondent claimed the applicants had not yet exhausted all the available domestic remedies. Therefore, the respondent argued that the Tribunal lacked the requisite jurisdiction on the matter.

The concept of *exhaustion of local remedies* is by no means unique to the Protocol as it features in numerous international tribunals. The International Court of Justice has described it as "a well-established rule of customary international law" aimed at allowing the state the opportunity, where a violation has occurred, to redress it by its own means within its municipal legal system.²⁵ For example, the African Charter on Human and Peoples' Rights (hereinafter *African Charter*) stipulates that the African Commission on Human and Peoples' Rights (hereinafter *African Commission*) can only deal with a matter submitted to it after all available local remedies have been used.²⁶ Similarly, the

23 Article 15(2) of the Protocol.

24 In the Supreme Court, the applicants had based their claim on, inter alia, the fact that Amendment 17 eliminated their right to equal treatment before the law; to a fair hearing before an independent and impartial court; and their right not to be discriminated against on the basis of race or place of origin regarding land ownership.

25 *Interhandel* Case 1959 ICJ Reports 6 at 27.

26 Article 50.

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European Convention for the Protection of Human Rights and Fundamental Freedoms provides that the European Commission of Human Rights may only deal with a matter after all domestic remedies have been exhausted.²⁷

This principle directs parties to first exhaust municipal remedies, that is, from the lowest court to the highest court in the land, prior to engaging extraterritorial tribunals. The principle's *raison d'être* is to afford domestic courts the opportunity to deal with matters which they are best placed to decide upon as they can apply the relevant national laws with ease, and also to ensure that international tribunals do not, in a sense, usurp the jurisdiction of local courts that can speedily ensure that justice is done. The principle also has much to do with common sense.

However, the principle of exhausting local remedies is not absolute and may not be complied with in cases where the domestic law does not offer a remedy or the remedy available is futile.²⁸ Article 15(2) of the Protocol obviates the need to pursue local remedies where one "is unable to proceed under the domestic jurisdiction". Similarly, the African Charter provides that this principle need not be adhered to if it is clear that the procedure of achieving the remedy will be unduly prolonged. Therefore, in such situations, a party is at liberty to seek the audience of an international tribunal for redress.

Seen in this light, Amendment 17 – which ousts the jurisdiction of Zimbabwe's law courts from any matter connected to the acquisition of land – may also be said to oust the requirement to exhaust all local remedies before lodging a matter before the Tribunal. In view of the Amendment's provisions, the first and second applicants were not able to institute effective proceedings under their domestic law.²⁹

The respondent further contended that the Treaty simply outlined the principles and objectives of SADC, without providing the standards against which members' actions could be measured. As such, the respondent stated that the Tribunal could not rely on standards derived from other treaties as that would be tantamount to legislating on behalf of SADC members,

27 Article 26.

28 Dugard, J, D Bethlehem, M du Plessis & A Katz. 2005. *International Law: A South African perspective* (Third Edition). Lansdowne: Juta, p 293.

29 This position was confirmed by the Supreme Court of Zimbabwe handed down on 22 February 2008 in *Mike Campbell (Pvt) Limited v Minister of National Security Responsible for Land, Land Reform and Resettlement* SC49/07, where the court dismissed the applicants' claim. The Supreme Court stated that the determination of the extent to which constitutional protection of property rights might be protected was of a political and legislative nature; hence, the acquisition and the manner thereof were not judicial questions. Furthermore, the legislature had, in the clear and unequivocal language of Amendment 17, excluded the jurisdiction of the court in land acquisition matters.

a function that belonged to the Summit as SADC's supreme policymaking body with the authority to adopt legal instruments for the implementation of the Treaty.³⁰ Moreover, although numerous SADC Protocols had been adopted, none specifically addressed the issue of human rights and agrarian reform. Therefore, the respondent submitted, there first had to be a Protocol addressing such matters so as to give effect to the Treaty's principles. The respondent further argued that the duty of the Tribunal was to interpret the law as adopted by members and, where there was no specific relevant law, the Tribunal could not exceed its mandate and rule on the validity of Zimbabwe's land reform in the absence of applicable SADC law.

In response, the Tribunal concisely and elaborately pointed out otherwise, relying on the Treaty's provisions, the Protocol, and the principles of public international law. It maintained that Article 21(b) of the Protocol enjoined the Tribunal not only to develop its own jurisprudence, but also to take cognisance of applicable treaties, general principles and rules of public international law as its sources of law. Consequently, the Tribunal opined, where the Protocol is silent, the Tribunal has recourse to these sources of law. Furthermore, the Tribunal found that it is not necessary for a Protocol on human rights and agrarian reform to be adopted in order to give effect to the Treaty's principles, particularly in light of Article 4(c) of the Treaty, which enjoins members "to act in accordance with the principles of human rights, democracy and the rule of law". This in itself, the Tribunal concluded, was sufficient ground to confer jurisdiction upon it to adjudicate disputes concerning human rights, democracy and the rule of law – matters which were significant in this case.

The respondent could also not rely on its municipal laws, namely Amendment 17, to avoid its treaty obligations. The Vienna Convention of the Law of Treaties specifically deals with such situations and stipulates, in Article 27, that a party may not cite its domestic law as justification for not fulfilling any international agreement. This makes it clear that compliance with the dictates of domestic laws is not a defence to breach of international responsibilities by a state. To do so would allow states to evade their international law duties simply by enacting domestic legislation.

Therefore, the Tribunal unanimously held that it had jurisdiction to hear the matter.

Access to justice

The question was whether the applicants had been denied access to the courts and whether they had been deprived of a fair hearing. These two fundamental rights are encapsulated in the principle of the rule of law, which is one of the

30 Article 10 of the Treaty. However, the Summit may delegate this authority to any other SADC institution, as it may deem fit.

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principles in the Treaty: Article 6(1) directs members to respect the rule of law and to refrain from taking measures jeopardising the substance of these principles. Thus, members have a duty to protect the right of access to the courts and the right to a fair hearing.

As regards the right of access to the courts, the Tribunal referred to various interpretations of such right by prominent international tribunals, among them the African Commission, which dealt with this issue in *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*.³¹ The matter dealt with ouster clauses preventing Nigerian courts from hearing cases brought by publishers contesting the search and seizure of their premises. The Commission held that such a state of affairs would result in a legal situation where the judiciary could no longer provide a check on the executive branch of the government, which was inimical to constitutional democracy. In yet another matter before the African Commission, namely *Zimbabwe Human Rights NGO Forum v Zimbabwe*,³² where a clemency order exonerating perpetrators for politically motivated crimes prevented the complainant from having recourse for such crimes, the Commission held that, in order for the rule of law to be upheld, individuals whose rights had been infringed had to have an effective remedy, without which the rights on their own were of little value.

In incisive detail, the Tribunal stated that the role played by the courts was of cardinal constitutional significance, and that legislation that asserted to get rid of the power of the courts to hear matters affecting individuals' rights was contrary to the rule of law, which required that individuals had access to the courts. With reference to Amendment 17, the Tribunal held that the actions undertaken in terms of Section 16B impinged on the constitutional right to the protection of the law and to a fair hearing, particularly in light of the Amendment's wording that expressly deprived the applicants of approaching the courts for recourse for their expropriated property. The Tribunal was, therefore, satisfied that the applicants had been deprived of their lands without being afforded the opportunity to access the courts and to obtain a fair hearing; consequently, the respondent had acted in breach of Article 4(c) of the Treaty.

Thus, the Tribunal unanimously concluded that the applicants had indeed been denied access to the courts of Zimbabwe.

Racial discrimination

The applicants also contended that the land reform pursuant to Amendment 17 was racially motivated, as it was based solely on considerations of race and ethnic origin and was aimed specifically at white people, regardless

31 Comm. No. 140/ 94, 141/ 94, 145/ 95 (1999).

32 Comm. No. 245 (2002).

of whether they had acquired the land during the colonial period or after Zimbabwe's independence. Furthermore, even if Amendment 17 made no overt reference to race or colour, this did not mean that it did not target white-owned farms because there was clear legislative intent directed only at white farmers. Based on this, the applicants argued, the respondent, by enacting and implementing Amendment 17, was in breach of Article 6(2) of the Treaty, which precluded members from discriminating against anyone on the basis of race, *inter alia*.

In rebuttal, the respondent submitted that the agrarian reform programme was meant to benefit people who had been historically disadvantaged during colonial rule. Consequently, it was against this background that applicants' lands were identified and acquired. The respondent maintained that, as such, this could not be labelled as racism, and they had not flouted Article 6(2) in their opinion.

The Tribunal pointed out that discrimination, in whatever form, was outlawed in international law by numerous treaties such as the United Nations Charter,³³ the Universal Declaration of Human Rights,³⁴ the International Covenant on Civil and Political Rights,³⁵ the African Charter,³⁶ and the Convention on Elimination of All Forms of Racial Discrimination (hereinafter *Convention*). The Tribunal pointed out that the respondent had acceded to the African Charter and the Convention.

While the Treaty does not define *racial discrimination*, the Convention in Article 1(1) defines it as discrimination based on race which has the purpose or effect of nullifying or impairing the recognition or enjoyment and exercise on an equal footing of human rights. The Tribunal rightly concluded that the respondent was duty bound to respect and protect non-discrimination of any kind, and to this end prohibit any racial discrimination in its laws, policies and practices. This is, of course, in addition to the fact that the Treaty itself expressly prohibits racial discrimination in Article 6(2).

Thus, it rested on the Tribunal to decide whether, in the absence of specific reference to race, one could say that there had been discrimination. The Tribunal found that, even if there was no such express mention, the effect of Amendment 17 would be felt by white farmers. The treatment meted out

33 Article 1(3) encourages respect for human rights for all, without distinction as to race.

34 Article 2 grants everyone all the rights set forth in the Declaration, without distinction of any kind, i.e. including distinctions according to race.

35 Article 2(1) requires that parties to the Covenant are obliged to respect all individuals without distinction of any kind, i.e. including distinctions according to race.

36 Article 2 provides that every individual shall be entitled to the rights set forth, without discrimination of any kind, i.e. including distinctions according to race.

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to the applicants was discriminatory, therefore. The aim of the government's land reform would have been legitimate if the criteria for identifying the land were objective and reasonable, fair compensation was paid for lands acquired, and the lands were indeed distributed to the poor, landless and other disenfranchised groups. This reasoned conclusion signifies that the Tribunal acknowledges, and rightly so, existing land imbalances, but that the correction of such disparities has to be achieved within the limits of the rule of law. In *Commercial Farmers Union v Minister of Lands*,³⁷ Zimbabwe's Supreme Court itself recognised the crucial role that the rule of law plays, when it acknowledged that, if the expropriation of white-owned land were to be conducted under the rule of law, it would not be discriminatory.

The Tribunal, by a majority of four to one, held that the applicants had been discriminated against on the basis of race, and that, therefore, Article 6(2) of the Treaty had been violated. The Tribunal unanimously found the respondent to be in breach of its obligations under Article 4(c) of the Treaty. In addition, the Tribunal also unanimously directed the respondent to take reasonable measures to protect the possession, occupation and ownership of the applicants' lands.

Compensation

The applicants contended that the expropriation of their land by the respondent without compensation was in breach of international law and the Treaty. International law requires the expropriating state to pay compensation. The respondent could not rely on its national law to circumvent its international obligations; regardless of the manner in which the farms were acquired or the aims thereof, compensation was due and payable. Regarding the three applicants already evicted, the Tribunal ordered that the respondent pay fair compensation on or before 30 June 2009.

Enforcement of the Tribunal's decisions

Article 16(5) of the Treaty provides that the Tribunal's decisions are final and binding. On the other hand the responsibility of enforcing and executing the Tribunal's rulings primarily lies with member states.³⁸ It is in the enforcement of its decisions that the Tribunal is lacking in fulfilling its mandate.

Article 32 of the Protocol stipulates that a member's rules of civil procedure regarding enforcement of foreign judgments, and in whose territory a judgment

37 2001 (2) SA 925 (ZSC).

38 Ruppel, OC & FX Bangamwabo. 2008. "The SADC Tribunal: A legal analysis of its mandate and role in regional integration". In Bösl, A, W Breytenbach, T Hartzenberg, C McCarthy & K Schade (Eds). *Monitoring Regional Integration in Southern Africa Yearbook*. Stellenbosch: Trade Law Centre for Southern Africa, p 21.

is to be enforced, govern such enforcement. In addition, SADC and members' institutions are obliged to take the necessary steps to ensure such execution.

Owing to the respondent's failure to abide by the Tribunal's two interim orders, the applicants, pursuant to Article 32(4) of the Protocol,³⁹ proceeded to file an urgent application seeking an order that the respondent was in breach and contempt of the Tribunal's interim rulings.⁴⁰ The Tribunal found in favour of the applicants, and ruled that it would proceed in terms of Article 32(5) of the Protocol. The stated Article provides that, if non-compliance by a member with a decision has been shown to exist, the Tribunal is obliged to report the same to the Summit in order for the latter to take "appropriate action". Since the content of *appropriate action* is not defined, it is submitted that this provision is inadequate and ambiguous and should be dealt with, as it contributes to the Tribunal's weaknesses as far as enforcement is concerned. A clear rule dealing with non-complying states should be clearly spelt out to prevent members from escaping their international legal obligations.⁴¹

The respondent also failed to comply with the Tribunal's ruling in the main ruling in *Campbell*,⁴² in respect of which the applicants also sought the Tribunal to declare the respondent to be in breach and contempt of the ruling. The Tribunal once again found in favour of the applicants and again referred the matter to the Summit in terms of Article 32(5). The Zimbabwean Government issued a statement to the effect that the state was not bound by the regional court's ruling, and regarded it as being null and void of any legal effect.⁴³ It would seem, judging from Zimbabwe's stance, as if issues of national sovereignty take precedence over the rule of law. This is actually in contrast with the principle of sovereignty which requires that states themselves be subject to the rule of law.

Another application in terms of Article 32(4), based on the respondent's continued disregard of the Tribunal's rulings, was lodged with the Tribunal in

39 Article 32(4) allows any party concerned to report a member's non-compliance with a Tribunal ruling.

40 *Campbell v Republic of Zimbabwe* SADC (T) 11/2008.

41 Coleman, G & G Erasmus. 2008. "Regional dispute resolution: The SADC's first test". Available at http://www.tralac.org/unique/tralac/pdf/20080205_hotseat.pdf; last accessed 20 December 2010.

42 *Campbell v Republic of Zimbabwe* SADC (T) 03/2009. Evidence was tendered showing non-compliance, which included the respondent's contention that the Tribunal lacked jurisdiction and that its ruling was "nonsense" and of "no consequence", and that the respondent planned to resume with the prosecution of defaulting farmers under Zimbabwe's Land (Consequential Provisions) Act.

43 "Zimbabwe not bound by regional court ruling: Justice Minister". Available at <http://jurist.org/paperchase/2010/07/zimbabwe-is-not-bound-by-sadc-rulings-justice-minister.php>; last accessed 11 January 2011.

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Louis Karel Fick & Others v Republic of Zimbabwe.⁴⁴ The Tribunal once again found in favour of the applicants based on the evidence supplied to it, which included a letter from the respondent stating that it would no longer submit itself to the Tribunal's jurisdiction, that any decision rendered by the Tribunal would be null and void, and that the High Court of Zimbabwe, citing the country's public policy, declined to register or enforce the Tribunal's ruling.⁴⁵ Once more, the Tribunal found for the applicants and also made the same order pursuant to Article 32(5), referring the matter to the Summit.

The applicants proceeded to make an application to the High Court of South Africa in order to register and enforce the Tribunal's main ruling in *Campbell* in terms of Article 32(1) of the Protocol. The application met with success, and property belonging to the respondent located in South Africa was attached. However, in the High Court of South Africa, the respondent challenged the attachment of these properties on the grounds that they were diplomatic properties and, therefore, immune to attachment. The High Court only confirmed the writ of execution for one property which was being used for commercial purposes, while the writs of execution against the other properties were declared invalid and set aside because the properties were indeed diplomatic property and, therefore, immune from attachment.⁴⁶

In light of the above, the current position regarding the enforcement of the Tribunal's decisions is an impediment to its mandate. Bestowing upon the Tribunal the mandate of ensuring respect for the rule of law, human rights and democracy is rendered useless if it is not simultaneously empowered with the authority to ensure compliance with its rulings. Unless members observe their Treaty obligations in good faith, the Tribunal's decisions will remain unenforceable.

The authority of the Summit to enforce decisions

The Summit, composed of Heads of State and Government and established by Article 9 of the Treaty, is the SADC's principal organ tasked with the overall

44 SADC (T) 01/2010.

45 *Gramara (Private) Limited & Another v Government of the Republic of Zimbabwe* HC 33/09.

46 *The Republic of Zimbabwe v Sheriff Wynberg North & Others* 2009/34015 [2010] ZAGP JHC 118. The decision in this case was handed down on 22 November 2010, and the case is presently unreported (available at <http://www.saflii.org/za/cases/ZAGPJHC/2010/118.html>; last accessed 30 November 2010). South Africa's Foreign States Immunities Act, 1981 (No. 87 of 1981) precludes the attachment of foreign states' movable or immovable property in order to enforce a judgment without the written consent of the foreign state. However, this does not apply to property which is used or intended for use for commercial purposes.

responsibility of policy direction and control of SADC functions.⁴⁷ In terms of Article 32(5) of the Protocol, the Summit is the ultimate body to decide on the course of action to be taken in cases where a member disregards a ruling by the Tribunal. Article 33 of the Treaty provides that sanctions may be imposed against any member that, without good reason, persistently fails to fulfil its Treaty obligations or implements policies that undermine the trade bloc's principles and objectives. Furthermore, Article 33(2) enjoins the Summit to determine these sanctions on a case-by-case basis. Unfortunately, neither the Protocol nor the Treaty provides any examples of the possible sanctions as guidance.

In order for the Summit to reach a binding decision, such decision needs to be reached by consensus.⁴⁸ Article 19 of the Treaty further reinforces this position by stating that, unless provided otherwise, decisions by SADC institutions are to be taken by consensus. It is important, therefore, to predict the possibility of SADC imposing any sanctions in the near or even distant future on the Zimbabwean Government in particular for its failure to implement the Tribunal's ruling(s), or any other member state. Thus, because the Summit's decisions are to be reached by consensus, it means that even the member against whom sanctions are being contemplated has to agree to such an action. It is quite unthinkable to imagine a member willingly submitting or supporting the imposition of sanctions against itself.

The decision to review the role, function and terms of reference of the Tribunal

A month after the Tribunal's ruling in *Louis Karel Fick & Others v Republic of Zimbabwe*, the SADC Summit was held. While no official response has been forthcoming from SADC regarding Zimbabwe's disdain of the Tribunal's rulings, SADC members adopted a decision during the Summit to the effect that a review be undertaken within a period of six months regarding the role, functions and terms of reference of the Tribunal.⁴⁹ The SADC Secretariat has since commissioned a study to review the Tribunal's mandate as outlined in Article 16 of the Treaty, and to make recommendations regarding the reluctance of member states to relinquish some of their sovereignty to the regional organisation.⁵⁰

47 Article 10 (2) of the Treaty .

48 Article 10(8) of the Treaty stipulates that "unless otherwise provided for in this Treaty, the decisions of the Summit shall be by consensus and shall be binding".

49 *Communiqué of the 30th Jubilee Summit of SADC Heads of State and Government* (2008:para. 32).

50 "Review of the role, responsibilities and terms of reference of the SADC Tribunal". Available at <http://www.sadc.int/index/browse/page/790>; last accessed 2 December 2010.

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While the review of the Tribunal's structure and function is not in itself irregular, the same cannot be said of the effect that this decision has had on the work of the Tribunal. The Tribunal's power to receive and hear new matters has been withdrawn. The Summit failed to renew the terms of office of the judges whose tenure had expired.⁵¹ This state of affairs should also be viewed in light of the provisions of Article 3 of the Protocol, which deal with the Tribunal's constitution and composition. A reading of Article 3 in its entirety shows that the Tribunal is obliged, at all times, to have ten members, and that there are to be five members available to constitute a full bench. There are currently only four sitting Tribunal members.⁵² The cumulative effective of the above is that, with only four sitting members, the Tribunal is not properly constituted. Procedurally, therefore, even assuming that the Tribunal had not been ordered to stop hearing new matters, the Tribunal lacks sufficient judges to be properly constituted. Consequently, the Summit's decision in intent and effect suspended the Tribunal.

It is unfortunate that SADC, as a collective, by suspending the Tribunal, failed to take this opportunity to guarantee the latter's effectiveness. One would have hoped that the Summit would welcome the occasion to assert and reaffirm the Tribunal's mandate by calling for the enforcement of its decisions. Instead, the Summit effectively suspended the Tribunal. Regrettably, an unenviable precedent has been set that might be followed by other members, namely to allow the principle of sovereignty to trump over the wider interest of integration – even though, by signing SADC instruments, members have in effect surrendered a certain amount of sovereignty to the supranational body.⁵³

Conclusion

While the decisions of the Tribunal are final and binding, their enforcement ultimately lies with the Summit. One needs to bear in mind the crucial role that dispute settlement institutions such as the Tribunal play in sustaining regional integration processes. In this regard, greater commitment, political will and

51 Southern Africa Litigation Centre, Centre for Human Rights and Rehabilitation (Malawi), Botswana Centre for Human Rights, Africa Regional Office of the International Commission of Jurists, Legal Assistance Centre (Namibia), Open Society Justice Initiative, Socio-economic Rights Institute of South Africa & Zimbabwe Exiles Forum. 2010. "Implications of the decision to review the role, function and the terms of reference of the SADC Tribunal", p 6. Available at http://www.southernafricalitigationcentre.org/news/item/SADC_Tribunal_The_Effective_Suspension_of_the_SADC_Tribunal; last accessed 4 December 2010.

52 Southern African Litigation Centre et al. (ibid.8). It should be noted that six positions are currently vacant, five of which are due to the Summit's failure to renew the terms of office of those judges whose tenure had expired. The sixth fell vacant after Zimbabwe withdrew its Tribunal member.

53 Ruppel & Bangamwabo (2008:26).

good faith are needed from members to implement the Treaty's objectives, principles and provisions. On this issue the buck, so to speak, stops with the Summit as far as the enforcement of the Tribunal's rulings is concerned.

While the Tribunal's jurisprudence is still meagre, in light of the few years it has been in operation, it has nonetheless shown itself to be competent – as evidenced by the well-articulated *Campbell* judgments. One cannot but applaud the Tribunal for the manner in which it interpreted SADC's legal instruments and related them to other international instruments, and in the process developed a unique SADC jurisprudence within international legal developments and accepted standards. In view of the Summit's decision to review the Tribunal's role and function, which has effectively suspended the Tribunal's work, one hopes that an expeditious solution will be reached to enable the Tribunal to fulfil its mandate, lest it turn into a white elephant.

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Regional trade integration strategies under SADC and the EAC: A comparative analysis

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Abstract

Regional integration is more important today than it has ever been for eastern and southern Africa's development. This article engages in a comparative study of the key trade liberalisation provisions found in the constitutive legal instruments of the East African Community and the Southern African Development Community with the aim of identifying shortcomings in the legal framework and making proposals to address them. It concludes that serious efforts need to be made to reduce barriers to trade, increase capacity to implement and monitor implementation, and streamline and harmonise the various integration initiatives.

Introduction

The South African Deputy Minister of Trade and Industry, Elizabeth Thabethe, was recently quoted as telling a South Africa–Zambia business forum that the global economic crisis had made it more urgent for regional integration to be at the top of the southern African region's economic agenda.¹ Given the proliferation of regional trade agreements (RTAs) across Africa as a whole and in eastern and southern Africa in particular, this would appear to be a call, not for the creation of more such arrangements, but for the operationalisation, rationalisation and implementation of obligations under those arrangements that already exist. These include the Southern African Customs Union (SACU), the Southern African Development Community (SADC), the East African Community (EAC), and the Common Market for Eastern and Southern Africa (COMESA).

With 2011 marking the beginning of the second decade of the 21st century, it is an apt time to reflect on member states' record regarding the implementation of their obligations over the past ten years. It is also an opportune time to make some proposals regarding the steps that need to be taken in order for the region to improve its dismal record and to achieve its goals over the coming decade.

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1 "Regional integration should top SADC agenda: Minister"; available at <http://www.lusakatimes.com/2010/12/03/regional-integration-top-sadc-agenda-minister/>; last accessed 13 January 2011.

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This article will, therefore, provide an overview of the key legal provisions facilitating regional integration within the EAC and SADC regions, and identify some of the shortcomings that can be found in the current legal frameworks. It will also try to tease out some lessons that SADC can take on board from the EAC's experience with deeper trade liberalisation and integration.

The next two sections provide some background information regarding the overall integration strategies adopted by the EAC and SADC, respectively. The paper will then look at various aspects of their trade liberalisation regimes, starting with the steps that have been taken to ensure the free movement of goods and the rules of origin adopted in this regard. After that, the article will look at the rules relating to the elimination of non-tariff barriers (NTBs) and the manner in which the principle of non-discrimination is being applied, before briefly discussing trade remedies and trade facilitation measures. The discussion will also touch on the approaches taken with regard to relations with third parties. Challenges facing regional integration will then be analysed before a conclusion is drawn regarding the prospects for enhanced regional integration.

The EAC: A customs union and beyond

Though the history of cooperation in the east African region can be traced as far back as 1917,² the EAC, in its current format, was only established in 1999, following the signing of the Treaty Establishing the East African Community.³ It is composed of five states, three of which (Kenya, Uganda, and Tanzania) were the founding partners, while Burundi and Rwanda joined in 2007. The objectives of the Community as set out in the Treaty include the progressive formation of a customs union, a common market, a monetary union and, ultimately, a political federation.⁴ Though the EAC has marked a number of significant milestones since its establishment – among which are the launch of the EAC Customs Union, the conclusion of a Protocol on a Common Market, and the entry into force of the latter Protocol on 1 July 2010 – these gains have been fitful and uneven. Developments on the ground have not always reflected the rhetoric of the politicians and the obligations contained in the constitutive documents.

2 This was the year in which the British colonies of Kenya and Uganda were joined together in a customs union. This later became the East African High Commission, which in turn morphed into the East African Common Services Organisation before its transformation into the original East African Community in 1967. See Mutai, Henry Kibet Mutai. 2007. *Compliance with international trade obligations*. Alphen aan den Rijn: Kluwer Law International, pp 116–118.

3 Treaty establishing the East African Community, 30 November 1999 (entered into force 7 July 2000). Available at <http://www.eac.int/treaty/>; last accessed 14 January 2011.

4 EAC Treaty, Article 5(2).

Regional trade integration strategies under SADC and the EAC

The EAC aims at achieving what is sometimes referred to as *deep integration* through a series of incremental steps. The incremental nature of integration is buttressed by the principles underlying the Community. Amongst the most important of these are “the principle of variable geometry which allows for progression in co-operation among groups within the Community for wider integration schemes in various fields and at different speeds”, and the principle of asymmetry.⁵ These provisions were included in the Treaty primarily to allay the fears of Tanzania and Uganda, which feared that, given their relatively lower levels of development, their economies ran the risk of being swamped by Kenyan goods if they were obliged to liberalise at the same rate. These principles have since proved to be central to the strategy being undertaken by partner states.⁶

The East African trade regime is set up and governed by Chapter Eleven of the Treaty, entitled “Co-operation in Trade Liberalisation and Development”. According to the Treaty, the customs union was to be set up progressively over the course of a transitional period.⁷ The Protocol guiding the process during this transitional period was to be concluded within four years of the Treaty’s entry into force.⁸ This arrangement was fairly unusual in the sense that, rather than adopt the conventional progression described in the economics literature, which involves a move from a free trade area (FTA) to a customs union and then to a common market,⁹ the FTA and customs union stages in the EAC were implemented simultaneously. The various elements comprising the trade regime will be discussed after the following brief overview of the SADC framework.

SADC: A cooperative approach to integration

The Southern African Development Community (SADC) is the successor organisation to the Southern African Development Coordination Conference (SADCC). It is currently composed of 15 states, i.e. Angola, Botswana, the Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. It was formed in 1992 with the signing of the SADC Treaty.¹⁰ Unlike the EAC, which only came into existence in its current guise

5 EAC Treaty, Article 7(1). The principle of asymmetry is defined in Article 1(1) as being “the principle which addresses variances in the implementation of measures in an integration process for purposes of achieving a common objective”.

6 Also referred to as *member states* herein.

7 EAC Treaty, Article 75(2).

8 EAC Treaty, Article 75(7).

9 See Balassa, B. 1961. *The theory of economic integration*. Homewood, ILL: Richard D Irwin, Inc., p. 2.

10 Treaty of the Southern African Development Community (SADC), opened for signature 17 August 1992 (entered into force 30 September 1993).

some eight years later, SADC's initial focus was on the harmonisation of its programmes rather than on regional integration.

The SADC Protocol on Trade, which contains the framework of the SADC trade regime, is actually older than the EAC Treaty, having been signed in August 1996. However, it only entered into force four years later, in 2000. The delay in the Protocol's entry into force was, perhaps, the first sign of the region's lack of preparedness to undertake trade liberalisation. The members' objectives, as set out in the Protocol, include the liberalisation of "intra-regional trade in goods and services on the basis of fair, mutually equitable and beneficial trade arrangements" and the creation of an FTA covering the member states.¹¹ The Protocol was notified to the World Trade Organization (WTO) under Article XXIV of the General Agreement on Trade and Tariffs (GATT),¹² and referred by the Council for Trade in Goods to the Committee on Regional Trade Agreements for examination.¹³

An examination of the Protocol's provisions reveals a close connection between the rules set out under the Protocol and the rules found in the WTO Agreements, with a number of rules on different disciplines having been adopted directly from the WTO. Though this approach had the benefit of ensuring that there is no conflict between these provisions, the opportunity to tailor the provisions to the requirements of SADC member states – some of whom are not WTO members – was lost.

The following sections examine various aspects of the EAC and SADC trade regimes, starting with those provisions relating to the free movement of goods. The aim of this discussion is to provide an overall picture of the current state of trade liberalisation in the region as it relates to the duties imposed on the states by the Treaties.

Liberalising the intra-regional movement of goods

The free movement of goods between states generally requires the creation of an FTA within which tariffs on goods originating within the area (as defined in Rules of Origin) are eliminated.

In the EAC, this phase began in earnest with the signing of the Protocol on the Establishment of the East African Community Customs Union on 2 March

11 SADC Protocol on Trade, Article 2.

12 See WTO/World Trade Organization. 2004. *Southern African Development Community Free Trade Area: Notification by Tanzania*. WTO Doc. WT/REG/176/N/1. Geneva: WTO.

13 See WTO. 2004. *Protocol on Trade in the Southern African Development Community*. WTO Doc. WT/REG/176/3. Geneva: WTO.

2004.¹⁴ The Protocol, which entered into force on 1 January 2005, provided for the elimination of customs duties and other charges of equivalent effect on imports; the removal of NTBs to trade; and the establishment of a common external tariff.¹⁵ Because the then three partner states were at different levels of development, the approach taken was progressive and asymmetric, with immediate duty-free movement of goods from Tanzania and Uganda to Kenya, and between Tanzania and Uganda.¹⁶ Goods moving from Kenya to Tanzania and Uganda were divided into two categories: Category A goods were eligible for immediate duty-free treatment, while Category B goods were eligible for a gradual reduction in tariffs.¹⁷

Similarly, within SADC, the Trade Protocol provided for the elimination of barriers to intra-SADC trade and a reduction of tariffs. Such elimination and reduction were to be effected under the principle of asymmetry, and were to be completed within a period of eight years, i.e. by 2008.¹⁸ This is a longer transition period than that adopted by the EAC, even though the SADC process started earlier. The programme devised by member states provided for the five SACU states to take the lead in removing their tariffs. The Protocol also provides for goods to be categorised into different classes for the purposes of tariff reduction. Thus, goods in Category A were to be liberalised immediately; those in Category B were identified for gradual liberalisation; while Category C comprises goods identified as being sensitive and whose tariffs are last to be liberalised.¹⁹

It can therefore be seen that the approaches adopted by the two regional trade agreements are similar: they both try to cater for the economic inequalities prevailing among the participants. However, whereas the internal elimination of tariffs has been concluded within the EAC (which has even proceeded to introduce a common external tariff as part of its efforts to create a customs union), the process is ongoing within SADC.

Rules of origin

Rules of origin are an essential feature of free trade agreements because they are used to determine the goods that are eligible for preferential treatment.

14 The text of the Protocol on the Establishment of the East African [Community] Customs Union (hereafter *EACCU Protocol*) is available at http://www.customs.eac.int/index.php?option=com_docman&task=doc_view&gid=1&tmpl=component&format=raw&Itemid=164; last accessed 14 January 2011.

15 EACCU Protocol, Article 2(4).

16 EACCU Protocol, Article 11(2).

17 EACCU Protocol, Article 11(3)–(5).

18 SADC Protocol on Trade, Article 3(1).

19 Ng'ong'ola, C. 2000. "Regional integration and trade liberalisation in the Southern African Development Community". *Journal of International Economic Law*, 3:485.

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Without rules of origin, imports from third party countries would be able to enter the FTA through the country with the lowest external tariffs before moving on to the other FTA member(s), thus depriving the latter of customs revenue.²⁰ Though fully-fledged customs unions do not require rules of origin because the member states apply a common external tariff to imports, both the EAC and SADC require these rules due to the progressive nature of the integration and the many exemptions to the common external tariff.

Thus, the EACCU Protocol provides that goods are to “be accepted as eligible for Community tariff treatment [only] if they originate in the Partner States”.²¹ For purposes of determining whether goods originate in the Community, the Protocol contains a detailed Annex setting out the EACCU’s Rules of Origin.²² Since the scope of this article does not allow for a comprehensive analysis of the Rules of Origin, the discussion will be limited to a description of the broad requirements.

The regulations set down four different criteria under which goods can be accepted as originating in member states. The first criterion categorises goods that are wholly produced in a partner state.²³ The second categorises goods produced wholly or partially from imported material where the cost, insurance and freight (c.i.f.) value of the imported materials does not exceed 60% of the total cost of the materials used. The third criterion categorises goods whose value added accounts for at least 35% of the goods’ ex-factory cost. The fourth and last criterion categorises goods considered as originating in the partner states are those goods that are classified or become classifiable under a tariff heading other than that under which they were imported.²⁴ Though these rules are fairly straightforward, there have been disputes between the partners over their application. For instance, there was a refusal by Tanzania to allow vehicles that had been assembled in Kenya to enter Tanzania duty-free on the ground that they did not meet the requirements of the Rules.²⁵

Similarly, within SADC, an Annex to the SADC Protocol sets out the Rules of Origin used to determine which goods are eligible for preferential treatment as “originating goods”.²⁶ These Rules provide for two different criteria under

20 The phenomenon is known as *trade deflection*.

21 EACCU Protocol, Article 14.

22 East African Community Customs Union (Rules of Origin) Rules, Annex III.

23 Examples of such goods include mineral products extracted from the ground of a partner state, vegetable products harvested within a partner state, and live animals born and raised within that state. See EACCU (Rules of Origin) Rules, Rule 5(1).

24 EACCU (Rules of Origin) Rules, Rule 4(1).

25 See Omondi, George. 2010. “Origin rules row denies firms free EAC access”, *Business Daily*, 7 July 2010. Available at <http://www.businessdailyafrica.com/Company%20Industry/Origin%20rules%20row%20denies%20firms%20free%20EAC%20access/-/539550/953418/-/471r4/-/>; last accessed 14 January 2011.

26 SADC Protocol on Trade, Article 12; SADC Protocol on Trade, Annex I.

which products can be considered as originating in a member state. The first categorises goods that have been wholly produced in any member state.²⁷ The other criterion categorises goods considered as having originated from a member state, namely those goods that –²⁸

... have been obtained in any Member State incorporating materials which have not been wholly produced there, provided that such materials have undergone sufficient working or processing in any Member State within the meaning of paragraph 2 of this Rule.

Paragraph 2 then goes on to refer to a separate Appendix setting out the conditions to be fulfilled by such products. This is a much more complex approach than that adopted by the EAC, and does not lend itself to easy application by the business community. The danger of such a complex Rules of Origin regime is that it will discourage traders from seeking the benefits of lower tariffs as the time and expense of satisfying the Rules will be daunting. As a result, the tariff framework will be underused and the goodwill of those for whom it was created will be lost.

The elimination of non-tariff barriers

The issue of NTBs is generally a cause of great concern within RTAs. The gravity of the situation was laid bare by the Permanent Secretary of Kenya's Ministry of East African Community, David Nalo, when he stated that the business community within East Africa loses more than US\$9 million annually due to NTBs.²⁹ This is despite the EAC Treaty obliging partner states –³⁰

... to remove all the existing non-tariff barriers on the importation into their territory of goods originating from the other Partner States and thereafter to refrain from imposing any further non-tariff barriers.

This provision is reiterated in the EACCU Protocol, which also requires its partners to formulate a mechanism for identifying and monitoring the removal of NTBs.³¹ In spite of these provisions, complaints by traders about the existence of NTBs are frequent. As Mr Nalo lamented, "even after one NTB is

27 Examples of such goods are mineral products extracted from the ground or seabed of member states, vegetable products harvested there, and live animals born and raised there. See SADC Protocol on Trade, Annex I, Rule 4.

28 SADC Protocol on Trade, Annex I, Rule 2(1)(b).

29 MEAC/Ministry of East African Community. 2010. "Non-tariff barriers costing East African businesses millions". *Jumuiya News* [a magazine of the Ministry of the East African Community], 18(July–September):30.

30 EAC Treaty, Article 75(5).

31 EACCU Protocol, Article 13.

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removed there is always another way of erecting a new one with the same or more capacity of hindering trade”.³²

The issue of the use of sanitary and phytosanitary (SPS) measures as NTBs to trade, for instance, has been a long-running source of irritation for partner states. For example, Uganda has maintained a ban on the import of Kenyan beef for a number of years. It only lifted a ban on the import of Kenyan bull semen after Kenya had lifted a ban on the import of Ugandan chicks into the Kenyan market.³³ Neither the EAC Treaty nor the EACCU Protocol contains any specific provisions allowing partners to regulate the use of either SPS measures or technical barriers to trade. It can be assumed, therefore, that these disciplines are governed by WTO Rules since all the partners are also WTO members.

As a means of combating NTBs, and pursuant to Article 13 of the Protocol, a system known as the *Monitoring Mechanism for the Elimination of Non-tariff Barriers in EAC*³⁴ has been developed jointly by the EAC and East African Business Council Secretariats.³⁵ The framework created by the mechanism is aimed at monitoring the existence of NTBs and suggesting ways through which they can be eliminated.

The legal position in SADC is similar to that of the EAC. Recognising that NTBs can often serve as obstacles to the free movement of goods, the SADC Trade Protocol requires member states to “adopt policies and implement measures to eliminate all existing forms of NTBs” and “refrain from imposing any new NTBs”.³⁶

With regard to SPS measures, which can sometimes act as barriers to trade, the SADC Protocol contains an explicit reference to international standards. It requires members to “base their SPS measures on international standards, guidelines and recommendations”.³⁷ Where consultations are required for purposes of recognising the equivalence of specific SPS measures, these are to be done in accordance with the WTO’s SPS Agreement.

Similarly, for standards and technical barriers to trade, SADC members are to use relevant international standards as the basis of their standards-related

32 MEAC (2010:31).

33 Kazooba, Charles. 2009. “Uganda now lifts ban on Kenyan semen, beef still off the menu”. *The EastAfrican*, 19–25 January, pp 1–2.

34 Sic.

35 See “Non-tariff Barriers (NTBs) Monitoring Mechanism: Overview”. Available at http://www.eac.int/trade/index.php?option=com_content&view=article&id=114&Itemid=41; last accessed 12 January 2011.

36 SADC Protocol on Trade, Article 6.

37 SADC Protocol on Trade, Article 16.

measures.³⁸ Such international standards-based measures are presumed not to create unnecessary obstacles to trade.³⁹

Quantitative restrictions are also sometimes used as an alternative to tariffs for purposes of restricting trade. In order to avoid this outcome, the use of quotas within SADC is to be progressively eliminated, although members may apply quotas in situations where tariffs under the quotas are more favourable than those outside them.⁴⁰

This area of NTBs is one where the two regional trade agreements have adopted broadly similar approaches even though, institutionally, the EAC would appear to be ahead of SADC. This is one area where SADC would be able to learn from the EAC, especially with regard to the involvement of the private sector in monitoring NTBs.

Non-discrimination

One of the dangers faced by any party to a trade agreement is the possibility that one's partner(s) will discriminate against one by granting more favourable treatment to domestic goods and producers than to imports. National treatment provisions are, therefore, a common feature of trade agreements. The EAC Protocol imposes a national treatment obligation on partner states, obliging them to treat domestic products and those of partner states alike. Specifically, partners are to ensure that they do not enact legislation or apply administrative measures which directly or indirectly discriminate against the same or similar products of partner states.⁴¹ In addition, they are not to impose on imports from partner states any kind of internal taxation that is in excess of that imposed on similar domestic products.⁴² These provisions have generally not proved to be controversial in the Protocol's implementation.

The SADC Protocol on Trade, like the EACCU Protocol, provides that members are to accord to goods traded within SADC the same treatment as goods produced nationally in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.⁴³ This is a mandatory requirement.

Having been formed with the goal of establishing a customs union as a step on the road to eventual political federation, the EAC constitutive documents do not provide for the application of a most-favoured-nation (MFN) principle.

38 SADC Protocol on Trade, Article 17(1).

39 SADC Protocol on Trade, Article 17(2).

40 SADC Protocol on Trade, Article 7.

41 EACCU Protocol, Article 15.

42 EACCU Protocol, Article 15(2).

43 SADC Protocol on Trade, Article 11.

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This confirms that, legally, partner states are obliged not to engage in any individual trade negotiations with third parties, but to negotiate as a single entity. This is reinforced by the provisions of Article 37, which requires the Community “to co-ordinate its trade relations with foreign countries so as to facilitate the implementation of a common policy in the field of external trade”. Discrimination by partners through entering separate, more favourable agreements with third parties would, thus, be avoided.

Where trade relations with third parties are concerned, the SADC position is different from that adopted by the EAC in that the SADC Protocol contains an MFN treatment clause.⁴⁴ Members are permitted to grant or maintain preferential trade arrangements with third countries, provided that such arrangements do not impede the objectives of the Protocol and that “any advantage, concession, privilege or power granted to a third country under such arrangements is extended to other Member States”.⁴⁵ The implication of this provision for Tanzania, which is an EAC partner state, is that the privileges and advantages granted to the other EAC members should be granted unconditionally to all the other SADC members. Though the SADC Protocol goes on to provide that member states are not obliged to extend preferences of another trading bloc of which they were a member at the time of the Protocol’s entry into force,⁴⁶ this provision would not save Tanzania. This provision would appear to have been included to cater for the position of SADC’s SACU members. This anomalous situation is a clear example of the legal pitfalls created by the overlapping membership syndrome.

Trade remedies

Unfair trade practices are a common complaint from businesses forced to deal with competing imports. The EAC tries to cater for such practices by providing for the availability of anti-dumping duties, countervailing duties, and safeguarding measures.

With regard to dumping,⁴⁷ the Protocol prohibits dumping if it either —⁴⁸

... causes or threatens material injury to an established industry in any of the Partner States, materially retards the establishment of a domestic industry

44 SADC Protocol on Trade, Article 28(1).

45 SADC Protocol on Trade, Article 28(2).

46 SADC Protocol on Trade, Article 28(3).

47 *Dumping* is defined in the Protocol as being “the situation where the export price of goods imported or intended to be imported into the Community is less than the normal value of like goods in the market of a country of origin as determined in accordance with the provisions of this Protocol”. See EACCU Protocol, Article 1.

48 EACCU Protocol, Article 16(1).

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therein, or frustrates the benefits expected from the removal or absence of duties and quantitative restrictions of trade between the Partner States.

The procedures to be followed in applying anti-dumping duties within the EAC are set out in the EACCU (Anti-dumping) Regulations.⁴⁹ The Regulations provide that, where the investigation is initiated against another partner state, the Regulations apply; but where the investigation is against a foreign country, the provisions of the WTO Agreement apply.⁵⁰ However, given the definition of *dumping* in the Protocol, which refers to the importation of goods “into the Community”, it is not clear whether it would be legally permissible to impose anti-dumping duties on a partner state. The Regulations would appear to contradict the Protocol in this regard, and it remains to be seen what effect this will have when an attempt is made to apply them.

Unlike the case with the EAC, which has a detailed annex on dumping, the SADC Trade Protocol’s provisions regarding anti-dumping measures are brief and only require members to comply with WTO provisions in applying such measures.⁵¹

On the issue of subsidies and countervailing duties, EAC partner states are not prohibited from granting subsidies; but there is a notification obligation requiring them to notify other partner states in writing of any subsidies that operate directly or indirectly to distort competition.⁵² Where goods that have benefited from subsidies are imported into the EAC, the Community may levy countervailing duties equal to the amount of the estimated subsidy, pursuant to the provisions of the annexed Subsidies and Countervailing Measures Regulations.⁵³

Regarding subsidies, the SADC Protocol simply provides that subsidies that distort or threaten to distort competition in the SADC region are forbidden. members are accordingly permitted to levy countervailing duties, in accordance with WTO provisions, for the purposes of offsetting subsidies.⁵⁴

With regard to safeguards, the EAC Treaty permits a partner state that suffers serious injury due to the application of the provisions of Chapter Eleven to

49 EACCU Protocol, Annex IV. Article 1 of the EACCU Protocol defines *anti-dumping measures* as “measures taken by the investigating authority of the importing Partner State after conducting an investigation and determining dumping and material injury resulting from the dumping”.

50 EACCU Protocol, Anti-dumping Regulations, Regulation 4.

51 SADC Protocol on Trade, Article 18.

52 EACCU Protocol, Article 17.

53 EACCU (Subsidies and Countervailing Measures) Regulations, Article 18.

54 SADC Protocol on Trade, Article 19.

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take necessary safeguarding measures.⁵⁵ This provision is reiterated in the EACCU Protocol.⁵⁶ Further provisions in the Protocol regarding safeguards state, *inter alia*, that safeguarding measures can be applied to –⁵⁷

... situations where there is a sudden surge of a product imported into a Partner State, under conditions which cause or threaten to cause serious injury to domestic producers in the territory of like or directly competing products within the territory.

The application of such measures is to be done in accordance with the provisions of the Safeguard Measures Regulations.⁵⁸

On safeguards, the SADC Protocol on Trade provides that –⁵⁹

... a Member State may apply a safeguard measure to a product only if that Member State has determined that such product is being imported to its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

The Protocol links the determination of “a serious injury” to the WTO Agreement on Safeguards,⁶⁰ thus ensuring that there is harmony between SADC and WTO requirements. Therefore, it can be seen that, in regard to both the EAC and SADC, it is imperative that the members establish strong and effective domestic bodies charged with the duty of determining whether serious injury is being or has been inflicted on the state concerned.

As an institutional measure, the EAC is required to establish a Committee on Trade Remedies to handle matters pertaining to rules of origin, anti-dumping measures, subsidies and countervailing duties measures, safeguarding measures, and Dispute Settlement Mechanism Regulations.⁶¹ The Committee is to be composed of nine members, qualified and competent in matters of trade, customs and law.⁶² The purpose of the Committee is to work through investigating authorities established in each partner state in the initiation and conduct of investigations. The Committee is charged with the duty of, *inter alia*, making affirmative or negative determinations on investigations, recommending

55 EAC Treaty, Article 78.

56 See EACCU Protocol, Article 36. *Safeguard measures* are defined in Article 1 of the Protocol as “protective measures taken by a Partner State to prevent serious injury to her economy as provided under this Protocol”.

57 EACCU Protocol, Article 19(1).

58 EACCU Protocol, Annex VI (Safeguard Measures) Regulations.

59 SADC Protocol on Trade, Article 20.

60 SADC Protocol on Trade, Article 20(2).

61 EACCU Protocol, Article 24(1).

62 EACCU Protocol, Article 24(2). It was not possible to establish if this provision has been changed to cater for the expansion of the EAC to include Burundi and Rwanda.

provisional measures, and reporting to the Council on all matters referred to it. The Committee is also charged with the administration and management of the Dispute Resolution Mechanism.⁶³ If not operationalised with great care, these provisions have the potential to lead to a conflict of interest between individual states and the Community as a whole.

Trade facilitation

Trade facilitation refers to those measures that can be taken to assist the movement of goods once formal trade barriers are eliminated. It is defined in the EACCU Protocol as meaning “the co-ordination and rationalisation of trade procedures and documents relating to the movement of goods from their place of origin to their destination”.⁶⁴ As part of the effort to facilitate trade, partners are required to simplify their trade documentation and procedures.⁶⁵ For purposes of customs nomenclature, the partners have agreed to adopt the Harmonised Commodity Description and Coding System.⁶⁶ As a result, the possibility of conflict regarding the proper classification of goods has been minimised.

SADC member states are also required to take measures to facilitate the simplification and harmonisation of trade documentation and procedures.⁶⁷ These measures include reducing the cost of all trade documentation and procedures by aligning intra-SADC and international documentation on the United Nations Layout Key, and reducing the number of documents required to a minimum.⁶⁸ Members are also required to standardise the documents by using internationally accepted standards, practices and guidelines as a basis for designing their documents and the information required to be in them.⁶⁹ In order to ensure that these provisions are complied with, a Subcommittee on Trade Facilitation is to be set up by the Committee of Ministers responsible for trade matters.⁷⁰ This institutional set-up differs from that contained in the EAC framework, in that the responsibilities of the Subcommittee are far fewer than those of the EAC’s Committee on Trade Remedies.

63 EACCU Protocol, Article 24(4).

64 EACCU Protocol, Article 2(1).

65 EACCU Protocol, Article 7(1).

66 EACCU Protocol, Article 8(2).

67 SADC Protocol on Trade, Article 14.

68 SADC Protocol on Trade, Annex III (Concerning Simplification and Harmonisation of Trade Documentation and Procedures), Article 3.

69 SADC Protocol on Trade, Annex III, Article 4.

70 SADC Protocol on Trade, Annex III, Article 6.

External relations

The issue of member states' relations with third parties is closely linked to that of non-discrimination. Although it is an intrinsic characteristic of customs unions that their members conduct their trade relations with third parties as a unit, the EAC requires members to honour their commitments in respect of other international organisations to which they belong.⁷¹ This provision means that Tanzania, which was already a member of SADC and had signed the SADC Trade Protocol before the EAC came into being, is not required to terminate her obligations under SADC. However, this can clearly lead to confusion in the event that Tanzania's EAC obligations clash with her SADC obligations. Furthermore, it illustrates the lack of a coherent trade policy.

Given the existence of overlapping regional trade arrangements in the southern African region when SADC was formed, it was necessary to cater for those countries that were already party to other agreements. In order to achieve this, SADC members are permitted to maintain preferential trade and other trade-related arrangements that existed at the time the Protocol entered into force.⁷² They are also permitted to enter into new preferential trade arrangements among themselves, provided these are not inconsistent with the provisions of the Protocol.⁷³ This is an application of the principle of asymmetry, and enables members who wish to liberalise trade amongst themselves at a faster pace to do so. Though this has the benefit of ensuring that members that are economically constrained do not hold back their fellows, it also undermines the legally binding nature of the obligations in the Protocol.

Despite not being obliged to conduct negotiations as a unit, members are exhorted to "coordinate their trade policies and negotiating positions in respect of relations with third countries or groups of third countries and international organisations".⁷⁴ This appeal can be seen in the ongoing negotiations with the European Union (EU) regarding Economic Partnership Agreements (EPAs), where a group of SADC countries – Angola, Botswana, Lesotho, Mozambique, Namibia, South Africa and Swaziland – are negotiating as a group. However, the weakness of this provision is also visible from the fact that six other members – the Democratic Republic of the Congo, Madagascar, Malawi, Mauritius, Zambia and Zimbabwe – are negotiating under the eastern and southern Africa configuration, while Tanzania is negotiating an EPA with her EAC partners.

71 EACCU Protocol, Article 37(1).

72 SADC Protocol on Trade, Article 27(1).

73 SADC Protocol on Trade, Article 27(2).

74 SADC Protocol on Trade, Article 29.

Having provided this overview of the key legal provisions regulating integration within the EAC and SADC, the following section briefly outlines some challenges facing integration.

Challenges facing regional integration

The review of the status of regional integration in the two bodies reveals that there are a number of challenges that will need to be overcome in the years ahead. Some of these challenges are historic in nature; others are the consequence of loosely drafted instruments, while yet others are implementation-related.

The primary historical challenge facing trade liberalisation in the eastern and southern African region – and which has manifested itself in the proliferation of overlapping regional trade agreements – is the lack of a coherent, realistic policy to guide the process. Though the 1980 Lagos Plan of Action and the 1991 Treaty Establishing the African Economic Community set out an overall vision of a united Africa,⁷⁵ they inadvertently laid the groundwork for the proliferation of regional trade agreements: with all the bodies having the same overall goal, there was no disincentive to joining as many as were available in the name of ‘solidarity’ with one’s neighbours. Once this had been done, however, the challenges posed by sovereignty and parochial interests have proved to be an obstacle to actual liberalisation.

The most recent effort – in the form of the tripartite COMESA–EAC–SADC negotiations – to harmonise the trade regimes of these different bodies is promising; but, given the different objectives of the three bodies, such negotiations do not offer much hope of a short-term solution.

The challenge to integration posed by the nature of the constitutive instruments is that, from a legal perspective, the parties concerned will not find it easy to comply with the obligations contained therein. For example, some of the language setting out the obligations is ambiguous, and the time frames required to comply with them are unrealistic. Moreover, many provisions contain overambitious targets together with lavish exceptions that totally undermine the objective of creating rules-based organisations.

The implementation-related challenges primarily revolve around capacity – or, to be more precise, the lack thereof. Capacity limitations have proved to be a hindrance to regional integration both at the national and the regional level. Lack of capacity manifests itself in a number of ways, including financial and human resources. With regard to financial limitations, member

75 For more on the African Economic Community, see Mutai, Henry Kibet. 2007. *Compliance with international trade obligations*. Alphen aan den Rijn: Kluwer Law International, pp 104–109.

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states sometimes have problems meeting their financial obligations. An example of this is Burundi, which was allowed to pay only US\$1 million of its budgetary contribution for the 2007/8 and 2008/9 financial years, instead of its full contribution of US\$4.5 million.⁷⁶ This inability to finance expenditure means that there is an over-reliance on external investors and donors. In the 2008/9 financial year, for example, 20% of the EAC budget was sourced from development partners. This lack of capacity among the eastern and southern African states is exacerbated by their membership of many arrangements.

From the human resources perspective, there is a severe lack of expertise in both the legal and economic sectors. The few experts there are find themselves overstretched when faced with the demands at the multilateral (WTO and EU), regional and bilateral levels. The EAC and SADC Secretariats are also faced with the same financial and human resource constraints.

Conclusion

Regional integration in both the EAC and SADC holds a lot of promise for the states concerned, but a number of steps need to be taken in order to get regional integration and trade liberalisation back on track.

The first thing that needs to be done is to address the legal lacunae in the agreements that permit continued protectionism. If the member states are truly serious about trade liberalisation, then more needs to be done about increasing intra-regional trade through the elimination of tariffs and the reduction, if not complete removal, of exceptions – which usually concern the very goods where partners have a comparative advantage!

The second issue that needs to be addressed is the capacity deficit. A successful economic policy can only be devised by properly trained economic experts. Once a coherent, well-thought-out policy has been devised, then legal experts are required to transform the economic goals into binding legal instruments. Moreover, after the instruments have been adopted, sufficient expertise is required to implement the provisions, monitor their implementation, and resolve disputes that arise from them.

The last issue that will need to be addressed as a matter of urgency is the harmonisation of the trade policies of eastern and southern African states. Only when this has been done will the cost of doing business in the region come down and trade increase. The current initiative in the guise of the tripartite talks is commendable, but it will need to be closely monitored and ramped up significantly in the next few months.

76 Kezio-Musoke, David. 2008. "Burundi allowed to pay only \$1m to EAC budget". *The EastAfrican*, 7–13 July:24.

Regional trade integration strategies under SADC and the EAC

Finally, it is to be hoped that this survey of the strategies adopted within the EAC and SADC will stimulate further, more intensive research on the areas highlighted in this article.

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Conjuring systemic risk through financial regulation by SADC central banks

Dunia Zongwe*

Abstract

This article is the first attempt at drawing a picture of the Southern African Development Community (SADC) Central Bank Model Law within the overall frame of regional financial integration and enhanced risk regulation in the financial industry. The SADC Committee of Central Bank Governors (CCBG) in 2009 adopted a Central Bank Model Law whose Chapter VI enshrines central banks' strategies for stabilising financial systems in the SADC region. Chapter VI embodies key principles; it is not binding law, yet it derives a great deal of legitimacy from its origins in the CCBG. The prevention of systemic risk is the central objective of financial regulatory policy and the prism through which the efficiency of the Model Law is to be viewed. This article lays out the tenor of the concept systemic risk and the means to avoid it generally. It then describes the Model Law's specific tools for conjuring that risk. The significance of risk regulation is underscored by recent financial crises and the growing part played by financial institutions in the economic development and integration of SADC. The Model Law's provisions on disclosure, the accommodation of banks, emergency liquidity assistance, and central bankers' banker role, including as lender of last resort, are robust. However, the article's greatest concern is the provision – or, more precisely, the lack thereof – on capital and liquidity standards. The lack of such provision is unjustifiable in an era of economic globalisation and in light of the financial integration objectives of the legal framework of SADC as a regional development community.

Introduction

Just like the devil is the pastor's arch-nemesis, so is systemic risk the financial regulator's worst nightmare. The analogy is not far-fetched. In so many ways, systemic risk resembles the idea people have commonly formed of the devil. It is elusive; when it strikes it is devastating; when it enters the heads of those it possesses it seduces them to act with a herd mentality; and it may vanish when faith in the system is strong. It behoves the regulator to devise

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strategies to conjure systemic risk and strengthen faith in the financial system. The Committee of Central Bank Governors (CCBG) in the Southern African Development Community (SADC)¹ adopted a Central Bank Model Law² (hereinafter *Model Law*) in 2009 that enshrines a strategy for insuring domestic financial institutions against systemic risk. In order to gauge the readiness of central banks in SADC to prevent a major financial crisis, one needs to know how the subregion has agreed, as a whole, to ward off systemic risks through the Model Law. Against this background, this article unveils the strategy of SADC central bankers to shield their financial sector from systemic risks. That strategy is embodied in Chapter VI of the Model Law, which confers on SADC central banks sweeping supervisory and regulatory functions.³ The article lays out the tenor of the concept of *systemic risk* and the means to avoid it generally, and then emphasises how Chapter VI of the Model Law specifically tackles those risks.

This is the first attempt to draw a picture of Chapter VI of the Model Law within the overall frame of regional financial integration and enhanced risk regulation. Unsurprisingly, therefore, the legal literature on Chapter VI of the Model Law is virtually non-existent. Moreover, there are few legal writings on the regulation and supervision of financial institutions at SADC level. This article aims to bridge the gap in the legal literature as regards financial regulation within regional economic groupings. The broader concern the article answers is centred on the optimal contents of a financial plan devised at the level of a regional economic grouping for systemic risk management and regional economic integration.

Systemic risk

Why the Model Law?

The importance of studies on the regional regulation of SADC financial institutions is underscored by recent financial crises, not least of which is the series of measures taken in 2009 in Nigeria to salvage its financial sector by

1 SADC is a regional economic community made up of 15 countries in southern Africa, namely Angola, Botswana, the Democratic Republic of the Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

2 SADC Model Central Bank Law, 2009; available in English, French, and Portuguese at [http://www.sadcbankers.org/SADC/SADC.nsf/LADV/2C7584478FB6CEF842257674003206A8/\\$File/Model+Law%28English2009%29.pdf](http://www.sadcbankers.org/SADC/SADC.nsf/LADV/2C7584478FB6CEF842257674003206A8/$File/Model+Law%28English2009%29.pdf); last accessed 26 March 2011.

3 Model Law, Article 52.

bailing out a few major commercial banks.⁴ Even though some analysts may have thought initially that it would spare states parties to the SADC Treaty (member states), the 2008–2009 global credit crunch stifled trade, foreign direct investment (FDI),⁵ remittances and development aid to member states. Botswana was the worst affected, recording a negative growth rate of -5,4% in 2009,⁶ while in the United States (US), many an expert said that the global financial crisis was the worst depression since the Great Depression.⁷ Jurisdictions in North America and Europe are taking stock of their systems of regulating financial institutions after the 2008–2009 global credit crunch. The Model Law came into being in that global economic environment and in the context of intense soul-searching within leading financial centres. This article advances reflections on financial regulation by analysing it from the vantage point of regional integration.

The growing role of financial intermediaries in the economic development and integration of SADC stresses the timeliness of research on financial regulation by regional economic communities. As SADC countries are stepping up investments in the information and communication technology (ICT) and banking sectors, banks and other financial institutions are increasingly serving as inevitable intermediaries in SADC's development and integration. The US\$5.5 billion purchase by the Industrial and Commercial Bank of China (ICBC) of a 20% stake in the largest bank in SADC and Africa, namely Standard Bank, in February 2008 is a perfect example of the growing part played by financial institutions in foreign investment inflows in the region.⁸ This Chinese portfolio investment in Standard Bank is strategic as Standard Bank operates in 18 countries in Africa, and in nearly all SADC member

4 See Melik, James. 2011. "Nigeria's top banker wins international recognition". *BBC News*, 6 January; available at <http://www.bbc.co.uk/news/business-12126920>; last accessed 26 March 2011.

5 Investment inflows to southern Africa decreased from US\$28.7 billion in 2008 to US\$21.6 billion in 2009, but the stock of investment inflows increased from US\$101,4 billion in 2008 to US\$165,1 billion in the same year; UNCTAD/United Nations Conference on Trade and Development. 2010. *World Investment Report 2010: Investing in a low-carbon economy*. Geneva: UNCTAD, p 32.

6 CIA/Central Intelligence Agency. *World Factbook 2011: Botswana*. Available at <https://www.cia.gov/library/publications/the-world-factbook/geos/bc.html>; last accessed 3 February 2011.

7 See e.g. Posner, Richard A. 2009. *A failure of capitalism: The crisis of '08 and the descent into depression*. Cambridge, MA: Harvard University Press.

8 For instance, Chinese banks have reportedly made more loan commitments to developing nations in 2010 than the World Bank that same year; Dyer, Geoff & Anderlini, Jamil. 2011. "China's lending hits new heights". *Financial Times*, 17 January; available at <http://www.ft.com/cms/s/0/488c60f4-2281-11e0-b6a2-00144feab49a.html>; last accessed 14 January 2011

states, except Madagascar and Seychelles.⁹ The great strategic value of China's investments in Standard Bank is also evident from the fact that the ICBC has used Standard Bank to finance 65 projects in Africa, most notably the Morupule B Power Station in Botswana, Africa's largest power station as of 2010.¹⁰

Parsing the texture of the Model Law is a superb opportunity for a fresh look on national central banks as they discharge their responsibility to uphold financial stability. Nine of the 15 central banks in SADC supervise all financial regulations,¹¹ a situation that surely underlines this analytical exercise. In terms of the Bank of Tanzania Act of 2006, one of the principal functions of the central bank in Tanzania is to "supervise banks and financial institutions including mortgage financing, development financing, lease financing, licensing and revocation of licences".¹² National legislation empowers the Bank of Tanzania to keep away systemic risk by licensing banks, issuing prudential regulations, and by otherwise supervising banks.¹³

Risk

Admittedly, the central objective of financial regulation is the prevention of systemic risk.¹⁴ Stated positively, the overarching objective of financial regulation is to guarantee the safety and soundness of the financial system.¹⁵ On a practical plane, one of the ultimate goals of financial regulation is to secure systemic stability in the economy and ensure institutional safety and soundness.¹⁶ While the rationale of financial regulation is crystal clear, the contents of the financial legislation enacted to fulfil this rationale are not so neatly cut. More often than not, the contents of financial legislation did not evolve in a logical or consistent fashion, building instead on historical

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- 9 See Standard Bank. 2011. "Worldwide presence". Available at <http://www.standardbank.com/WorldWide.aspx>; last accessed 14 January 2011.
- 10 "ICBC cooperates with Standard Bank on 65 projects", *China Daily* (People's Republic of China), 25 May 2009.
- 11 See CCBG/Committee of Central Bank Governors in SADC. 2009. *Financial systems*. Pretoria: CCBG.
- 12 Bank of Tanzania Act, 2006, section 5(1).
- 13 CCBG (2009:227).
- 14 Scott, Hal S. 2010a. "Reducing systemic risk through the reform of capital regulation". *Journal of International Economic Law*, 13:763.
- 15 The two goals of financial regulation are to ensure the soundness and safety of the financial system and to foster the growth and development of financial markets; see Pan, Eric J. 2011. "Structural reform of financial regulation". *Transnational Law and Contemporary Problems*, 19:796, 800.
- 16 Falkena, Hans, Roy Bamber, David Llewellyn & Tim Store. 2001. *Financial regulation in South Africa*. Johannesburg: SA Financial Sector Forum, p 2.

antecedents rather than a systematically logical design.¹⁷ Financial legislation sometimes comes up to the quality of financial intermediaries, sometimes information asymmetries, sometimes market behaviour, and sometimes the market infrastructure.¹⁸

Notwithstanding the centrality of systemic risk for financial regulation, the Model Law does not define the concept – although it uses it. For example, it lays down that central banks may grant emergency liquidity assistance to a distressed bank at such price as they consider appropriate if they are of the opinion that the distressed bank poses a systemic risk to the banking sector.¹⁹ The use of the concept of *systemic risk* in the Model Law implies either that the Model Law avoids defining a concept that it knows to be a hot potato, or that it erroneously assumes that readers have a common understanding of the concept. In either hypothesis, an analysis of the concepts of *risk* and *systemic risk* is apposite.

In finance, *risk* is an elusive notion that refers to the probability of permanent loss of assets. Risk is often (con)fused with uncertainty. Frank Knight's stance in his book *Risk, uncertainty and profit* is to posit the now widely accepted dichotomy.²⁰ For Knight, *risk* is the set of calculable possible future outcomes for a relevant performance indicator, a known set of probabilities.²¹ Conversely, *uncertainty* is what cannot be known because it is in some fashion unpredictable and, therefore, non-quantifiable.²² Since then, several scholars have questioned Knight's dichotomy. Three positions have emerged, the first of which contends that risk and uncertainty are distinct.²³ The second position counters that the two are inseparable,²⁴ while the third adds that the

17 See Tietje, Christian & Matthias Lehmann. 2010. "The role and prospects of international law in financial regulation and supervision". *Journal of International Economic Law*, 13:663, 665.

18 (ibid.).

19 Model Law, article 47(4)(b).

20 Knight, Frank H. 1921. *Risk, uncertainty and profit*. Chicago: Chicago University Press.

21 White, Colin & Miao Fan. 2006. *Risk and foreign direct investment*. Hampshire: Palgrave Macmillan, p 27.

22 (ibid.).

23 Knight (1921:4); De Graaf, J. 1963. *Theoretical welfare economics*. Cambridge: Cambridge University Press, p 116.

24 *Risk* is uncertainty about the world and all probabilities are subjective assessments of uncertainty; see Aven, Terje. 2003. *Foundations of risk analysis: A knowledge and decision-oriented perspective*. West Sussex: John Wiley & Sons, pp 28, 50. Some relation and some distinction between *risk* and *uncertainty* can be found, but the presumption that risk is quantifiable is rejected; see Miller, KD. 1992. "A framework for integrated risk management in international business". *Journal of International Business Studies*, 23(2):311–331.

two are part of the same continuum.²⁵ This article takes the latter position, and assumes that risks of losses are inherent in any economic activity and that uncertainty about the future increases the desirability of insuring against risks.

Systemic risk

If *risk* is the probability of asset losses, then *systemic risk* is easily understood as the probability that a system or actors within a system may suffer significant losses. Unfortunately, *systemic risk* is seldom fully understood, and experts talk past one another²⁶ on the concept because it is not an easily fathomable phenomenon. Two elements are discernible in the various definitions of *systemic risk*, namely the event that touches off significant losses within the financial system, and the consequences of the triggering event. Most renderings of *systemic risk* are linked by their reference to the event that sparks the series of asset losses that spreads like wildfire through the financial sector.²⁷ The spark or trigger event is an economic shock²⁸ or an institutional failure,²⁹ which sets off a sequence of significant losses to financial institutions or substantial (financial) market price volatility – or both.³⁰ The most spectacular example of a systemic risk with disastrous effects on both financial institutions and markets is the 2008–2009 mortgage crisis in the US. Many an expert believes that the collapse of the investment firm Lehman Brothers touched off the chain of failures within the financial sector that spread throughout the US economy, and that eventually snowballed into a global financial meltdown.

Experts are also not of one mind as to the consequences of the trigger event. Some say the consequence is a series of successive and cumulative losses;³¹ others affirm that it is substantial market price volatility, corporate liquidity reductions, and bankruptcies;³² and yet others insist it is the impact on other interlocking market participants.³³ The Model Law is silent as to its position in these debates, and confines itself to the phrase *systemic risk to the banking*

25 A continuum exists between pure risk and pure uncertainty; see Meldrum, Duncan H. 2000. "Country risk and foreign direct investment". *Business Economics*, 35:33–34.

26 For more on how definitions of *systemic risks* can be inconsistent, see Schwarcz, Steven L. 2008. "Systemic risk". *Georgetown Law Journal*, 97:193, 197.

27 (ibid.:198).

28 Kupiec, Paul & David Nickerson. 2004. "Assessing systemic risk exposure from banks and GSEs under alternative approaches to capital regulation". *Journal of Real Estate Finance and Economics*, 48:123.

29 See Schwarcz (2008:198).

30 (ibid.).

31 Kaufman, George G. 1996. "Bank failures, systemic risk, and bank regulation". *Cato Journal*, 16:17, 20.

32 Kupiec & Nickerson (2004).

33 See Schwarcz (2008:197).

sector,³⁴ which can mean any and all of the three consequences mentioned above.

Too big to fail in SADC

The concept of *systemic risk* needs to account for the region-wide mandate of SADC institutions like the CCBG. This refined comprehension of *systemic risk* involves the recognition that rising financial integration in SADC brings in its fold a more probable danger that a large bank in one country with connections to other banks in other countries may occasion a crisis throughout the region. Accordingly, it involves the conviction that rational financial regulation in a regional integration setting should strive to prevent or at least nip a financial crisis in one member state in the bud before it contaminates other member states in the region. It is a major premise of this article that the contents of an ideal and complete Model Law on central banking explicitly provides for the most efficient devices to combat systemic risk.

The risk of successive institutional failures is seldom carried by the insolvency of one or a few small financial institutions. It is usually the insolvency of financial institutions that are too big and interconnected that threatens the entire financial system.³⁵ In SADC, South African banks dwarf their regional counterparts, with Standard Bank, ABSA, Nedcor, and FirstRand, in that order, topping the list of the largest banks not only in southern Africa but in the whole of Africa as well.³⁶ Standard Bank, with its tentacles reaching for markets in almost all of SADC, is the kind of financial institution whose failure might precipitate institutional debacles in the entire region. This risk exists notwithstanding the fact that South African banks have been relatively stable and well capitalised,³⁷ even during the 2008–2009 financial storm worldwide.

Financial institutions and regulation

Financial institutions are perhaps better conceived by reference to their function, namely financial intermediation, which is the linking of savers and borrowers. Indeed, financial institutions play important roles in the daily life of households and businesses as well as in regional economic development. These institutions are the repository of personal wealth, the principal source of credit for most firms and households, and the catalysts of economic

34 Model Law, article 4(b).

35 See Avery, Alan W, Kathleen A Scott & Lindsey Carson. 2010. "Dodd-Frank Act attempts to curtail systemic risk". *Banking Law Journal*, 127:766.

36 "Biggest banks in Africa", *Global Finance*, 6 December 2010; available at <http://www.gfmag.com/tools/best-banks/10923-biggest-banks-in-africa-2010.html#axzz1CzFf1mKS>; last accessed 4 February 2011.

37 World Economic Forum. 2009. *The Africa Competitiveness Report 2009*. Geneva: World Economic Forum, pp 52–53.

exchanges. By intensifying resource mobilisation for regional development, financial institutions are one of the areas prioritised by SADC to achieve its finance and investment policies.³⁸ They are, as exemplified by the ICBC–Standard Bank association in funding infrastructure projects, an emerging model for financing regional economic development in SADC. SADC is concerned about the difficulties that small- and medium-scale enterprises continue to face in accessing credit, despite substantial liberalisation of the financial sector in the region;³⁹ this is why SADC plans to intensify financial reform, primarily focussing on non-bank financial institutions. Financial institutions also work as advisors and agents for various clients in a variety of other financial transactions.

There are three major types of financial institutions:⁴⁰

- Deposit-taking institutions, e.g. banks, credit unions, and mortgage loan companies
- Insurance companies and insurance funds, and
- Brokers, underwriters and investment funds.

For the purposes of financial supervision, however, the financial industry is traditionally grouped into banks, insurance companies, and securities firms.⁴¹ This is the classic organisation of the industry, even if a great amount of cross-sectoral financial intermediation occurs today.⁴² Under the traditional method, each of these three sectors will have its own regulator.⁴³ The purpose of the financial regulator is to protect investors by preventing financial institutions from taking unacceptably high risks that may endanger the interests of creditors, i.e. depositors and savers.⁴⁴

Four worst-case scenarios

The institutional failure or economic shock of one firm may set in motion a chain reaction through four channels: interbank deposits, net settlement payment systems, imitative runs, and counterparty risk in derivative transactions.⁴⁵

38 SADC/Southern African Development Community. 2004. *Regional Indicative Strategic Development Plan 35*. Gaborone: SADC.

39 (ibid.:28).

40 Siklos, Pierre. 2001. *Money, banking, and financial institutions: Canada in the global environment*. Toronto: McGraw-Hill Ryerson, p 40.

41 Tietje & Lehmann (2010:666ff).

42 (ibid.:667).

43 (ibid.).

44 Heremans, Dirk. 2000. "Regulation of banking and financial markets". In Bouckaert, Boudewijn & Gerrit de Geest (Eds). *Encyclopaedia of Law and Economics, Volume I. The history and methodology of law and economics*. Cheltenham: Edward Elgar; pp 950, 951.

45 Scott, Hal S. 2010b. "The reduction of systemic risk in the United States financial system". *Harvard Journal of Law & Public Policy*, 33:671, 673ff.

Thus –

- when a bank that holds sizeable deposits of other banks for payment processing purposes, the failure of that bank may cause the other banks to fail as well
- in the net settlement payment system, inter-institution transactions accumulate during the day, and their respective values are set off against one another at the end of the day; if a bank fails to settle its position in a net settlement system for large value payments, the other banks to whom those payments were due may fail⁴⁶
- an imitative run or a ‘run on the bank’ occurs when the failure of one bank leads depositors of other banks, especially those who are not insured, to fear that their banks will also fail and to withdraw their deposits, thus creating a liquidity crisis and, eventually, institutional failure, and⁴⁷
- a counterparty risk in derivative transactions, say credit default swaps (CDSs), may prompt a series of bank failures. Here, if institution A cannot settle its derivative position with institution B, both institutions A and B fail.⁴⁸ If institution B in turn cannot settle its position, institution C will fail, and so on.⁴⁹ The subprime crisis in the US, which was responsible for the 2008–2009 global financial crisis, is an excellent illustration of counterparty risk in derivative transactions.⁵⁰ Subprime borrowers obtained mortgage loans from mortgage banks. Mortgage banks, such as Countrywide Financial, sold subprime mortgages on the secondary market. Securitiser, especially Fannie Mae and Freddie Mac, then purchased subprime mortgages on the secondary market, pooled them, and securitised them, i.e. they sold mortgages as mortgage-backed securities (MBSs) to financial institutions and investors on the open market. Financial institutions sold subprime MBSs to their shareholders, their depositors and to one another. MBSs spread even farther within and outside US financial markets when financial institutions began exchanging CDSs. When the subprime mortgage borrowers started defaulting on their loans, a long chain of institutional failures unravelled nationally and, later, internationally.

Regulation

Central banks and national authorities intervene to keep off the above four worst-case scenarios. An elaborate system of regulatory interventions applies

46 (ibid.:674).

47 (ibid.).

48 (ibid.:675).

49 (ibid.).

50 For more on how the US subprime crisis unfolded, see Schiller, Robert J. 2008. *The subprime solution: How today's global financial crisis happened, and what to do about it*. Princeton, NJ: Princeton University Press.

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to financial services more than any other sectors in the economy.⁵¹ This more invasive regulatory system, cutting deep into organisational structures,⁵² owes itself to the nature of financial services warranting a degree of regulatory control and oversight that is substantially more intrusive and expensive than the legal rules governing other business ventures.⁵³ The vast majority of legal rules covered in the Model Law also rest on the notion that financial intermediaries are special. More than any other economic sectors, financial intermediaries are concerned with the future and, hence, are characterised by greater risk and uncertainty.⁵⁴ They create asymmetric information problems as parties to financial operations have different information, and they are more interdependent than actors in any other sectors.⁵⁵

The principal justification for regulation concerns the propensity of financial intermediaries to take excessive risks if they are not strictly restrained by regulation.⁵⁶ It is truly a common justification of risk regulation that government agencies are obliged to protect public investors – e.g. depositors, insurance policy holders and mutual fund shareholders – from risk-taking by financial intermediaries. Investors want to know how much risk is associated with particular investments before they invest, and how those risks compare with the risks associated with other comparable investments.

Current financial regulatory regimes focus on the degree of sophistication of investors. Banks are generally the most regulated financial institutions because the financial regulatory regimes take for granted that investors in banking institutions tend to be less sophisticated than in other sectors of the financial services industry. However, such assumptions of the degree of investors' sophistication are questionable, as in practice most people are ignorant about finance – even among educated people in developed nations.⁵⁷ Furthermore, such assumptions changed after the latest global financial crisis adversely affected developed economies because of what was happening in the most sophisticated sector of the financial services industry.

51 Heremans (2000:951).

52 Tietje & Lehmann (2010:665).

53 See Clark, Robert C. 1975. "Federal income taxation of financial intermediaries". *Yale Law Journal*, 84:1603.

54 Heremans (2000:953).

55 (ibid.).

56 For more on the justifications, see Clark (1975).

57 Surveys conducted in the US in 2007 and in the UK in 2008 established that a substantial proportion of the general public in the English-speaking world is "ignorant of finance"; Ferguson, Niall. 2008. *The ascent of money: A financial history of the world*. New York: The Penguin Press, pp 10ff.

Conjuring systemic risk through financial regulation by SADC central banks

Six basic instruments are used for financial regulation, which represent best practices in the field:

- The first is mandated disclosure, which is often used for securities transactions.
- The second instrument is the prevention of conflicts of interests. In Zambia, the Banking and Financial Services Act of 1994, as amended, places a duty on fiduciaries such as directors and managers to disclose conflicts of interest.⁵⁸ Similarly, the 1997 law on financial institutions in Angola tries to fend off conflicts of interest by prohibiting the granting of credit and guarantees by financial institutions to their fiduciaries.⁵⁹
- The third instrument used for financial regulation is mandating required levels of competency, including licences, tests, inspection, and examination. The Model Law similarly permits SADC central banks to license banks and financial institutions.⁶⁰
- The fourth instrument is capital adequacy requirements. That is, if the bank has certain liabilities, it has to have certain assets on hand. Typically, banks are subject to the most stringent and most detailed capital adequacy requirements. Capital adequacy requirements figure in the central bank law of several SADC member states⁶¹ and the Basel Accords II.⁶²
- The fifth instrument is portfolio diversification requirements. Financial institutions reduce risks by diversifying portfolio investments.
- The sixth and last tool is consumer protection.

It is apparent from these regulatory tools that financial regulation can be regarded as a continuing set of restrictions on institutional risk-taking. This set of restrictions reflects a trade-off between risk and return that most investors would demand from financial intermediaries if the public could police intermediaries directly.

SADC cooperation

Chapter VI of the Model Law is no ordinary normative system on the regulation of financial institutions by central banks. The Model Law is a showpiece of financial legislative cooperation in the region, as contemplated by the Protocol to the SADC Treaty on Finance and Investment adopted by the SADC Summit of Heads of State and Government in Maseru, Lesotho, in 2006. Financial cooperation is a principle of SADC law that holds that member states are obliged to cooperate and coordinate their policies and strategies in investment,

58 Banking and Financial Services Act of 1994, section 35.

59 Lei das Instituições de Crédito e Sociedades Financeiras 1997, article 57.

60 Model Law, article 6(2)(a).

61 For example, South Africa, Swaziland and Zimbabwe; see CCBG (2009).

62 Basel II: International Convergence of Capital Measurement and Capital Standards: A Revised Framework. Part 2; hereinafter *Basel Accords II*.

taxation, central banking, and regional capital and financial markets, with a view to achieving economic development and eradicating poverty.⁶³ The Model Law and its Chapter VI should, therefore, be seen as efforts to accelerate SADC's financial integration.

The Model Law

A note on the Model Law explains that it embodies general principles to facilitate the operational independence of SADC central banks and the harmonisation of their legal and operational frameworks, and sets standards of accountability and transparency in those frameworks.⁶⁴ The long title of the Model Law is to “update and re-enact” the national legislation on the central bank of member states.⁶⁵ Thus, it is very likely that, after the adoption of the Model Law in 2009, member states will effect adjustments in the form of amendments or new legislation to conform to the Model Law. However, the fact that SADC member states belong to multiple regional cooperation schemes – including the Common Market for Eastern and Southern Africa (COMESA) and the Southern African Customs Union (SACU) – and the sometimes conflicting obligations that result from such multiple memberships may complicate member states' application of the Model Law.

The Model Law is an all-around corpus of provisions on the operations of a central bank. It addresses the functions and objectives of SADC central banks,⁶⁶ local currency,⁶⁷ international reserves,⁶⁸ payment systems,⁶⁹ reporting requirements,⁷⁰ the relationship of central banks with government⁷¹ and other financial institutions,⁷² monetary policy committees,⁷³ and institutional arrangements.⁷⁴ The following sections bring into closer focus the relationship of central banks and other financial institutions in safeguarding the stability of the financial system.

63 See Zongwe, Dunia P. 2011. “An introduction to the law of the Southern African Development Community”. *GlobaLex*, February; available at http://www.nyulawglobal.org/Globalex/Southern_African_Development_Community.htm; last accessed 26 March 2011.

64 Model Law, “Explanatory Note”.

65 Model Law, “Central Bank Model Law”.

66 Model Law, Chapter I.

67 Model Law, Chapter IV.

68 Model Law, Chapter VII.

69 Model Law, Chapter VIII.

70 Model Law, Chapter IX.

71 Model Law, Chapter V.

72 Model Law, Chapter VI.

73 Model Law, Chapter III.

74 Model Law, Chapter II.

Functions of SADC central banks

The Model Law retains the twin functions of central banking, namely monetary and financial stability. For the Model Law, the primary objective of a central bank is to “achieve and maintain price stability”.⁷⁵ Central banks need to be independent,⁷⁶ but may support the general economic policy of the government.⁷⁷ In pursuing its primary objective, a central bank has to articulate monetary policy,⁷⁸ including exchange rate policies;⁷⁹ hold gold and foreign exchange reserves;⁸⁰ regulate matters relating to the domestic currency;⁸¹ act as a fiscal agent to the government;⁸² and act as a banker to the government and banks alike.⁸³ This article, however, does not dwell on the role played by SADC central banks in monetary stability but on their role in financial stability.

The role of central banks in the regulation of banking and other financial institutions is chalked out in the Model Law’s Chapter VI, entitled “Relationship with Banks and Other Financial Institutions”. The Model Law entrusts central banks with the power to regulate,⁸⁴ supervise and license financial institutions;⁸⁵ assist banks in financial difficulty;⁸⁶ and participate in international financial institutions that seek financial stability through monetary cooperation.⁸⁷ Although Chapter VI of the Model Law is not binding law, it derives a great deal of legitimacy from its origins in the CCBG, which is composed of the 15 central bank governors⁸⁸ in SADC.⁸⁹ It is a set of default rules that SADC member states can either leave in place or modify to suit local realities. Two types of default rules are distinguishable: market-mimicking, and information-forcing.

75 Model Law, article 4(1).

76 Model Law, article 5.

77 Model Law, article 4(2).

78 Model Law, article 6(1)(a).

79 Model Law, article 6(1)(b).

80 Model Law, article 6(1)(c).

81 Model Law, article 6(1)(d).

82 Model Law, article 6(1)(f).

83 Model Law, article 6(1)(f) and (g).

84 Model Law, article 6(2)(b).

85 Model Law, article 6(2)(a).

86 Model Law, article 6(2)(m).

87 Model Law, article 6(2)(e).

88 By law, the current members of the CCBG are Rundheersing Bheenick (Mauritius), Martin G Dlamini (Swaziland), Caleb M Fundanga (Zambia), Gideon Gono (Zimbabwe), Ernesto G Gove (Mozambique), Pierre Laporte (Seychelles), Perks M Ligoya (Malawi), Gill Marcus (South Africa), Jean-Claude M Masangu (DRC), José L Massano (Angola), Rets'elisitsoe A Matlanyane (Acting Governor, following the passing of Moeketsi P Senaoana in March 2011; Lesotho), Linah K Mohohlo (Botswana), Benno J Ndulu (Tanzania), Frédéric Rasamoely (Madagascar), and Ipumbu W Shiimi (Namibia).

89 2006 Protocol to the SADC Treaty on Finance and Investment, Article 19; hereinafter *Finance Protocol*.

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Market-mimicking default rules are those meant to remain in place by most parties because they represent an efficient allocation of rights and duties.⁹⁰ As shown later in this article, most provisions of Chapter VI of the Model Law fall into that category. Information-forcing default rules, on the other hand, only serve to encourage the parties to reach an efficient allocation of rights and are not designed to be maintained.⁹¹

Notable features

Regarding banks and financial institutions, relevant domestic legislation may endow the central bank with two broad powers: to regulate, and to supervise.⁹² *Regulation* is the prescription of rules,⁹³ whereas *supervision* entails the enforcement of regulatory rules.⁹⁴ While the object of Chapter VI of the Model Law is unambiguously financial regulation by SADC central banks, an explanatory note in that chapter states that supervision is an optional function.

Chapter VI of the Model Law contains seven provisions on the regulation of banks and other financial institutions. One provision is on disclosure by banks and other financial institutions. SADC central banks may prescribe, by notice in the national government gazette and to each bank, the way in which banks and lending institutions⁹⁵ are obliged to disclose —⁹⁶

- annual interest rates payable on deposits
- the terms for obtaining credit
- fees
- commissions, and
- any such charges payable.

Violation of the terms of those notices is a criminal offence.⁹⁷ These notices apply uniformly in the member state whose central bank issued the notices, provided that the notices be permitted to differentiate between banks, credit-extending institutions, other creditors, and classes according to the nature of their business.⁹⁸

The provision on cash reserve requirements⁹⁹ for banks is a prominent feature of Chapter VI of the Model Law. SADC central banks may prescribe to the main

90 Crasswell, Richard. 2000. "Contract law: General theories". In Bouckaert & De Geest (2000:950–951).

91 (ibid.:5ff).

92 Model Law, article 52.

93 Scott (2010b:673).

94 See Tietje & Lehmann (2010:664).

95 Model Law, article 50(2).

96 Model Law, article 50(1).

97 Model Law, article 50(4).

98 Model Law, article 50(3).

99 That is, how much of the deposits must be held in equity or equity-like securities.

office of each bank the maintenance by banks of required reserves, including marginal required reserves, against deposit and other similar liabilities of the banks that may be specified for that purpose.¹⁰⁰ They may prescribe different reserve ratios for different classes of deposits and other similar liabilities, and may provide their method of computation.¹⁰¹ However, there is a proviso that the reserve ratios are to be uniform for all banks in the same class, although the ratios may differ between different classes of banks.¹⁰² The Model Law further lays down that banks may withdraw required reserves from central banks in order to pay existing obligations, clear cheques, and settle balances among themselves, provided that they replenish the withdrawn reserves within the period specified.¹⁰³ If banks fail to maintain the required reserves in the appropriate ratios, central banks may impose on those banks a penalty rate higher than the rate officially published by the central banks on the amount of the deficiency as long as it continues.¹⁰⁴

Another provision of the Model Law is on the accommodation of banks by SADC central banks. Central banks may exchange with banks doing business in their territory certain commercial paper (e.g. bills of exchange and promissory notes), treasury bills, and other instruments approved by the central banks¹⁰⁵ and they may carry out discount operations in favour of the banks.¹⁰⁶ Subject to a number of restrictions,¹⁰⁷ the Model Law allows SADC central banks to grant advances to banks secured by commercial paper and other acceptable instruments.¹⁰⁸

The bank accommodation provision of the Model Law also envisages emergency liquidity assistance in exceptional circumstances. It empowers central banks to grant advances or contingent commitments to banks if, in the central banks' opinion, such action will preserve the public interest and the financial condition of the bank in distress.¹⁰⁹ In addition, central banks may grant emergency liquidity assistance to a distressed bank at market price if they believe the bank does not constitute a systemic risk to the banking sector, and at such price as the central banks deem fit if they believe the distressed bank constitutes such a risk.¹¹⁰ However, they may grant such assistance only if the distressed bank will be able to repay it,¹¹¹ and only if the finance minister

100 Model Law, article 49(1)(a).

101 Model Law, article 49(2).

102 Model Law, article 49(2)(a).

103 Model Law, article 49(3).

104 Model Law, article 49(4)(a).

105 Model Law, article 47(1).

106 Model Law, article 47(6) and (7).

107 Model Law, article 47(3).

108 Model Law, article 47(2).

109 Model Law, article 47(4)(a).

110 Model Law, article 47(4)(b).

111 Model Law, article 47(5)(a).

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agrees with the advance or commitment¹¹² and confirms in writing that separate funds or debt securities will be given to cover the advance or commitment.¹¹³

A further provision of the Model Law affirms the function of the central bank as a bank to bankers. It states that SADC central banks may open accounts for, and accept deposits from, banks doing business in their territory on the terms and conditions that they may determine.¹¹⁴

Finally, the Model Law places a duty on SADC central banks to fix and publicly announce from time to time the rates for discounts, rediscounts, advances, loans and overdrafts.¹¹⁵

General observations

The text of the Model Law reveals that, although it intends to cover financial institutions as a group, the Model Law is in actual fact preoccupied with banks and banking institutions. This preference for banks should not come as a surprise since banks are the archetype of financial institutions¹¹⁶ and the type that dominates financial sectors in SADC member states. Financial crises are also likely to be driven through by banks, which may be the reason why banks are also the most regulated type of financial institutions.

The Model Law assumes that the central bank, as opposed to a separate and specialised agency, regulates financial institutions. In the wake of the latest global financial crisis, debates, especially in Europe and the US, have in the main revolved around the question whether enhanced systemic risk regulation requires central banks,¹¹⁷ a unified regulator,¹¹⁸ other regulators, or some other institutions to assess risk.¹¹⁹ In the SADC region, the choice of chief financial

112 Model Law, article 47(5)(b).

113 Model Law, article 47(5)(c).

114 Model Law, article 46.

115 Model Law, article 48.

116 Tietje & Lehmann (2010:665).

117 The Chancellor of the Exchequer in the United Kingdom announced in July 2010 that the British Financial Services Authority (FSA) would be abolished and that prudential supervisory powers would be returned to the Central Bank of England; see Cleary Gottlieb Steen & Hamilton LLP. 2010. Alert note: "A new approach to financial regulation: The end of the United Kingdom FSA". 1849 PLI/Corp 153. Also available at <http://www.lexology.com/library/detail.aspx?g=ac4a7273-9ff8-4a2b-9d72-8980577ff823>; last accessed 24 March 2011.

118 Mwenda. Kenneth Kaoma. 2006. *Legal aspects of financial services regulation and the concept of a unified regulator*. Washington, DC: World Bank. Although this book was written before the 2008–2009 financial crisis, Mwenda considered the question of whether countries should adopt a unified financial regulator.

119 Karmel, Roberta S. 2010. "The controversy over systemic risk regulation". *Brooklyn Journal of International Law*, 35:823.

regulator is varied. In most SADC countries, it is the central bank that supervises all financial institutions. This is the case in the Democratic Republic of the Congo, Lesotho, Malawi, Mauritius, Mozambique, Seychelles,¹²⁰ Tanzania, Zambia and Zimbabwe.¹²¹ In a minority of member states, the central bank supervises banks, while a specialised agency supervises non-bank financial institutions. This is what obtains in Angola, Botswana, Namibia, and South Africa.¹²² Finally, there is one peculiar case: Madagascar, where a specialised agency, the Commission de Supervision Bancaire et Financière, supervises all financial institutions.¹²³ Thus, Chapter VI of the Model Law does not apply to Madagascar, as its central bank is not the financial regulatory authority.

It is somewhat odd, at times disturbing, but in any event noteworthy, that the Model Law does not make use of some basic elements of financial regulation. Portfolio diversification rules do not appear in the Model Law, for example. The same holds true for conduct and conflict rules. Monitoring tools such as examination and inspection are not expressly provided for, even if they can be read into the power granted in the Model Law to central banks to license financial institutions. Regulation of interest rates, albeit not so much a basic tool of financial regulation, is also not among the provisions of the Model Law. A charitable explanation of these omissions is that the CCBG left it to domestic financial legislation to fill in the blanks. Another generous explanation is that the Model Law merely represents 'key principles' as distinct from specific rules. A further explanatory factor is that relevant legislation in some member states may assign the task of using these tools to institutions other than the central bank.

Where the Model Law locks risk

If, as shown earlier, the prevention of systemic risk is the *raison d'être* of financial regulation, it follows that the ability to avert systemic risks is the touchstone of the Model Law's efficacy. In that connection, the first thing to note is that the Model Law is intentionally overly broad and lacking in specificity – and, thus, incomplete. As a tactical matter, the Model Law's incompleteness is wise, generally speaking, because information asymmetries between the CCBG and national institutions in foreseeing future financial crises and responding to them are significant. Moreover, the CCBG may consider leaving some areas of financial regulation unregulated in order not to hamper the innovative potential of financial actors and intermediaries.¹²⁴ The CCBG gains

120 Central Bank of Seychelles. 2009. *Financial Services Supervision Annual Report 2009*. Mahé: Central Bank of Seychelles, p 10.

121 CCBG (2009).

122 (ibid.).

123 (ibid.:76).

124 Tietje & Lehmann (2010:664).

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much by deferring to national institutions in determining the specific obligations of financial institutions before and during systemic crises.

The provision on disclosure is undoubtedly one of the most powerful tools of the Model Law in reducing systemic risk. Indeed, information-asymmetric problems, in the form of adverse selection and moral hazard, explain why the protection of investors is imperative. *Adverse* selection arises before a transaction takes place, while *moral* hazard occurs after the transaction.¹²⁵ Adverse selection arises because depositors have inferior and incomplete information about the riskiness of a bank's portfolio, which means they often have inadequate means of telling safe banks from risky ones. With respect to moral hazard, deposits function like an insurance in the bank's favour and, therefore, create a risk for depositors that the bank may embezzle or lose deposits or other depositors' assets in a bad investment. The disclosure principles of the Model Law speak to adverse selection and moral hazard issues.

The discretion of central banks to consult at any time with banking and other financial institutions on any matters if need be¹²⁶ should strengthen the Model Law's disclosure principles. In a sense, much of the financial regulatory structure can be conceived of as a collective best guess regarding the form and content of advance disclosure of institutional risk-taking that most investors would demand before they invest. Once it is understood that disclosure promotes transparency, then the merits of transparency in financial regulation attach to the disclosure rules in the Model Law. Those merits are at least threefold:¹²⁷ disclosure, by providing legal certainty, would provide the basis for establishing trust in the financial system;¹²⁸ would lay open the values and goals of financial policy;¹²⁹ and would instil accountability in financial actors.¹³⁰

The emergency liquidity assistance in exceptional circumstances evidently targets situations that may threaten financial stability. This purpose is abundantly evident from the provision that central banks may grant advances to banks if they believe such action will preserve the public interest and the financial condition of distressed banks, and will prevent bank failure from prompting systemic risk.¹³¹ These provisions reinforce the role of central banks as lender of last resort. Lender-of-last resort interventions may overcome liquidity crises with which banks are confronted, thus obviating financial crises,

125 Heremans (2000:953).

126 Model Law, article 51.

127 Kaufmann, Christine & Rolf H Weber. 2010. "The role of transparency in financial regulation". *Journal of International Economic Law*, 13:779.

128 (ibid.:784ff).

129 (ibid.:787ff).

130 (ibid.:791ff).

131 Model Law, article 47(4)(a) and (b).

although these interventions may lead to moral hazard and other concerns.¹³² It bears reminding, therefore, that SADC central banks should intercede as ultimate lenders only for financial institutions that are solvent and in conformity with the country's monetary policy, lest they provoke an inflation.¹³³

Where risk lurks

The treatment of capital and liquidity standards in the Model Law is disappointing. The Model Law faithfully describes the job of financial regulation in setting cash reserve norms, but it does not specify what those reserve ratios for deposits are. The CCBG should have made that specification. Furthermore, given that capital requirements are arguably one of the most important weapons in the arsenal of systemic risk regulation,¹³⁴ the CCBG should also have included a minimum capital requirement. In a similar vein, the CCBG could have worked out a liquidity ratio, a lending limit, or a risk concentration clause, which are all indispensable ingredients of national financial regulation. At the very least, the CCBG could have included those provisions in the Model Law by reference to international norms, primarily the Basel Accords. The inclusion of such provisions in the Model Law is all the more necessary because some of these provisions, such as leverage ratios, are clearly best handled internationally rather than through disparate national requirements.¹³⁵ This fact is not foreign to the decision of the Basel Committee on Banking Supervision (Basel Committee) to introduce a leverage ratio, quantitative liquidity ratios, and counter-cyclical capital buffers in the draft Basel III.

In a world of global financial challenges,¹³⁶ financial regulation and supervision should be in phase with the ongoing internationalisation process.¹³⁷ The internationalisation process entails that municipal law pegs capital adequacy ratios down. Capital adequacy regimes are the single most important set of rules in international and domestic banking law¹³⁸ and can cushion the most serious shocks to the banking system as well as forestalling systemic failures.¹³⁹

132 Heremans (2000:958).

133 (ibid.:961).

134 Leverage ratios are clearly best handled internationally rather than through disparate national standards, according to Scott (2010a:763).

135 (ibid.:769).

136 The most significant trend in banking is globalisation, according to Heath Price Tarbert. 2001. "Rethinking capital adequacy: The Basle Accord and the new framework". *The Business Lawyer*, 56:767, 770.

137 For a similar argument, see Weber, Rolf H. 2010. "Multilayered governance in international financial regulation and supervision". *Journal of International Economic Law*, 13:683.

138 Bhala, Raj. 1997. "Equilibrium Theory, the FICAS Model, and international banking law". *Harvard International Law Journal*, 38:1, 21.

139 "The Great Banking Capital Conundrum", *Retail Banker International*, 30 April 1999, p 17.

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Nevertheless, some experts argue that central banks and governments should refrain from fixing capital adequacy ratios and let markets determine them.¹⁴⁰ It is, therefore, still open to question whether the CCBG should have left the specification of capital adequacy requirements out of the Model Law and deferred to national central banks or markets. At the same time, capital adequacy laws are practically identical the world over, thanks to the rules laid down by the Basel Committee,¹⁴¹ which would suggest that international thresholds, if different from Basel-made rules, are strongly advisable.

All the same, with the growing globalisation of financial institutions, as demonstrated by the global financial crisis, comes the realisation that international standards can conduce financial stability better than national laws alone. This realisation is undergirded by the provision in the Model Law that allows central banks to take part in international financial institutions working to stabilise financial systems,¹⁴² such as the Basel Committee and the Financial Stability Board. What is more, it is hard to see how the CCBG can move SADC to a regional central bank without an agreement on threshold capital requirements. Risk tends to flee from regulated and transparent sectors of the financial industry to sectors that are less so.¹⁴³ Today, it is not enough that national governments design near-impregnable financial systems to avoid institutional failures and a resultant financial crisis. It is important that, in addition, they collectively set up standards because of the intermeshed nature of financial institutions in the era of globalisation. By skipping over capital and liquidity standards, the CCBG has maybe missed a chance to legislate against the next crisis in the region.

Conclusion

Although it is the greatest regional economic group in terms of gross domestic product in sub-Saharan Africa,¹⁴⁴ SADC faces daunting development challenges that call for major public investments. Raising money from banks and other financial institutions, over and above other sources of finance, becomes critical to development in the SADC region. Thus, it is the responsibility of SADC and the CCBG – a sort of regional-level, mini-Basel Committee – to develop the financial industry and to jealously preserve financial stability. SADC and the CCBG know they will not be able to expand financial services and protect financial stability without guarding against systemic risk. It is with

140 Heath Price Tarbert (2001:773ff).

141 (ibid.:775–776).

142 Model Law, article 6(2)(e).

143 Masters, Brooke & Jeremy Grant. 2011. "Finance: Shadow boxes", Financial Times (UK), 2 February 2011; available at <http://www.ft.com/cms/s/0/6431e2e0-2f09-11e0-88ec-00144feabdc0.html#axzz1HWD1SSon> last accessed 24 March 2011.

144 SADC (2004:9–10).

Conjuring systemic risk through financial regulation by SADC central banks

that knowledge that they have passed a Model Law to fit central bankers in the region with the institutional and legal armoury to defend financial stability and fight risk to financial systems within SADC.

Chapter VI of the Model Law is the part that specifically turns to financial regulation and supervision. It enshrines seven stipulations, namely on –

- disclosure
- publication of information
- cash reserve requirements
- the accommodation of banks by central banks
- emergency liquidity assistance
- the role of central banks as the bank to bankers, and
- consultation between central banks and banks.

The capacity of the Model Law to stem systemic risk is the prism through which its efficiency must be viewed. The Model Law's provisions on disclosure, the accommodation of banks, emergency assistance, and central bankers' banker role, including as the lender of last resort, are robust. The greatest concern is the provision – or, more precisely, the lack thereof – on capital and liquidity requirements. This omission in the Model Law is unjustifiable in an era of economic globalisation and in view of the financial integration objectives of the legal framework of SADC as a regional development community. The drafting of the Model Law was an opportunity before the CCBG to effectively pave the way for a regional central bank by setting strong and common capital standards, but the deference and timidity with which they approached the issue might be the door by which the devil might sneak in the financial system.

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Enhancing access to South African social security benefits by SADC citizens: The need to improve bilateral arrangements within a multilateral framework (Part I)

Marius Olivier*

Abstract

This contribution, the first of two parts, reflects critically on access to South African social security benefits by Southern African Development Community (SADC) citizens. The article discusses this issue by examining relevant SADC migration dimensions, the existing migration law and policy regime in South Africa, and the fragmented nature of the South African social security system. Legally and factually, the position of non-citizens in terms of South African immigration law is superimposed on their social security status. To some extent, this is qualified by the provisions of labour agreements entered into between South Africa and some of its SADC partners. The result is that most categories of SADC citizens have only limited – and, in some cases, severely restricted – access to South African social security benefits. The historical evidence, supported by data on modern-day migration movements within SADC, suggests that systems of labour migration in southern Africa, and in particular to South Africa, are deeply entrenched. And yet, South African immigration law and policy, as a regime superimposed on the existing social security framework, is characterised by its emphasis on control and deportation, and on restricting access, controlling movement and regulating presence in the host country. Immigration law and policy does not honour a human rights approach, and fails to encourage and support migration. To a large extent, the failure to encourage and support migration and to concentrate on control is also apparent from the scope and orientation of the labour agreements between South Africa and several SADC countries. Immigration laws and policy in South Africa, as is the case in other SADC countries, generally focus on the effects of migration, rather than on the underlying causes thereof.

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Introduction

This contribution reflects critically on access to South African social security benefits by Southern African Development Community (SADC) citizens. Part I engages with the contextual framework. It discusses relevant SADC migration perspectives, including historical and data perspectives, as well as the lack of appropriate migration policy dimensions. Reflecting on migrants' access to South African social security benefits necessarily implies an understanding of the limited public framework and entrenched fragmented nature of the South African social security system. It also requires an appreciation of the (impact of the) legal distinctions between various categories of non-citizens in South Africa and the interplay between immigration law and policy classification and restrictions, on the one hand, and access to social security benefits by these very categories, on the other. Bilateral labour agreements with neighbouring countries also have an impact on the immigration and social security status of migrant workers covered by these agreements.

Part II¹ discusses several problems and challenges affecting SADC citizens' access to South African social security benefits. It investigates, in particular, the current bilateral regime as well as regional standards and perspectives. It argues that an alternative paradigm needs to be developed: a range of unilateral steps needs to be taken, and appropriate and tailor-made bilateral arrangements within a multilateral framework are required.

These contributions are also based on extensive literature surveys recently undertaken for the World Bank,² the International Labour Organisation,³ and the South African Department of Social Development. These surveys were at times accompanied by some empirical evidence obtained in the course of discussions with key stakeholders.

1 Forthcoming.

2 For a more extensive discussion, see Olivier, M. 2009. "Regional overview of social protection for non-citizens in the Southern African Development Community (SADC)". *Social Protection Discussion Paper No. 0908*. Washington, DC: World Bank, paragraphs 3.1 and 3.4. Available at <http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Labor-Market-DP/0908.pdf>; last accessed 10 March 2011.

3 See, in particular, Olivier, M. 2010a. *Reflections on the feasibility of a multilateral SADC social security agreement involving South Africa and Lesotho, Mozambique, Swaziland and Zimbabwe*. Geneva: International Labour Organization.

SADC migration perspectives

Migration data, nature and trends; historical perspectives; and the role of remittances⁴

Economic migration appears to be by far the most prevalent form of migration in the world:⁵

The chief motive for the majority of migrants is without doubt the pursuit of better living standards for themselves and for their families.

Within SADC, the majority of migrants target countries with better economies.⁶ Therefore, the migration flow is towards Botswana, Namibia and South Africa because these countries have stronger economies and also experience skills shortages.⁷ South Africa, in particular, attracts by far the majority of intra-SADC migrants.⁸

From the available evidence, subject to some exceptions,⁹ it appears that most of the migration from SADC is actually to other SADC countries. Thus, intra-SADC movement is the prevailing characteristic of migration from SADC

4 See Olivier (2009) and Olivier, M. [Forthcoming]. "Political and regulatory dimensions of access, portability and exclusion: Social security for migrants, with an emphasis on migrants in southern Africa". In Sabates-Wheeler, R & R Feldman (Eds). "Migration and social protection: Vulnerability, mobility and access".

5 Stepanek, M & J Skorpik. 2005. "Social security in a long life society". Unpublished paper presented at the Fourth International Social Security Association (ISSA) International Research Conference on Social Security, Antwerp, 5–7 May 2005, p 3.

6 However, political migration has largely been the result of instability in countries such as the Democratic Republic of Congo (DRC) and, earlier, Angola and Mozambique.

7 In terms of the traditional classification, a distinction is drawn between *labour-exporting* and *labour-importing* countries (particularly South Africa). However, some traditionally labour-exporting countries also receive migrant streams, such as the DRC, Tanzania, Zambia and Zimbabwe. See Klaaren, J & B Rutinwa. 2004. "Towards the harmonisation of immigration and refugee law in SADC". In Crush, J (Ed.). *Migration Dialogue for Southern Africa (MIDSA) Report No. 1*. Cape Town/Kingston: Institute for Democracy in Africa & Queens University, p 76.

8 For example, a recent five-country study on intra-SADC migration revealed that 86% of migrants from the said countries (Botswana, Lesotho, Mozambique, Swaziland and Zimbabwe) are currently working in South Africa; see Pendleton, W, J Crush, E Campbell, T Green, H Simelane, D Tevera & F de Vletter (Eds). 2006. "Migration, remittances and development in southern Africa". *Migration Policy Series No. 44*. Kingston/Cape Town: Southern African Migration Project & Institute for Democracy in Africa, p 3.

9 At least two exceptions should be noted. The first relates to the tendency of sizeable numbers of citizens of SADC countries to migrate to the erstwhile colonial metropolises. Secondly, South Africa constitutes a unique case, as vast numbers of South Africans have emigrated to a range of countries.

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countries.¹⁰ In fact, migration has been a long-standing feature of the labour market framework in southern Africa, particularly as far as work on the mines and in agriculture is concerned.¹¹ Apart from informal cross-border trade-related migration,¹² work on the mines – again, particularly in South Africa – served as a magnet for both internal¹³ and external migrants. As a result, as indicated by Crush et al. (2005), it could be argued that the industrial development of some countries in the region was made possible only by the use of labour from other countries.¹⁴ From a historical perspective, as is supported by data on modern-day migration movements within SADC, it can be said that systems of labour migration in southern Africa are deeply entrenched and have become part of the long movements of people for generations, primarily in search of better living and working conditions.¹⁵

While many cross-border migrants in southern Africa are circular migrants, migration patterns within SADC have largely been characterised by their permanent or ongoing nature. Once immigration linkages are established, they are very difficult to break, and migration flows are almost impossible to reverse.¹⁶ This is particularly true of the mining and agricultural industries in southern Africa. In fact, a recent five-country migration study in SADC indicated

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- 10 See the migration data for SADC in the Global Migrant Origin Database, Version 4, available at http://www.migrationdrc.org/research/typesofmigration/Global_Migrant_Origin_Database_Version_4.xls; last accessed 10 March 2011. FIDH/International Federation of Human Rights. 2008. *Surplus people? Undocumented and other vulnerable migrants in South Africa*. Paris: International Federation of Human Rights, p 5.
- 11 Cf. Fenwick, C & E Kalula. 2005. "Law and labour market regulation in East Asia and southern Africa: Comparative perspectives". *International Journal of Comparative Labour Law and Industrial Relations*, 21:193–226.
- 12 See generally Crush, J, V Williams & S Peberdy. 2005. *Migration in southern Africa*. Geneva: Global Commission on International Migration, pp 15–16. It has been reported that cross-border traders and shoppers spent an estimated R10 billion in South Africa in 2005 (FIDH 2008:38); see also the subheading "Irregular or undocumented non-citizens" later herein.
- 13 Internal labour-market-related migration, in particular in South Africa, was not always voluntary. The need for labourers initially resulted in the introduction of a plethora of taxes (to be paid in cash, and known as *hut* or *poll taxes*), which were applied to push reluctant peasants into wage labour in the region; see generally Kanyenze, G. 2004. "African migrant labour situation in southern Africa". Unpublished paper presented at the International Confederation of Free Trade Unions – African Regional Organisation (ICFTU–AFRO) Conference on Migrant Labour, Nairobi, 15–17 March 2004, p 2.
- 14 Crush et al. (2005:5–6).
- 15 (ibid.).
- 16 Reitzes, M. 2003. "Regionalizing international migration: Lessons for SADC". *Migration Policy Brief No. 11*. Kingston/Cape Town: Southern African Migration Project, p 18.

that migration is now clearly regarded as a career rather than as a passing phase in the working lives of migrants, despite the fact that they maintain strong links with the home country.¹⁷ This also flows from the fact that more migrants from the countries concerned¹⁸ are older,¹⁹ married,²⁰ and, in most cases, heads of households.²¹ In addition, the same study indicates that many migrant-sending households have a migration 'tradition' which is passed on from one generation to the next in that parents and even grandparents worked outside the home country.²² Furthermore, it is generally accepted that SADC-related migration is characterised by several dimensions,²³ including contract labour migration,²⁴ declining levels of legal migration to and within the region, an increase in clandestine and undocumented (i.e. irregular) migration,²⁵ and an increased feminisation of cross-border migration.²⁶

The importance and role of migration in SADC countries are also demonstrated by the extent and significance of remittances to recipient households. Remittances play a vital role in supporting southern African households, as they are fundamental in enabling families to meet their everyday needs.²⁷ For most migrant-sending households, migrant remittances comprise the main source of household income. Lesotho is one of the most migration-dependent

17 (ibid.:4).

18 That is, (migration from) Botswana, Lesotho, Mozambique, Swaziland and Zimbabwe (ibid.:1).

19 Only 7% of the migrants covered in the survey were under the age of 25; in contrast, 41% were over 40 (ibid.:2). See also Crush et al. (2005:21–23).

20 As many as 62% of the migrants covered by the survey were married (ibid.:2).

21 Just over half the migrants were actually the head of the household rather than an ordinary member of it, although the pattern differed from country to country (ibid.:2–3).

22 About 50% of the migrants covered in the survey indicated that their parents had been cross-border migrants (ibid.:3).

23 Generally, see Kanyenze (2004:1–2).

24 The proportion of foreign workers in contract labour, especially on the mines, rose from 40% in the late 1980s to close to 60% today (Crush et al. 2005:7). This has been particularly beneficial to Mozambique, as the share of Mozambican workers in contract labour in South Africa rose from 10% to 25% in the same period.

25 Irregular migration appears to be widespread and on the increase in southern Africa, although the exact numbers of irregular migrants are a subject of constant debate and conflicting opinion. A recent study estimates that there are 500,000 irregular migrants in South Africa (ibid.:12–13). See also FIDH (2008:5).

26 Crush et al. (2005:14); SAMP & IOM/Southern African Migration Project & International Organization for Migration. 2005. *HIV/AIDS, population mobility and migration in southern Africa: Defining a research and policy agenda*. Kingston/Cape Town/Geneva: SAMP & IOM, p 17.

27 Dodson, B, H. Simelane, D. Tevera, T. Green, A. Chikanda & F de Vletter. 2008. *Gender, migration and remittances in southern Africa*. Cape Town: Institute for Democracy in Africa, p 8.

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countries in the world. Migrants' remittances are the country's major source of foreign exchange, accounting for 25% of gross domestic product in 2006.²⁸

A recent study undertaken in five SADC countries found that 85% of migrant-sending households receive cash remittances.²⁹ These are sent on a regular basis and "easily outstrip agriculture in relative importance as a household income source".³⁰ In fact, the same study remarks that, —³¹

[a]cross the region as a whole, annual median income from wage employment and cash remittances is the same . . . When cash and commodities are combined, however, the value of remittances exceeds all other forms of income.

Remittances are primarily used for consumption spending, in particular for household food security and other basic needs.³² However, they also play a significant role in the economic development of SADC countries. As remarked in a recent study, and echoing the international experience in this regard, —³³

[f]or national economies, cross-border remittances are a source of foreign exchange and taxes, contribute to the balance of payments, and provide capital for enterprises and valuable household incomes.

Therefore, SADC governments and even international organisations have started to integrate remittances as a tool for development in their poverty reduction strategies.³⁴

SADC country and regional policy frameworks pertaining to migration and the position of migrants, particularly in the host country context, need to take these phenomena of intra-SADC migration into account. Incorrect and overly restrictive policy choices may have a devastating effect on household survival and poverty in the region:³⁵

28 Crush, J, B Dodson, J Gray & C Leduka. 2010. *Migration, remittances and gender-responsive local development: The case of Lesotho*. Santo Domingo/New York/Maseru: UN International Research and Training Institute for the Advancement of Women & United Nations Development Programme, p 2.

29 Pendleton et al. (2006:4).

30 (ibid.:5).

31 (ibid.).

32 (ibid.:6–7).

33 Crush et al. (2005:18); see also Thouez, C. 2005. "The impact of remittances on development". In UNFPA/United Nations Population Fund (Eds). *International migration and the Millennium Development Goals*. New York: UNFPA.

34 Ramírez, C, M Domínguez & J Morais. 2005. "Crossing borders: Remittances, gender and development". *UN-INSTRAW Working Paper*. Santo Domingo: United Nations International Research and Training Institute for the Advancement of Women, p 52.

35 Reitzes (2003:18).

Restrictive policy interventions that fail to acknowledge migration linkages between sending and receiving countries are likely to depend on coercive measures rather than on consensus. They would disrupt and dislocate survival networks, generating increased poverty by severing the economic lifelines on which many migrants and their dependants rely for survival. No historical linkages existed between labour-receiving countries in western Europe and the sending countries from which they recruited and imported their labour. Despite this, ... once migration linkages were established they could not be broken, and governments found it impossible to reverse migration flows.

For a range of reasons, reliable data on the extent and volume of migration within and to SADC is hard to obtain.³⁶ This also applies to South Africa, the major migrant-receiving country in the region.³⁷

Contextual and policy perspectives

As noted by the International Organization for Migration (IOM), SADC member states have no clear common approach towards immigration.³⁸ In fact, security concerns, in the form of control and deportation, appear to characterise the migration laws and policies of the various SADC countries. Migration within the region is viewed as a 'problem', rather than as an opportunity. According to the IOM,³⁹ member states' immigration policies limit regional economic growth by distorting the labour market, inhibiting cross-border movements, criminalising informal economies, and marginalising migrants.

Migrants in SADC, particularly intra-SADC migrants, invariably find themselves in a precarious position, also in relation to social security.⁴⁰ They face seemingly insurmountable difficulties due to the operation of several legal restrictions, inappropriate and inchoate policies, and the treatment they generally receive, especially in the host country.

With regard to the legal and supporting policy framework, the legal principle of the territorial application of national laws generally prevalent in SADC countries means that migrants are usually excluded from social security laws that

36 Kanyenze (2004:12–15). The dimensions of migration in SADC are uncertain; see e.g. Williams, V. 2002. "An overview of migration in the SADC region". Unpublished paper presented at the SAMP/LHR/HSRC workshop on Regional Integration, Poverty and South Africa's Proposed Migration Policy, Pretoria, 23 April 2002, p 65.

37 For data on migrants worldwide and in Africa in general, see Holzmann, R, J Koettl & T Chernetsky. 2005. *Portability regimes of pension and health care benefits for international migrants: An analysis of issues and good practices*. Geneva: Global Commission on International Migration, pp 3, 6.

38 IOM/International Organization for Migration. 2005. *Current migration themes in southern Africa: An IOM perspective*. Geneva: IOM, p 5. See also Olivier ([Forthcoming]).

39 (ibid.).

40 See Olivier (2009:100–106, paragraph 9.1).

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operate in their home country, while nationality and residence requirements often exclude foreigners from the operation of social security laws in their host country. Other legal restrictions, for example, in relation to the portability of benefits, also exist. In short, in the absence of legal and policy frameworks and special measures that respond adequately to their precarious position in social security, and in the absence of suitable bilateral treaties or enforceable regional standards, in addition to an overarching multilateral framework, intra-SADC migrants are discriminated against in law and practice.⁴¹

Immigration laws and policy in SADC countries generally focus on the effects of migration, and not on its underlying causes. The policy and legal framework in this regard emphasises the tightening of controls, the monitoring of borders, and – particularly in South Africa – the establishment of detention centres and the increased deportation of irregular migrants.⁴² A recent study remarked that “[N]o country, with the possible exception of Botswana, has migrant or immigrant-friendly legislation on the books”.⁴³ An increasingly forceful line on enforcement is adopted.⁴⁴

In essence, immigration laws and practice in SADC are not geared towards honouring a human rights approach or towards encouraging and supporting migration, but towards restricting access, controlling movement and regulating presence in the host country.⁴⁵ In addition, primacy is given to immigration laws and policy – at the expense of social security laws and labour laws.⁴⁶

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- 41 Generally, see Baruah, N & R Cholewinski. 2006. *Handbook on establishing effective labour migration policies in countries of origin and destination*. Geneva: Organisation for Security and Co-operation in Europe, International Organization for Migration & International Labour Organization, p 154.
- 42 Maharaj, B. 2004. “Immigration to post-apartheid South Africa”. *Global Migration Perspectives No. 1*. Geneva: Global Commission on International Migration, p 23; Siddique, M. 2004. *South African migration policy: A critical review*. Perth: University of Western Australia Business School, p 32.
- 43 Crush et al. (2005:10, 24).
- 44 (ibid.:25).
- 45 According to Williams (2002:65), all SADC member states have immigration laws and policies based on three fundamental principles: (a) The sovereignty of the nation state; (b) The integrity of national boundaries; and (c) The right to determine who may enter its national territory and to impose any conditions and obligations upon such persons.
- 46 Mitchell, S. 2006. *Migration and the remittance euphoria: Development or dependency?*. London: The New Economics Foundation, p 22. See now, however, the judgment of the South African Labour Court in *Discovery Health Limited v CCMA & Others* [2008] 29 ILJ 1480 (LC), in which the South African labour court interpreted the provisions of the Immigration Act, 2002 (No. 13 of 2002) in accordance with constitutional protection available to workers.

The mistreatment of many intra-SADC and African migrants, also in the form of xenophobic actions, especially in South Africa, has been widely reported.⁴⁷ This applies in particular to specific vulnerable groups, including asylum-seekers and refugees, women involved in informal cross-border trade, and irregular migrants.

Therefore, it appears that governments in southern Africa, as is also the case in other parts of Africa, do not as a rule comprehend that migration is a livelihood strategy and, thus, crucial for the welfare of migrants, and that it also serves the developmental needs of the host country. As Black (2004) remarked, “[T]raditional countries of immigration, such as South Africa, Côte d’Ivoire and Gabon[,] have become more intolerant of migrant workers”.⁴⁸ Most governments in the SADC region tend to view migration to their countries as a threat rather than as an opportunity, and few, if any, have proactive immigration policies.⁴⁹

It is also clear that gender and poverty are closely related to migrants’ social security position. These two aspects are not properly provided for in existing country and regional migration policy frameworks. As indicated elsewhere,⁵⁰ migration in SADC – as is the case with social security – is deeply gendered. Appropriate policy responses are required to deal with the plight of female spouses who migrate and those who stay behind in the home country. Informal cross-border trade and human trafficking are further examples of the gendered dimension of intra-SADC migration.⁵¹ Furthermore, migration plays a profound role in preventing, redressing and alleviating poverty in SADC.⁵² However, proper integration of poverty issues within the migration policy framework is lacking in SADC:⁵³

There is a profound disjuncture between immigration policies and poverty reduction strategies in most countries in the Southern African region. Migration is

47 Landau, L. 2004. *Democracy and discrimination: Black African migrants in South Africa*. Geneva: Global Commission on International Migration. See also FIDH (2008). For example, xenophobic attacks in South Africa during May 2008 left more than 60 dead. For recent criticism by the UN Human Rights Rapporteur, see “SA skills shortage magnet for migrants”; available at <http://www.fin24.com/Economy/SA-skills-shortage-magnet-for-migrants-20110131>; last accessed 31 January 2011.

48 Black (2004:14).

49 Crush et al. (2005:8–9).

50 Olivier (2009:18–21; 117–127).

51 See African Union. 2006. *The Migration Policy Framework for Africa*. Document EX.CL/276 (IX), paragraph 6.5, paragraph 2.2; African Union. 2006. *African Union African Common Position on Migration and Development*. Document EX.CL/277 (IX), paragraph 3.8. See also the section entitled “Irregular or undocumented non-citizens” below, in relation to informal cross-border trade.

52 For example, via remittances.

53 Maharaj (2004:27–28, 29).

not systematically factored into national poverty reduction strategies throughout the region. Nor has immigration policy been integrated systematically with pro-poor policies ... To the extent that migration is sidelined or ignored in policy thinking, so pro-poor policy frameworks will fall short in their attempts to alleviate poverty and minimise inequalities in the region.

Labour market realities in SADC contribute to the precarious position of those who migrate. For them, working and living conditions are often, and have often been,⁵⁴ inadequate. Cross-border migrants are mostly unskilled or semi-skilled,⁵⁵ and are typically found at the lower end of the labour market in receiving countries.⁵⁶ Irregular migrants in particular are exploited, and their workers' and human rights are infringed.⁵⁷ Migrants are also especially affected by the restructuring of, and the conditions prevailing at, the environments where they are usually employed. A case in point is mining: as a result of labour market flexibility,⁵⁸ among other things, the mining industry in South Africa shed a large number of regular jobs between 1989 and 2000, causing a decrease in such jobs from almost 422,000 to about 231,000. Little effort was made to ameliorate the effects of retrenchments.⁵⁹ The state similarly failed to assist. Also, it has been noted that the mining sector in particular has a stubbornly high rate of disabilities and deaths.⁶⁰

The South African social security system: Limited public framework and entrenched fragmentation

Social assistance system

The South African social assistance system consists of the payment of social grants and the provision of various kinds of social services.⁶¹ However, the system is category-based and means-tested, as benefits are provided only to certain defined categories of persons who are deemed to be in need. As regards non-citizens, social assistance support is only available to permanent residents⁶² and, in some cases (not including the old age grant), refugees.

54 Poor working conditions of intra-regional migrants in southern Africa are a historical reality (Crush et al. 2005:5–6).

55 Pendleton et al. (2006:3).

56 Cross-border migrants are usually found in marginalised categories such as casual work, subcontracting, and informal trading (Kanyenze 2004:15).

57 (ibid.).

58 Subcontracting activities on South African mines have also been growing: (ibid.:16).

59 Kanyenze (2004:16).

60 (ibid.:17).

61 In terms of the Social Assistance Act, 2004 (No. 13 of 2004), social grants are provided for child support (for disadvantaged children), care dependency (for severely disabled children), foster care, disability, old age, and war veterans. Social relief of distress is available as a temporary intervention.

62 As per the judgment of the Constitutional Court in *Khosa & Others v The Minister*

Social insurance and unemployment

Various social insurance laws in South Africa deal with social security contingencies. The Unemployment Insurance Act (UIA)⁶³ covers workers and their dependants against temporary unemployment arising from termination of service, illness, and the birth or adoption of a child. However, migrant workers do not qualify for unemployment insurance benefits: they are excluded from coverage, since they have to return to their home country, when their contract of service, apprenticeship or learnership in South Africa ends.⁶⁴ This affects especially those migrant workers who work on a contract basis in South Africa, which applies to by far the majority of foreign mine- and farm workers there. Furthermore, the Unemployment Insurance Fund has no experience to date of paying benefits outside South Africa's borders, and only accepts South African-issued documentation for purposes of paying benefits to foreigners in South Africa.⁶⁵

Workmen's compensation: Legislation, assessments, and payments

A major problem facing workers from neighbouring countries who suffer occupational injuries or diseases in South Africa are the many South African laws and the largely uncoordinated institutional frameworks, as well as differences in the range of benefits. Different *statutes* deal with employment-related injuries and diseases within and outside the mining sector, and are administered by different government departments:⁶⁶ the Occupational Diseases in Mines and Works Act (ODMWA)⁶⁷ and the Compensation for Occupational Injuries and Diseases Act (COIDA).⁶⁸ COIDA and the ODMWA provide a system of no-fault compensation for employees who are injured in accidents that arise out of and in the course of their employment or who contract occupational diseases. Occupational lung diseases in the mining sector are covered by the ODMWA. This law is administered by the Department of Health, South Africa, via its

of Social Development & Others; Mahlaule & Others v The Minister of Social Development & Others 2004 (6) BCLR 569 (CC).

- 63 No. 63 of 2001. These benefits are payable by the Unemployment Insurance Fund. Employers and employees contribute equally to the Fund. The maximum period of benefits (in respect of a worker who has been contributing for a period of four years) is eight months.
- 64 Section 3(1)(d), UIA.
- 65 Pers. comm., Mr Sagren Govender, Executive Manager of Operations, Unemployment Insurance Fund, 24 May 2010.
- 66 In addition, two mutual associations are permitted to operate under licence, as authorised by the Minister of Labour. They are the Rand Mutual Assurance Company Limited (RMA) in the mining industry, and the Federated Employers' Mutual Association (FEMA) in building and construction.
- 67 No. 78 of 1973.
- 68 No. 130 of 1993.

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Johannesburg-based Medical Bureau for Occupational Diseases Directorate, where benefit medical examinations take place and former and currently employed mineworkers are certified. Lump sum (compensation) payments as well as medical benefits are provided in terms of the ODMWA, and are paid by the Compensation Commissioner operating under the auspices of the Department of Health. Occupational injuries (and deaths) as well as non-mine-related occupational diseases and mine-related diseases not covered by the ODMWA, such as noise-induced hearing loss, are essentially covered by COIDA.⁶⁹ This law is administered by the Compensation Fund of South Africa, which falls under the auspices of the Department of Labour. COIDA provides for different categories of benefits, which cover medical benefits as well as temporary and permanent disability compensation payments. The compensation payments could be in the form of lump sum or pension payments, depending on the severity of the disability. There are several major differences between ODMWA benefits and compensation payable under COIDA.⁷⁰

Still in the context of workmen's compensation, different and largely uncoordinated institutional avenues exist for, respectively, undertaking medical assessments and for processing and paying compensation. Medical assessments for mining-related lung diseases are undertaken by the Medical Bureau for Occupational Diseases Directorate. However, former mineworkers may not be able, either financially or medically or both, to travel to South Africa for this purpose. Medical assessments for occupational injuries in the mining context, and for occupational diseases in the mining context not covered by the ODMWA, fall under the auspices of the Rand Mutual Assurance Company Limited (RMA). For most other categories of former migrant workers, medical assessments are undertaken by the Compensation Fund of South Africa. Limited but insufficient steps have been taken to extend medical examination services to affected former workers from neighbouring countries.⁷¹ These

69 Also covered in terms of COIDA are occupational diseases suffered by employees working in the mining industry who are not covered by the ODMWA. These include mine health personnel.

70 For example, ODMWA benefits are generally inferior to those under COIDA. However, unlike COIDA, the ODMWA provides free benefit examinations. The ODMWA only provides for lump sum payments with no provision for pension payments or for additional compensation in the event of negligence on the part of the employer. However, additional compensation is payable if the permanent disability of the employee worsens from the first to the second degree. In terms of a recent Constitutional Court judgment (*Mankayi v AngloGold Ashanti Ltd* CCT 40/10, decided on 3 March 2011), a person covered under the ODMWA is not excluded from claiming for recovery damages against his/her employer for occupational diseases resulting in disablement or death. In contrast (?contrast?), section 35(1) of COIDA excludes a person covered under COIDA from claiming from his/her employer.

71 As far as former mineworkers are concerned, the RMA has established a medical clinic in Xai-Xai, Mozambique. Also, representatives from South Africa's Department

services are mostly restricted to existing beneficiaries and usually do not extend to former workers who have not yet been examined.

Streamlined and uniform payment mechanisms for cross-border workmen's compensation payments are largely absent. For many beneficiaries and dependants in neighbouring countries, banking facilities are non-existent or inaccessible. Also, transaction costs substantially reduce the value of a benefit paid out to beneficiaries.⁷² Compensation in respect of mining-related lung diseases covered by the ODMWA is paid by the Department of Health in South Africa through its Compensation Commissioner. The Commissioner pays these benefits directly into the claimant's bank account. If no bank account exists, the making of payments becomes problematic.⁷³ Compensation in respect of mining-related injuries and deaths, and for mining-related diseases not covered by ODMWA, is administered by RMA, which in some cases uses the services of the Employment Bureau of Africa (TEBA). Compensation in respect of occupational injuries and deaths as well as occupational diseases outside the mining context is paid by the Compensation Fund of South Africa, which depends on different payment modalities.⁷⁴

National/public retirement scheme

There is currently⁷⁵ no national or public retirement scheme in South Africa, as there is in Mozambique, implying that retirement insurance is covered by private mechanisms. Retirement insurance schemes – in the form of pension and provident funds – are regulated by the Pension Funds Act,⁷⁶ while the Financial Services Board (FSB)⁷⁷ is the regulatory and supervisory mechanism. However, some occupation-based retirement schemes are regulated by other statutes and cover particular categories of workers. These include the Military Pensions Act,⁷⁸ the Special Pensions Act,⁷⁹ and the General Pensions Act.⁸⁰

of Health visited Lesotho to investigate the possibility of having medical assessments done in Lesotho.

72 Olivier (2010a:178, paragraphs 465–466).

73 Apparently, as far as Lesotho is concerned, except for those with banking accounts, such payments are made via the Office of the Master of the High Court in Lesotho.

74 Including payment into either bank accounts or, in the case of Lesotho, into the Workmen's Compensation Trust Fund. The monthly pensions of Mozambican clients are paid into the bank account of the Mozambican Department of Labour.

75 However, significant steps have already been taken by the South African Government towards establishing a comprehensive national social security scheme covering retirement benefits as well.

76 No. 24 of 1956. It is believed that around 75% of workers in the formal sector in South Africa are members of occupation-based or private retirement schemes.

77 Established under the Financial Services Board Act, 1990 (No. 97 of 1990).

78 No. 84 of 1976.

79 No. 69 of 1996.

80 No. 29 of 1979.

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Furthermore, although steps to remedy the situation are contemplated, there is no generally applicable legislation in South Africa yet that –

- compels all employers to make retirement provision for their employees
- requires compulsory preservation,⁸¹ or
- enforces compulsory transfer.⁸²

In the mining industry, where large numbers of migrant workers are employed, the most common mechanism chosen are provident funds, which pay out a lump sum at retirement. These have invariably been set up through collective agreement, particularly for mineworkers at junior levels and manual labourers. Senior-level mine officials generally belong to pension funds that pay out regular, usually monthly, benefits. When a member passes away before retirement, survivor benefits can be paid out to the member's nominees and/or dependants. However, South Africa's Pension Funds Act allows for a 12-month period within which to trace and verify dependants, which may cause considerable delay in paying benefits to surviving spouses and children.⁸³ In addition, the trustees of the pension or provident fund can require so-called trusts to be set up, usually for minor children. These trust funds are operated by independent institutions, referred to as *beneficiary funds*.

The retirement schemes described above also fall under the FSB's supervisory and regulatory authority. However, until recently, trust funds created for the benefit of minor children, including minor children of deceased migrant workers, did not fall under the FSB's authority. The beneficiary funds responsible for the operation and safeguarding of the trust funds had to report only to the Master of the High Court. Subsequent to the loss of a large sum of money invested with an asset management company by a beneficiary fund,⁸⁴ such funds were required to register in terms of the Pension Funds Act and are now, therefore, FSB-regulated and -supervised institutions.⁸⁵

Farm workers in South Africa, many of whom are migrants, rarely belong to retirement schemes. Thus, they are largely left without a regular post-employment income when they retire.

81 That is, retention of retirement contributions or benefits built up in a retirement scheme for the benefit of a worker when that worker exits the (formal) labour market before retirement.

82 That is, compelling the transfer of retirement contributions or benefits built up in a retirement scheme for the benefit of a worker when that worker changes his/her employer.

83 Section 37C.

84 The so-called Fidentia episode, in which approximately R500 million (US\$70 million) was lost.

85 See section 2A of the Pension Funds Act, inserted by the provisions of the Financial Services Laws General Amendment Act, 2008 (No. 22 of 2008).

Enhancing access to South African social security benefits by SADC citizens

In all of the above cases, the required documentation needs to be submitted before a lump sum payment and/or regular payment of benefits can be activated. This could be particularly cumbersome for surviving spouses and their children, as they may live in remote rural areas, may not know which documents to submit, how to procure and fill it out, and may not be able to obtain the required supporting marriage and birth certificates, for example. In addition, continued payments may be subject to the submission of appropriately completed and attested life certificates – which may be beyond the capability of many illiterate beneficiaries.

National/public health insurance scheme

In the absence of a national or public health insurance scheme in South Africa, health care is provided for a small part of the population by private schemes which are regulated by the Medical Schemes Act.⁸⁶ Private health care provision is mainly occupation- and insurance-based. Public health care is available to the majority of the population, but has several shortcomings, including limited funding and capacity.

Motor vehicle accident insurance

Motor vehicle accident insurance, which is generally regarded as part of social insurance in South and southern Africa, is provided by the Road Accident Fund.⁸⁷ The Fund, which is primarily fed by a compulsory fuel levy, pays compensation to a third party for any loss or damage suffered as a result of any bodily injury or death caused by the negligent driving of motor vehicles.

In sum

Not all categories of workers from SADC countries have access to the full range of benefits generally available under the South African social security system. For example, domestic workers are excluded from the operation of COIDA, which keenly affects the position of Mozambican workers who are or were involved in this sector.⁸⁸ Furthermore, as indicated above, fixed-term contract migrant workers do not qualify for unemployment insurance benefits.

In conclusion, a bewildering array of fragmented institutional and operational mechanisms characterises the different service delivery elements in South Africa. Furthermore, these mechanisms can vary, depending on the category of workers affected (e.g. former mineworkers and other former migrant workers) and the nature of the issue concerned (e.g. occupational diseases and injuries). One is left with the clear impression that there is a lack of

86 No. 131 of 1998.

87 Established in terms of the Road Accident Fund Act, 1996 (No. 56 of 1996).

88 Section 1(xix)(d)(v), COIDA.

synergy, coordination and collaboration at policy, institutional and operational levels within South Africa, as far as social security provisioning and service delivery is concerned – particularly in relation to migrant workers and their dependants. This applies across the board, but especially in the realm of workmen's compensation.

Different categories of migrants and their access to South African social security benefits

Categories of non-citizens in South Africa: Immigration law and policy classification and restrictions

Permanent and temporary residents

The Immigration Act,⁸⁹ which regulates non-citizens' entry into and residence in South Africa, distinguishes between various categories of non-citizens according to their immigration status and/or purpose of entry. In terms of section 9(4)(b) of the Act, a non-citizen may enter and remain in the country only if s/he has a permanent residence permit or one of 14 different kinds of temporary residence permit.⁹⁰

A *permanent resident* is a non-citizen who has been granted permission to reside in the country indefinitely. Legally speaking, permanent residents are given the same treatment accorded to nationals, in terms of a number of South African Constitutional Court judgments.⁹¹ For example, a permanent resident in South Africa has all the rights contained in the Bill of Rights,⁹² except those rights explicitly reserved for citizens. As such, permanent residents are the elite of non-South Africans, and are able to apply for citizenship after five years.⁹³ Some citizens of other SADC countries have indeed acquired permanent residence status in South Africa in this manner.

A *temporary resident* is a non-citizen who has been granted permission to enter and/or reside in South Africa for a definite period of time. From a legal perspective, migrant workers invariably work on a temporary basis in South Africa, irrespective of the fact that many of them – especially migrant mineworkers – have been working in South Africa for many years. Those who work in South Africa within the framework of the labour agreements entered

89 No. 13 of 2002.

90 See sections 11–23.

91 *Larbi-Odam v Member of the Executive Council for Education (North-West Province) & The Minister of Education* 1998 (1) SA 745 1655 (CC); *Khosa & Others v The Minister of Social Development & Others*; *Mahlaule & Others v The Minister of Social Development & Others* 2004 (6) SA 505 (CC).

92 Chapter 2, Constitution of the Republic of South Africa of 1996.

93 See section 5 of the South African Citizenship Act, 1995 (No. 88 of 1995).

into with neighbouring countries are required to have their contracts renewed every 12 to 18 months.

The crucial provision in the Immigration Act⁹⁴ is that a temporary residence permit is issued on condition that the non-citizen is not, or does not become, a “prohibited or undesirable person”.⁹⁵ One of the means by which this result is attained in relation to temporary residents is by including various financial requirements for the issue of permits and, therefore, the granting of lawful entry into South Africa. In terms of section 30, an *undesirable person* includes anyone who is likely to become a public charge. This may imply that a non-citizen is deemed to be undesirable and denied entry if s/he lacks financial resources and needs social assistance or welfare.

Mention should also be made of section 21 of the Immigration Act. This section provides for the issuing of a corporate permit, which allows a corporate client (such as a mining company) to employ a number of foreigners on a corporate or collective basis, without the need to comply with the cumbersome conditions and procedures required in terms of the Act and applicable to, for example, (individualised) work permits.⁹⁶ Section 21 affords special and preferential status to corporate employers in relation to migrant workers from the signatory countries, including SADC countries, and designated sectors such as the mining sector. Further implications are that the corporate employer, e.g. a mining house, has to provide financial guarantees – unless exempted, either partially or wholly – to defray deportation and other costs should the permit be withdrawn. Financial guarantees are also required to defray such costs if a person employed in terms of the permit fails to leave South Africa when s/he is no longer subject to the corporate permit, e.g. when the period for which the worker had been engaged has expired.⁹⁷ However, the corporate permit does not guarantee the right to residence in South Africa, and it has important implications for the social security position of migrant workers from SADC employed in terms of such a permit, when read with the provisions of the labour agreements with South Africa. These migrant workers are not entitled to unemployment insurance benefits, as explained below.

It has been remarked that the Immigration Act attempts to strike a balance between the needs of the South African economy – particularly in respect of the need for highly skilled workers, the will to limit the inflows of largely

94 See section 10.

95 As defined in sections 29 and 30.

96 Regulated in section 19.

97 Section 21 of the Immigration Act, as amended. According to the Supreme Court Appeal judgment in *Director-General: Department of Home Affairs & Another v Mavericks Revue CC* [2008] 1 All SA 435 (SCA); 2008 (2) SA 418 (SCA), a repatriation guarantee cannot be required from the worker concerned in the case of a corporate permit.

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unskilled migrant workers or economic refugees,⁹⁸ and the concern that migrants' working conditions may undermine established labour standards and practices.⁹⁹ And yet, given the specific legal requirements that have to be met,¹⁰⁰ with some exceptions¹⁰¹ the majority of SADC migrants to South Africa, who are employed in semi-skilled positions, cannot qualify for a general work permit under the available categories.¹⁰² Therefore, the Immigration Act, in its current form, does not appear to be a suitable instrument to appropriately regulate the flow of migrant workers from other SADC countries to South Africa.

Finally, it should be noted that, apart from many documented migrants apparently remaining on temporary permits for long periods¹⁰³ as the possibility to apply for permanent residence after five years is not generally publicised and promoted, there are two further policy hurdles which effectively discourage and restrict migration to South Africa. The first is that migration policies in South Africa do not favour family reunification.¹⁰⁴ The second hurdle is that the Department of Home Affairs made a policy decision not to allow a foreigner to hold more than one permit at a time, and not to allow refugees to change their status or asylum seekers to change their permits if they married or had children with South African citizens.¹⁰⁵

Refugees and asylum-seekers

The international (including regional) standards and obligations relating to refugees and asylum-seekers, also in the area of social security, are crucially important for South Africa. This flows from the fact that, firstly, South Africa has ratified and is, therefore, bound by several of the relevant international and regional instruments; and that, secondly, every court, tribunal and forum has to consider international law in a matter involving the entitlement of refugees and asylum-seekers to the constitutional right to access to social security and to appropriate social assistance.¹⁰⁶

98 Both for security reasons and because of the high level of unemployment prevailing in South Africa (FIDH 2008:18).

99 (ibid.).

100 Especially the requirement that it has to be shown that nobody in South Africa has equivalent skills, qualifications or experience (FIDH 2008:5).

101 For example, mineworkers covered under bilateral agreements.

102 FIDH (2008:18).

103 (ibid.:21).

104 (ibid.); see also section 18, Immigration Act.

105 (ibid.).

106 See section 27(1)(c) of the Constitution, read with section 39(1)(b) and section 231, as well as section 233.

The importance of these international and regional standards is also evident from legislation on refugees, which deals with the position of refugees and asylum-seekers in South Africa. Section 1A of the Refugees Act¹⁰⁷ stipulates that it needs to be interpreted and applied in a manner consistent with –

- (a) the 1951 UN Convention Relating to the Status of Refugees;
- (b) the 1967 UN Protocol Relating to the Status of Refugees;
- (c) the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa;
- (d) the 1948 UN Universal Declaration of Human Rights; and
- (e) any domestic law or other relevant convention or international agreement to which South Africa is or becomes a party.

The Refugees Act defines an *asylum-seeker* as a person who is seeking recognition as a refugee in South Africa or whose refugee status has not yet been confirmed, as opposed to a *refugee*, who has been granted asylum in terms of the Act.¹⁰⁸ The distinction between *refugee* and *asylum-seeker* has important consequences for social protection status. Unlike refugees, asylum-seekers find it difficult to gain access to social protection until the final determination of their status. They receive only a minimum form of protection until such time as they become fully recognised refugees, and this makes their situation even more precarious. In South Africa, they are not explicitly legally included in provisions for social security, especially for social assistance. However, they are allowed to work and study.¹⁰⁹

Irregular or undocumented non-citizens

An *irregular or undocumented non-citizen* is one who is in South Africa without permission to reside in the country or who is otherwise present in the country in contravention of the country's immigration law. This includes a foreigner who has entered the country without proper authorisation or by fraudulent means, or who remains in the country beyond the date imposed by his/her visa or permit, or who engages in activities beyond the scope of what is duly authorised by that permit.¹¹⁰ In South Africa, an irregular non-citizen is regarded as an illegal foreigner, and is subject to arrest and deportation.

It is possible to discern different categories of irregular migrants, ranging from those who – as a result of porous borders, economic instability and weak

107 As inserted by the provisions of the Refugees Amendment Act, 2008 (No. 33 of 2008).

108 Section 1(iv), (v) and (xv), respectively.

109 *Minister of Home Affairs & Others v Watchenuka & Another* [2004] 1 All SA 21 (SCA).

110 Waller, L. 2006. "Irregular migration to South Africa during the first ten years of democracy". *SAMP Migration Policy Brief No. 19*. Kingston/Cape Town: Southern African Migration Project.

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institutions – are involved in a variety of clandestine and unlawful cross-border criminal activities such as human trafficking, to those who trade and visit informally across borders and those who are unable to procure the necessary documentation or who have overstayed the period of their authorised sojourn in South Africa.¹¹¹

Immigration policies should, therefore, be sensitive to the nature of and reasons for the irregular status of a particular migrant. Notably, Article 69(2) of the United Nations (UN) Migrant Workers Convention¹¹² suggests that –

Whenever States Parties concerned consider the possibility of regularizing the situation of such persons in accordance with applicable national legislation and bilateral or multilateral agreements, *appropriate account shall be taken of the circumstances of their entry, the duration of their stay in the States of employment and other relevant considerations*, in particular those relating to their family situation. [Emphasis added]

*The Immigration Act and cross-border traders*¹¹³

Substantial numbers of migrant workers entering South Africa from neighbouring countries are cross-border traders. According to a recent study by the Southern African Migration Project conducted at major border posts with all South African neighbours except Namibia and Botswana, “of the 6 million border crossings in a year, 30–50% are by small-scale traders”.¹¹⁴

National and regional economic policy initiatives, and especially the SADC Free Trade Protocol, indicate that South Africa and other countries in the region view regional trade as part of the solution to the region’s economic problems and as a means of promoting regional integration and development and alleviating poverty. Yet, as Peberdy (2002:35) points out, current trade policies have paid little attention to the activities of small entrepreneurs – primarily women – who are involved in informal cross-border trade and who are also part of the movement of goods and capital through the region.¹¹⁵

111 See Olivier (2009:15–16).

112 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, GA Resolution 45/158, Annex, 45 UN GAOR Supp. (No. 49A) at 262, UN Doc. A/45/49 (1990). The Convention entered into force on 1 July 2003.

113 See Olivier (2010b:20–22, paragraphs 32–35).

114 “Immigration: What it’s doing to South Africa”, *Financial Mail*, 16 February 2007, p 36.

115 See Peberdy, S. 2002. “Hurdles to trade? South Africa’s immigration policy and informal sector cross-border traders in the SADC”. Unpublished paper presented to a workshop of the Southern African Poverty Network (HSRC), Lawyers for Human Rights, and the Southern African Migration Project “Regional Integration, Migration and Poverty”, Pretoria, April 2002.

However, the barriers regarding eligibility to enter South Africa seem insurmountable to many cross-border traders, and have encouraged irregular entry into South Africa.¹¹⁶ While the Immigration Act introduced cross-border permits which allow multiple entries for “a foreigner who is a citizen or a resident of a prescribed foreign country with which the Republic shares a border”,¹¹⁷ these permits do not authorise the holders to trade.¹¹⁸ Besides, while the 2002 Immigration Act established that these permits could be granted even to people who did not hold a passport but were registered with the Department of Home Affairs, this possibility has been removed by the 2004 amendment of the Act.¹¹⁹

Technically, cross-border permits do not allow cross-border traders to participate in street trade in South Africa, which leaves them vulnerable to arrest by police and Home Affairs officials, and engenders corruption.¹²⁰

Access to social security in South Africa

Permanent and temporary residents

In terms of the Constitution, foreigners with permanent residence status are entitled to the same socio-economic rights as citizens. Access to social assistance was, therefore, extended to permanent residents in the landmark case of *Khosa & Others v The Minister of Social Development & Others; Mahlaule & Others v The Minister of Social Development & Others*.¹²¹ Permanent residents in South Africa are entitled to the whole spectrum of social insurance benefits.

Temporary residents cannot access social assistance, however, as this is restricted to citizens and permanent residents.¹²² The Social Assistance Act¹²³ states that it applies to a non-citizen of South Africa only in the event

116 See Olivier (2009:100).

117 Section 24.

118 FIDH (2008:19).

119 (ibid.). This impacts negatively on many neighbouring countries' citizens, particularly Zimbabweans, who do not have passports and who are unable to obtain them expeditiously from their various home administrations.

120 Peberdy (2002:43).

121 2004 (6) SA 505 (CC). The Constitutional Court found that the Constitution expressly provided that the Bill of Rights enshrined the rights of “all people in our country” and, in the absence of any indication that Section 27(1) was restricted to citizens – as in some other provisions in the Bill of Rights – the word *everyone* could not be construed as referring only to citizens (paragraph 47).

122 This was confirmed in *Khosa*, which held that excluding temporary residents from social assistance was justified on the basis of the “tenuous link” that temporary residents had with the country.

123 No. 13 of 2004.

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of a bilateral agreement providing for this, i.e. an agreement between South Africa and the country of which that person is a citizen.¹²⁴ The Minister of Social Development can, with the concurrence of the Minister of Finance, also prescribe that a group or category of persons should be covered.¹²⁵ However, no bilateral agreements have yet been signed, and the Minister of Social Development has not extended social assistance to any category of temporary non-citizens. Temporary residents can, however, access the public health care system in cases of emergency.¹²⁶

Nonetheless, temporary residents qualify for some social insurance benefits. Temporary residents who are migrant workers on work permits are eligible for compensation for –

- employment injuries and diseases
- occupation-based health and retirement benefits (in the case of retirement benefits where the rules of a fund allow), and
- motor vehicle accident insurance.

With regard to health care, temporary residents are not covered in the public sector – although, as indicated above, they can access the public health care system in cases of emergency. Otherwise, health care is available to them only through contributory private schemes as regulated by the Medical Schemes Act.¹²⁷

As regards unemployment insurance coverage in the case of termination of services, illness, maternity or adoption, temporary residents in South Africa who are migrant workers are excluded if they have to return to their country of origin. For example, the UIA excludes persons who enter South Africa for the purpose of carrying out a contract of service, apprenticeship or learnership if there is a legal or a contractual requirement or any other agreement or undertaking that such person is obliged to leave South Africa, or be repatriated upon termination of the contract.¹²⁸

Refugees and asylum-seekers

In principle, refugees in South Africa enjoy full legal protection, which includes the constitutionally entrenched socio-economic rights set out in Chapter 2 of the Constitution, and specifically the right to access to social security,

124 Section 2(1).

125 Section 1, paragraph (b) of the definition of *South African citizen*.

126 In terms of Section 27(3) of the South African Constitution, no one may be refused emergency medical treatment.

127 No. 131 of 1998.

128 Section 3(1)(d) UIA.

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including, if they are unable to support themselves and their dependants, appropriate social assistance.¹²⁹

Notably, the 2008 Amendment Act¹³⁰ specifically deleted the provision which gave refugees an entitlement to the same basic health services and basic primary education to which citizens are entitled. This could conflict with South Africa's obligations under the 1951 UN Convention Relating to the Status of Refugees, which requires contracting states to accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as that accorded to their own nationals.¹³¹

In the case of *Union of Refugee Women & Others v Private Security Industry Regulatory Authority & Others*,¹³² the Constitutional Court considered the position of refugees in South Africa. It held that refugees who had been granted asylum were a special category of foreign nationals who had the right to remain in South Africa indefinitely. The court likened their position to that of permanent residents with regard to access to rights and privileges, although not in all aspects.¹³³ The court also held that refugees were allowed to take up employment, although not in every profession or industry.¹³⁴

From a legal perspective, therefore, refugees and asylum-seekers have access to occupational social security schemes, including health insurance and retirement insurance, as well as compensation for occupational injuries and diseases and for motor vehicle accidents. However, the temporary nature of their stay in South Africa may mean they fall outside the scope of workers usually covered by retirement fund arrangements. It is unclear whether refugees and asylum-seekers are entitled to contribute to and benefit from unemployment insurance. One reading of the UIA leaves one with the

129 Section 27(b), Refugees Act, read with section 27(1)(c) of the Constitution. The Social Assistance Act provides access to disability grants to refugees; see Regulation 3(a) of the Regulations Relating to the Application for and Payment of Social Assistance and the Requirements or Conditions in Respect of Eligibility for Social Assistance, GG 31356, 22 August 2008.

130 Refugees Amendment Act.

131 See Article 24 of the Convention.

132 2007) 28 *ILJ* 537 (CC).

133 (*ibid.*:paragraph 99).

134 The court stressed that, although section 27(f) of the Refugees Act grants refugees the right to seek employment, this right may be limited in the case of non-citizens, in accordance with the provisions of Section 22 of the Constitution. The regulatory scheme aimed at generally excluding refugees (subject to exception) was found to be narrowly tailored to the purpose of screening entrants to the private security industry and did not constitute a blanket ban on the registration of refugees as private security service providers.

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impression that they are not allowed to contribute to the Unemployment Insurance Fund.¹³⁵

As far as social assistance is concerned, the Regulations to the Social Assistance Act now include refugees as beneficiaries for the disability grant, the foster care grant, and social relief of distress.¹³⁶ However, they are not entitled to any of the other social assistance benefits, such as the old age grant. Asylum-seekers are provided with social assistance only in cases of emergency, such as emergency health care.

Whereas the Refugees Act entitles refugees to seek work, it does not contain a similar provision with regard to asylum-seekers. Nevertheless, the Supreme Court of Appeal upheld the right of asylum-seekers awaiting the processing of their applications to work or study: provisions in the Regulations in terms of the Refugees Act aimed at preventing them from exercising this right¹³⁷ were held to be beyond the powers of the Constitution.¹³⁸

Access to the full spectrum of social insurance benefits is needed in view of government policy in South Africa, which promotes self-sufficiency for refugees and their local integration. This, in turn, forces refugees to seek work and to rely on social insurance. The same applies to asylum-seekers who are allowed to remain in South Africa. Therefore, employment becomes a crucial element of the basic dignity and welfare of these two vulnerable categories of non-citizens.

Irregular or undocumented non-citizens

Undocumented migrants in South Africa enjoy some protection under the law. The case of *Discovery Health Ltd v CCMA & Others*¹³⁹ extended labour law protection to some categories of irregular or undocumented non-citizens, specifically those whose work permits have expired. Since the labour law status of a worker determines his/her right to employment-related social security benefits, the ruling could therefore imply access to social insurance protection for this category of non-citizens, i.e. that they should be able to access compensation for occupational injuries and diseases. They should

135 See section 3(1)(d), UIA.

136 Regulation 3(a) of the Regulations Relating to the Application for and Payment of Social Assistance and the Requirements or Conditions in Respect of Eligibility for Social Assistance (GG 31356, 22 August 2008) provides that a person is eligible for a disability grant if s/he is a South Africa citizen, permanent resident or refugee.

137 See Regulation 7 of the Refugee Regulations (Forms and Procedure), 2000.

138 *Minister of Home Affairs & Others v Watchenuka & Another* [2004] 1 All SA 21 (SCA).

139 (2008) 29 ILJ 1480 (LC).

also be eligible for unemployment insurance, although their temporary status may preclude them from such cover.

In terms of available best practice and existing international standards, irregular or undocumented migrants who have made social insurance contributions should be entitled to benefit from those payments or at least be repaid the sums contributed if, for example, they are expelled from the country.¹⁴⁰ Generally speaking, there is a movement away from an approach that focuses exclusively on the security aspects of irregular migration, i.e. on measures to combat irregular migration, towards a more nuanced approach that also emphasises the human rights of irregular migrants. Consensus is beginning to emerge that irregular migrants are entitled to certain minimum rights in the migrant-receiving country.¹⁴¹ The Committee of Inquiry into a Comprehensive System of Social Security for South Africa, the so-called Taylor committee, remarked in its report that –¹⁴²

there [is] ... constitutional pressure to ensure all people (including illegal immigrants) have access to *certain basic services (such as emergency healthcare)*. [Emphasis added]

A restrictive definitional context could materially impact on the social security protection of non-citizens, and may have particular genderised dimensions.

For example, as explained above,¹⁴³ the limited framework of temporary permits regulated by the Immigration Act makes it virtually impossible for

140 See Cholewinski, R. 2005. *Study on obstacles to effective access of irregular migrants to minimum social rights*. Strasbourg: Council of Europe, paragraph 40; Council of Europe. 2006. *Human rights of irregular migrants*. Strasbourg: Council of Europe, paragraph 70; Article 9(1) of the International Labour Organization Migrant Workers (Supplementary Provisions) Convention 1975 (Convention No. 143 of 1975); Article 27(2) of the UN Migrant Workers Convention; Olivier (2010b:paragraph IX).

141 In the words of a British House of Lords Select Committee on the European Union, “Governments need to manage migration in a way that controls illegal immigration effectively. But in doing so they must not forget that they are dealing with people, most of whom are motivated simply by a better life for themselves and their families, and in devising measures to control immigration they must ensure that they scrupulously observe their human rights obligations”; Session 2001-02, 37th Report, A Common Policy on Illegal Migration, HL Paper 187 (5 November 2002), p 17.

142 Republic of South Africa. 2002. *Committee of Inquiry into a Comprehensive System of Social Security for South Africa. Transforming the Present – Protecting the Future (Draft Consolidated Report)*. Pretoria: Republic of South Africa, p 115; also known as the *Taylor Committee*.

143 See earlier, under the section entitled “Irregular or undocumented non-citizens”. Outside the mining and commercial farming sectors, it is difficult for female migrants to obtain work permits, since employers have to apply for and justify them in terms of no South Africans being able to fill the position (UN-INSTRAW & UNDP/United Nations International Research and Training Institute for the Advancement of

informal cross-border traders to obtain permits authorising them to trade. Their status in terms of the legislation is, therefore, by and large that of an irregular migrant.

As far as social assistance is concerned, it can be argued that irregular non-citizens in South Africa are constitutionally entitled to core social assistance, which might entail emergency social relief. However, the provisions of the Social Assistance Act do not extend support to irregular non-citizens. With reference also to prevailing international standards, it is evident that irregular migrants are entitled to emergency health care as defined in the Constitutional Court's judgment in *Soobramoney*.¹⁴⁴

However, a distinction has to be drawn between *irregular adult migrants* and *children in an irregular situation*, whether such children are accompanied or unaccompanied. In accordance with international and regional standards,¹⁴⁵ case law in South Africa indicates that unaccompanied foreign children in South Africa should be treated as children in need of care in terms of the formal child protection (including welfare) system, and should not be processed through the immigration system.¹⁴⁶

Bilateral labour agreements

As is discussed in more detail in Part II, South Africa has entered into so-called labour agreements with a number of SADC countries. Whether these bilateral agreements are consistently applied and enforced is unclear, however. There is some indication that they are obsolete.

Nevertheless, an analysis of the agreements reveals that they were concluded to tightly regulate the flow of migrant labour to South Africa from other SADC countries.¹⁴⁷ Social security and related arrangements, and specifically portability issues, are dealt with solely as a by-product of the agreements. In this regard, the agreements typically arrange for the payment of taxes to the government of the sending country, particularly for the following deductions:

Women & United Nations Development Programme. 2010. *Migration, remittances and gender-responsive development: The case of Lesotho*. New York: United Nations, p 19).

144 *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997).

145 See, among other things, the UN Convention on the Rights of the Child, 1989.

146 *Centre for Child Law & Another v Minister of Home Affairs & Others* 2005 (6) SA 50 (T).

147 The agreements typically provide that employment is only permitted to occur in accordance with the provisions of the agreement; that a citizen of the sending country entering South Africa for purposes of employment is obliged to have a written employment contract attested in the home country; and that the period of employment is not permitted to exceed 24 months.

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- Deferred pay to be paid to the foreign national in the sending country upon return to that country
- Allowances payable to family members, and
- Monies to be paid into a welfare fund which may be set up by the government of the sending country for the purpose of supporting such citizens during periods of their disablement upon return to such country.

However, with the possible exception of the 1964 labour agreement regulating the employment of Mozambican mineworkers on certain South African mines, the obligations outlined above are clearly primarily imposed on the relevant employers and not the South African Government: the agreements invariably refer to the South African authorities having to 'endeavour to ensure' compliance by employers.

There are several other reasons why these agreements – to the extent that they may still be operational – need to be seen as limited in scope and effect, and as inadequate from the perspective of constituting true reciprocal agreement and enhancing the portability of South African social security benefits:

- The agreements are not reciprocal in nature, as they regulate the position of nationals of one of the respective countries only
- Repatriation is dealt with together with labour migration in the relevant regulation
- As a rule – but subject to some limited exceptions, e.g. the provisions on workers' compensation, in the case of Mozambique) – the agreements do not cover public social security transfers, but only employer- and occupation-based payments, and
- In view of the above, and given their overly controlling and restrictive orientation and purpose, although they provide some measure of portability of social security benefits, these agreements do not provide for other arrangements typical of coordination regimes,¹⁴⁸ such as maintenance of acquired rights, aggregation of insurance periods, and equality of treatment with nationals of the receiving country in social security matters.

In fact, these agreements effectively exclude nationals of the sending country from benefiting from unemployment insurance in South Africa: migrant workers who have to return to their home country as a result of the agreements are not regarded as contributors to, and can therefore not benefit from, the Unemployment Insurance Fund. While this may be seen as an arrangement which benefits the employers of such migrant workers,¹⁴⁹ this may leave migrants in a precarious position when they return to their home country.

148 Discussed in Part II [Forthcoming].

149 As they would otherwise have been liable to pay contributions to the Fund as well.

Conclusions

The social security position of migrants from SADC countries is influenced by their immigration status. Legally and factually, the position of non-citizens in terms of South African immigration law is superimposed on their social security status. The immigration status of migrant workers from SADC countries to South Africa is essentially determined by the provisions of the latter's Immigration Act, and qualified by the provisions of any bilateral agreements between South Africa and such countries. While many SADC migrants are employed on short-term work permits or via the corporate permit system, especially in the mining industry, some are already permanent residents and others are even citizens of South Africa. However, many SADC migrants are undocumented, which severely limits their access to social security benefits in South Africa.

The historical evidence, supported by data on modern-day migration movements within SADC, suggests that systems of labour migration in southern Africa, especially to South Africa, are deeply entrenched. Indeed, the industrial development of some countries in the region, including South Africa, depended heavily on the use of labour from other SADC countries. And yet, South African immigration law and policy, as a regime superimposed on the existing social security framework, is characterised by its emphasis on control and deportation, and on restricting access, controlling movement and regulating presence in the host country. The regime fails to honour a human rights approach and to encourage and support migration. To a large extent, this is also apparent from the scope and orientation of the labour agreements relating to the provision of migrant labour to South Africa that South Africa has concluded with several of its fellow members in SADC. Immigration laws and policy in South Africa, as is the case in other SADC countries, generally focus on the effects of migration, rather than on its underlying causes.

Reinvigorating African values for SADC: The relevance of traditional African philosophy of law in a globalising world of competing perspectives

Clever Mapaire*

Abstract

Africa has an important role to play in a globalised world. However, as Africa moves into the playing field, most of its value systems and legal heritage are getting weather-beaten as African governments throw in the towel to forces of Western civilisation and globalisation. It is discernible that this attrition has occurred largely for the sake of expediency and convenience. With a special focus on African traditional philosophy of law, this paper shows that traditional African jurisprudential thinking has been sidelined as being anti-development or too archaic to promote development; or it has been subjected to the so-called universal human rights norms and eroded. Implicit in this approach, and underlining the perception of African governments about traditional legal and value systems, is the evidence of a jurisprudence that remains too Eurocentric and legalistically state-centric; it denies that a postmodern, globality-focused legal scholarship is possible, provided modern African governments adopt pluralist lenses and legislators become legal plurality-conscious in any legislative process. This paper will present a model for the commandeering of an African legal identity, challenging most African states' projects of uniformising globalisation, and highlighting and advocating legal glocalisation and a recognition and respect of the internal diversities of laws across Africa. In this light, the paper shows the strength of African traditional value systems and philosophical thinking as a foundation of African legal systems, highlighting that different discourses have built up around the African traditional legal systems in a modern African state. Thus, after pointing out the scepticism surrounding the existence of African jurisprudential thinking, some important jurisprudential thoughts are explored in a bid to show an Africology of legal philosophy. The paper then advocates a plural, universal epistemology that goes beyond Eurocentrism and other ethnocentrism.

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Introduction

There cannot be regional or continental integration without law or without a common theory of law. From a legal perspective, regional and or continental integration needs a coherent and consistent value system which originates from the people or societies who/which are integrating. If these are necessary ingredients to regional integration, the question arises whether Africans have a theory of law. If so, what is the nature of that theory, and what are its special factual and normative elements? It may be a rather intricate matter to ascertain with certainty the existence of African law – let alone its exact nature, or its factual and normative elements. The existence or absence of African natural law has been obfuscated in an aura of jurisprudential disagreements and is sandwiched between legality and extralegality. These disagreements seem to find their roots in the scepticism about the existence of African philosophy per se – a cynicism which is quite rightly dying a natural death. The scepticism surrounding African moral and value systems sends a message that Africans need to revitalise their value systems discover their ontology and epistemology, and recuperate their lost dignity. This is a message which is important insofar as African continental and regional integration is to be effectively achieved, at least within the Southern African Development Community (SADC).

It is hackneyed to note that a recognition and revitalisation of African values will promote the taste of Africanness and respect for African traditional government systems. To this end, this paper recognises that positivism has long been dominant, but in order to achieve the imperatives of sustainable African integration, it advocates additional recognition of old and new natural laws as law, and especially highlights traditional and socio-cultural normative systems as legal inputs which promote reconciliation, social justice and the rebuilding of African often conflicting, flustered and conked-out societies. In this light, the paper will encourage a modern African government – and especially the legislature – to see law as a complex net of constant negotiation and compromise between competing legal facts of different strengths, reflected in official legal recognition or unofficial legal presence. This position will be taken as a foundation upon which African lawmakers should lay their ideas when legislating in a modern African state, not only in order to prevent the loss of African moral systems and heritage, but also to serve as an environment in which Africans can revitalise their moral and value systems for sustainable integration in a globalising world of competing jurisprudential perspectives.

The goal of this paper is not to trash Western law – a concept which is anyway broad and vague in jurisprudential terms – but to reiterate that African law of the past was never just about custom, and that African laws of the future cannot just be about state-made laws or international norms. Furthermore, instead of African law being regarded as barbaric and repugnant, as former colonisers once saw it as, it should be understood that it is an instrument of harmony and societal integration. Thus, SADC integration can be premised

on African traditional values and legal principles, and, hence, African law is a feasible means by which to advance an Afrocentric approach to African or SADC integration in a globalising world of hostile jurisprudential viewpoints. On this note, globalisation and the Western idea of law are living realities which Africa cannot ignore. The combination of the two sends the message that Africans can only handle current challenges to their heritage in a pluralist manner. Furthermore, when handling traditional norms in particular, Africans should do it constructively in a realistic spirit of legal negotiation with respect for plurality and diversity, rather than fight over competing visions that seek to totally discount other perspectives.

Conjecture, sceptical theory and the absence thesis

Whenever one talks about the flavour of Africanness or commonality under the theme of integration, important factual and normative questions arise regarding the law across African societies. It appears in global jurisprudence that there is a fixation of positions regarding what is *law* and what is not, or at least what can be accepted as *law* and what cannot. Whereas this fixation of positions exists, the question arises as to whether it is acceptable to conclude that Africa is just a recipient of law without a theory of its own. The other question is whether there is any evidence that Africa is overwhelmingly overshadowed by Western principles. This question comes up as one recognises that there is an inherent philosophy which makes Africans so uncomfortable with accepting positive law modelled on Western design. This unease indicates that there is another theory of law which is often misunderstood by many who subscribe to the positivist-obsessed Western laws. This theory of law deserves the tag *African* – and indeed, such law exists despite scepticism. This position stands as one recognises that the theory of legal positivism is incompatible with African traditional law where the separability thesis does not apply.¹

Competing philosophical perspectives: A matter of confusion?

Perspectives about what is and is not *law* have found special attention over centuries, and yet the problem persists. For this reason, African value systems continue to be pushed to the peripheries as being 'extralegal'. At the same time, Africans regard that extralegal system as 'legal'; hence, it is law. There is a realisation that law is one of the greatest institutions and social practices ever developed by humans, and humans originated in Africa – the so-called

1 This is because any reference to moral considerations in defining the related notions of law, legal validity, and legal system is inconsistent with the separability thesis. Under African law, there is no separation between law and morality. This justifies the view that African traditional law can just as well be regarded as African natural law.

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cradle of mankind.² Law is a product of cultural development. It represents a major step in cultural evolution.³ The evolution of culture should actually be taken to have come with the development of a theory of law. The problem with Western scholarship is that there has been an inevitable denial of the existence of African law, let alone the theory of African natural law. This denial, which is unhesitatingly swept aside in this paper, is based on two major points: the absence thesis, and the sceptical argument. Below it is shown in clearer terms that an African philosophy of law indeed exists, and it can be useful in fostering continental and regional integration. Therefore, the absence thesis and the sceptical theory with their positivistic tones should not be accepted as correct positions in global jurisprudence.

During colonial times, African laws existed as a hodgepodge of colonial compromises acceded to by expansionist figures consolidating their conquests. Against this backdrop, the absence thesis posits that there is no African jurisprudence.⁴ The non-existence of an African philosophy of law is premised on the non-existence of written records about the law. Is this position tenable? In all societies, the people's philosophy constitutes their system of thought and has always served as the basis for their attitudes on life. In this light, to deny the existence of African law is to deny the premise of African life and the values that underpin it. Philosophy does not exist only in written form, but also in substance and orature. A system of thought does not have to be written in order for a philosophy for it to exist. Thus, it is ridiculous to suggest that, because there are no written records in Africa regarding any jurisprudence, there is no African jurisprudence. In fact, the problem of writtenness is a defect common to almost all legal philosophy, whether in the West, in Africa or the Far East.⁵

Against this backdrop, it should be noted that communication in traditional Africa was and is still orally oriented. There is not much by way of written records to reveal how our ancestors in Africa philosophised about law. Africans living according to their traditional legal systems saw no need to write, as they viewed the spoken word as more effectual than its printed counterpart. This is why, after tracing the history of philosophy, Solomon and Higgins say the following:⁶

2 Idowu, W. 2005. "Scepticism, racism and African jurisprudence: Questioning the problematique of relevance". *An African Journal of Philosophy/Revue Africaine de Philosophie*, XVII:64.

3 (ibid.).

4 Idowu, W. 2006. "Against the skeptical argument and the absence thesis: African jurisprudence and the challenge of positivist historiography". *The Journal of Philosophy, Science & Law*, 6:34–49.

5 Durant, W. 1954. *Our oriental heritage*. New York: Simon & Schuster, pp 556–561.

6 Solomon, RC & MKA Higgins. 1996. *A short history of philosophy*. Oxford: Oxford University Press, p 6.

Reinvigorating African values for SADC

Face-to-face storytelling is captivating and personal. Literacy was rare. The written word was hard to come by and 'cool', distant, and impersonal by comparison. Elders in oral societies passed along their wisdom in poetry and song. When those cultures disappeared, however, their ideas – and whole civilizations, in effect – were lost to us.

Closely aligned to the absence thesis is the sceptical argument. The sceptical argument also rests on the premise that there is nothing called *African jurisprudence*. The reason is not that it is not written, but that there is simply no philosophy of law with the tag *African*. In this thesis, there is acceptance of some ordered political systems in African communities, but there is a denial of an African philosophy of law. On the whole, this position is, in reality, Eurocentric scepticism. The nature of this Eurocentric scepticism varies from author to author, however. Driberg, for example, asserts that Africans have no clear conception of *law*:⁷

[S]ymbols of legal authority ... are completely absent, and in the circumstances would be otiose.

Holleman⁸ contends that an African jurisprudential frame is missing and lacks an African system of rules; for him, therefore, there is nothing like an African jurisprudence. Similarly, M'Baye⁹ states that the rules governing social behaviour in traditional African societies are the very negation of law. In the same vein, Smith¹⁰ postulates that African peoples only know of *customs*, not *law*. The thrust of the theory, therefore, is that, even if Africans had indigenous systems of social control, such systems substantially lacked any trace of legality, legal concepts, or legal elements. This is what Idowu has to say on this score:¹¹

The attack on the idea of African jurisprudence has been reduced to the idea that African rules of societal control and norms could not be distinguished from rules of polite behaviour. The basis for this assertion and the denial of African jurisprudence, perceptively, can be explained in the light of three reasons: one, the absence of a legislative system, with the existence of a formal courts system and legal officials; two, due to the absence of a recognised system of sanctions; and thirdly, the presence on a large scale of authoritarianism which is not subject [to] and controlled by law. Interestingly, the import of these attacks consists in the view that African jurisprudence is at best queasy.

7 Driberg, JG. 1934. "The African conception of law". *Journal of Comparative Legislation and International Law*, 16:238.

8 Holleman, JF. 1974. *Issues in African law*. The Hague: Mouton, p 12.

9 M'Baye, K. 1975. "The African conception of law". In David, R (Ed.). *The legal systems of the world and their common comparison and unification*, Vol. II. New York: International Association of Legal Science, p 56.

10 Smith, MG. 1965. "The sociological framework of law". In Kuper, H & L Kuper (Eds). *Adaptation and development*. Berkeley: University of California Press, p 32.

11 Idowu (2006:4).

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Smith premised his claim on the assumption that African rules of societal control and norms could not be distinguished from the rules of polite behaviour dictated by African customs.¹² The basis for these scholars' denial of African jurisprudence in general and African conceptions of law in particular can be partly explained by their display of Eurocentrism on the one hand, and their lack of knowledge and understanding of the African idea of *law* on the other. Gluckman,¹³ in consonance with this, writes that the denial of an African conception and system of law is a mistaken position arising from a tradition imbued with ignorance about how the law works among Africans. Africans, he notes, have always had an idea of natural justice, the law and a legal system, even though they may not have developed indigenous practices in abstract theoretical terms.¹⁴

In a similar manner, Elias defends the thesis that Africans, like other cultural groups of the world – and Western groups in particular, had their own indigenous law.¹⁵ This law, also known as *customary law*, has the same functional capacity as other laws elsewhere. Elias tried to disabuse the minds of colonial writers of their naïve concept of African law. In the course of projecting the resonance of African customary (natural) law, Elias defines *African natural law* as the body of rules which are recognised as obligatory by indigenous Africans.¹⁶ According to him, “laws know no differences in race or tribe as it exists primarily for the settlement of disputes, and the maintenance of peace and order in all societies”.¹⁷ He writes further that –¹⁸

[t]he two chief functions of law in any human society are the preservation of personal freedom and the protection of private property. African law, just as much as, for instance English law, does aim at achieving both these desirable ends.

If English law or, in broader terms, Anglo-Saxon law can be used in globalising the world and in facilitating regional integration, why should Africans not revitalise their moral and value systems for sustainable African continental and regional integration? African law is a workable system which has better attributes, relatively, for African cultures. Thus, the development of African communities should not negate African law at the expense of other global competing perspectives. This is possible if Africans accept that African

12 Smith (1965:33).

13 Gluckman, M. 1972. *The allocation of responsibility*. Manchester: Manchester University Press, p. 173.

14 (ibid.).

15 Elias, TO. 1956. *The nature of African customary law*. Manchester: Manchester University Press, p 6.

16 Abiodun, BO. 2007. “Towards an African concept of law”. *African Journal of Legal Theory*, 1:73.

17 Elias (1956).

18 (ibid.:33).

jurisprudence is deducible by reason in ontological reflection. This means that the principles of African jurisprudence can be traced from their history, as reasoned by the people themselves in practising their cultures in their communities, and as they interact with other communities across the continent.

From Allott's observation that indeed there is a law with the tag 'African' and such law is unwritten for its development is based on flexible principles and its continued existence is guaranteed by orature, it is safe to conclude at this juncture that both the sceptical and absence arguments are really presumptive in their various claims rather than factual – let alone African.¹⁹ As Idowu²⁰ says, to make a factual and African claim about the denial of African jurisprudence is to exhaust all available evidences: a fact which is evidently missing in both the sceptical argument and the absence thesis.²¹ Indeed, it has been established that both arguments are not founded on the true principles of empirical history, which are experience and observation. The conclusions of these two arguments only elaborate what can be conveniently called a *distorted interpretation of history*, which does not contribute to the making of an authentic interpretation of Africa's participation in it.²²

There is a need, therefore, for an Africology of law: an African renaissance, to uncover Africa in jurisprudence and the cosmology in which it developed. The argument is that there is African traditional law, and it is useful in forming a jurisprudential background and/or foundation to African continental and regional integration. And if African moral and value systems are sidelined as extralegal then we need to revitalise and champion them. I argue here that it is possible to define *African law* and to revitalise those systems that are always sidelined in mainstream jurisprudence. The fact that African law is not written is in itself an indication of the existence of African enlightened jurisprudential thinking. The sceptical argument and the absence thesis have lost momentum with the rise of an African intellectual ecstasy that has engulfed academia in this globalising world, and which will be dealt with in more detail when African philosophical thinking is decoded below. But whereas the world is globalising, the principles of African law and its value systems as well as African natural laws can be glocalised. In other words, with African value systems, we can still have an interplay of local–regional–global legal interactions in a spirit of liberality.

The existent part of the non-existent

It is imperative at this point to consider the existence of the part of African jurisprudence which is being denied. What is the relevance of an African

19 Idowu (2006:36).

20 (ibid.:37).

21 (ibid.).

22 (ibid.:4).

jurisprudence for the process of integration and legal development in Africa? In the first place, it is necessary to understand the meaning of *jurisprudence*. Etymologically, the term *jurisprudence* comes from the Latin *juris*, meaning “law”, and *prudential*, meaning “skill”. Thus, it means “a knowledge of, or skill in, law”, and refers both to a philosophy or a system of law as well as to the skill of practising law.

African traditional law and its value systems are part of African jurisprudence or a product thereof. In order to understand what *African traditional law* is, an acceptable starting point would be to consider African ontology and the unique characteristics of the social institutions that evolved from that ontology because “the African legal tradition is a direct outcome of African ontology”.²³ *African ontology* means the African folk cosmology: the traditional African view of the universal order, and humankind’s place in it.²⁴ As Okafor postulates, the —²⁵

... morphology of African ‘reality’ and its concept of ‘existence’, show that there is an intimate ontological relationship between beings.

In other words, the African traditional world view recognises that there is “active interaction, a kind of inter subjective communion”²⁶ among the various entities that constitute the universe. These are premised on well-arranged legal institutions applying normative concepts of African jurisprudence, especially African natural law. These concepts will be dealt with in more detail below.

Glocalising the African mind: African musing on the junction of local–regional–global legal interactions

It has always been a challenge for Africans to ‘think global and act local’. Therefore, the process of glocalisation is a hurdle when it comes to sustainable African regional and continental integration in this world of competing jurisprudential perspectives. As a background and especially in the context of Africa, the glocalisation approach suggests that reconsidering frames of reference and order schemas is useful for both global and local research and management. Indeed, the global and local are really two sides of the same coin, as a place may be better understood by recognising the nature of glocalisation as a continuum. African moral values and systems

23 Okafor, FU. 1984. “Legal positivism and the African legal tradition”. *International Philosophical Quarterly*, 24(2):161. Generally, see also Okafor, FU. 1992. *Igbo philosophy of law*. Enugu: Fourth Dimension Publishing Company.

24 (ibid.:23).

25 (ibid.:161).

26 (ibid.).

can be viewed and revitalised in this context if the ability to ‘think global and act local’ is cultivated. The problem with most African legislators is that they tend to be clouded with imperatives from abroad, especially the forceful West. These imperatives, though alluring to African legislators, are not necessarily acceptable to the populations of the countries they serve. Thus, –²⁷

[t]he importance of building effective legal and regulatory systems has long been recognized by development professionals, yet there have been few programmatic initiatives that have translated empirical evidence and political intention into sustained policy success. A key reason is that such efforts have too often consisted of top-down technocratic initiatives that have inadequately appreciated the social and cultural specificity of the particular context in which they operate, as well as the complexity of the systems they have attempted to create. Justice sector reforms have frequently been based on institutional transplants, wherein the putatively ‘successful’ legal codes (constitutions, contract law, etc.) and institutions (courts, legal services organizations, etc.) of developed countries have this been imported almost verbatim into developing countries.

Sustainable regional and continental integration should have glocalisation as its close companion. *Glocalisation*, which is a portmanteau of the terms *globalisation* and *localisation*, describes a situation whereby foreign systems are adapted to local systems. In international economic law, glocalisation occurs where a product or service that has been developed and distributed globally is also fashioned to accommodate the user or consumer in a local market. In jurisprudential terms, therefore, the so-called universal principles of law – or, more precisely, universal principles of human rights – can be tailored to conform to local laws, customs or cultural preferences. Such an in-built system will be more acceptable to the local user or applier of the law than to the external educator who may try to impose the new external system.

A good example of this is traditional justice systems. Examples of such systems which have appeared in various publications across the world are the *Dare raMambo* of Zimbabwe, the *Gacaca* of Rwanda, the *Sungusungu* of Tanzania and the *Bashingatahe* of Sudan. These systems endured and survived colonial brutality and have continued to thrive in post-colonial and post-conflict periods. The relative success of these traditional institutions indicates that African traditional law and values, despite being manipulated as tools by the colonial powers to serve their own interests,²⁸ such systems knew how to manoeuvre their way around such control. African jurisprudence was preserved, therefore, with few but noticeable bruises. In Namibia and South

27 Chirayath, L, C Sage & M Woolcock. 2006. “Customary law and policy reform: Engaging with the plurality of justice systems”. Available at <http://www.rrojasdatabank.info/wir2006/chirayath.pdf>; last accessed 27 March 2011.

28 Mamdani, M. 1996. *Citizen and subject: Contemporary Africa and the legacy of late colonialism*. New York: Princeton University Press, p 17.

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Africa, for example, the former South African apartheid government's Native Administration Proclamation, which was transferred to Namibia in the 1920s, discriminated between blacks and whites in inheritance and marriage issues, but it was never followed in practice in the localities it was intended to affect. In this way, African customary law and its philosophy triumphed.

In East and West African colonies such as Italian Somaliland, a similar situation reigned. Royal Decree No. 695 of 1911 proclaimed Italians were governed by their own domestic law while Somalis were subject to 'native law'. At face value, this 'native law' appeared to be an indigenous institution that remained largely dictated by Somalis themselves;²⁹ in fact, however, it was a compromise arrived at with some thinking akin to glocal orientation. In most British colonies, the British colonial leadership masked their intention to usurp African customs as a mechanism of control³⁰ by appointing Africans to serve as administrators of a 'Native Authority' where these mechanisms would be used against their fellow citizens. This explains why the British used the repugnancy clause to regulate the application of African laws, as opposed to the assimilationist policy of the French and Italians. However, the repugnancy clauses did not do away with African laws: Africans instead created *official* and *living* customary law. *Official* customary law was that which was in conformity with the principles of natural justice and the public policy of colonial masters, whereas *living* customary law was that which was in contradiction with the laws of the colonial masters, but was nonetheless followed by traditional communities. As the substance of the law was subordinated to the quest for order, the claim to be bringing the 'rule of law' to Africa became the handmaiden of the imperative to ground power effectively. Thus, as Shihata suggests, an effective legal reform programme –³¹

... must also include such legislative, administrative, and judicial reforms as may be needed to ensure that the rules will be changed to serve the public interest, will be applied in a correct and fair manner ..., will be complemented by the necessary regulations and interpretations ... and will be subject to future reviews to ensure their continued relevance and usefulness.

Therefore, African legal reforms need to be cognisant of processes and outcomes to ensure efficiency, fairness, and non-arbitrariness.³² To implement

29 Tatten, S. 2009. "The olive branch? The role of a Somali justice system in the quest for peace". In Hinz, MO (Ed.) in cooperation with C Mapaure. *In search of justice and peace: Traditional and informal justice systems in Africa*. Windhoek: Namibia Scientific Society; Mamdani (1996:114).

30 Mamdani (1996:118); Tatten (2009).

31 See Shihata, IFI. 1995. "Legal framework for development: The World Bank's role in legal and judicial reform". In Rowat, M, WH Malik & M Dakolias (Eds). *Judicial reform in Latin America and the Caribbean: Proceedings of a World Bank Conference*. Washington, DC: World Bank, pp 13–15.

32 (ibid.:3).

reform, particularly in countries in transition or embroiled in trauma, the role of the state needs to be redefined. This redefinition does not mean dismantling the state as it exists in Africa, but reorienting the thinking of African leaders, especially in respect of legal and policy formulation in the global jurisprudential context. In other words, concerted glocal thinking by politicians and technocrats in African governments which is based on African jurisprudence will help in achieving sustainable continental or regional integration.

The main criticism levelled against African traditional justice systems is that they do not ascribe to international fundamentals of fair trial and equality.³³ These principles have their foundations in the Universal Declaration of Human Rights, to which not one African country had an input. This explains why the preaching of human rights from this perspective has always been considered as an imposition of Western concepts on Africa. Imposing formal mechanisms on communities without regard for local-level processes and informal legal systems may not only be ineffectual, but can actually create major problems – hindering uniform African glocal thinking in this world of competing jurisprudential perspectives. Thus, it should be noted that failure to recognise different systems of understanding about law may in itself be discriminatory or exclusionary. Therefore, there are often very good reasons why many people chose to use informal or customary systems, and this should be considered and understood³⁴ in order to sustainably revitalise African values for continental or regional integration.

Thinking like an African: Revitalising African jurisprudential concepts in a world of competing perspectives

Globalisation presents an omnipresent veneer insofar as we appreciate general jurisprudential thinking across the world. Yet, in many cases, local forces work to attenuate the impact of global processes. These forces are recognisable in efforts to prevent or modify the plans to totally embrace African value systems, while recognising acceptable global trends for the betterment of African continental and regional integration projects.

In order to appreciate African jurisprudential claims, it is important to put on a pair of Afrocentric goggles. Sustainable African continental and regional integration and societal cohesion should be informed by flexible Afrocentrism. *Afrocentrism*, in jurisprudential understanding, is a world view that considers African people, their values, cultures, histories, collective struggles, needs and aspirations to be central to the interpretation and utilisation of their normative

33 Mapaure, C. 2010. "Accused and cherished: Traditional and informal justice systems as seen by international organisations". In Hinz & Mapaure (2010:43–44).

34 Chirayath et al. (2006:5).

concepts. Afrocentrists commonly contend that approaching knowledge from a Eurocentrist perspective, together with certain mainstream assumptions applied to information in the West, has led to injustices and inadequacies in meeting the needs of African people – here meaning indigenous black Africans and those in the African diaspora. The Afrocentrist paradigm therefore seeks to discover and reinterpret information through African eyes, utilising it in ways that ensure benefit to Africans. What follows below is an exposition of some of the philosophies relevant to African jurisprudence, as developed from Afrocentrist philosophical thought.

Ubuntu: African human rights?

The celebrated concept of *ubuntu* (Zulu) or *unhu* (Shona), for example, is a typical African human rights jurisprudential concept. *Ubuntu* generally means “humanity towards others”. In the case of *S v Makwanyane & Another*, it was explained that an outstanding feature of *ubuntu* in an African community sense is the value it puts on life and human dignity. The dominant theme of African cultures is that the life of another person is at least as valuable as one’s own. This means that respect for the dignity of every person is integral to the concept of *ubuntu*. Although Western scholarship is replete with the belief that Africa is a continent that loves violence and conflict, during such turbulent times, distraught members of society decry the loss of *ubuntu*. Thus, heinous crimes are the antithesis of *ubuntu*. Treatment that is cruel, inhuman or degrading is bereft of *ubuntu*,³⁵ i.e. African human rights premised on reconciliation, dignity, and respect for human life.

In addition to the above, *ubuntu* speaks to African interconnectedness, a common African humanity and the responsibility to each that flows from an African connection. *Ubuntu* is an African cultural and philosophical concept that emphasises the commonality and interdependence of members of a community. It recognises a person’s status as a human being entitled to unconditional respect, dignity, value and acceptance from the members of the community to which s/he belongs. Courts in South Africa and elsewhere have held that *ubuntu* needs to become a notion with particular resonance in the building of African constitutional democracies.³⁶ In itself, *ubuntu* is a revitalisation of African values and moral principles. This concept was born and bred and is evolving in Africa; thus, it owes much to African traditional law. African societies have suffered greatly in the process of making laws and identifying themselves from a legal point of view,³⁷ but their lasting value

35 See *S v Makwanyane & Another* 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1, at paragraph 225.

36 See *South African Broadcasting Corporation Ltd & Another v Mpofu* (Unreported case A5021/08, decided on 11 June 2009, at paragraph 63.

37 Ramose, MB. 1999. *African philosophy through ubuntu*. Harare: Mond Books, p 43.

orientation in *ubuntu* holds up an alternative in the sense that this uniquely African concept advocates a renewed concern for the human person.

The above point is made more succinct by Van Binsbergen:³⁸

Ubuntu as a form of African philosophy thus blends in with other potential, imagined or actual gifts of Africa to the wider world: African music and dance, orality and orature, kingship, healing rituals in which trance and divination play major roles, a specific appreciation of time, being and personhood – all of them cultural achievements from which especially the North Atlantic could learn a lot and (to judge by the latter's dominant forms of popular music and dance throughout the twentieth century) is increasingly prepared to learn, in a bid to compensate such spiritual and corporeal limitations and frustrations as may be suspected to hide underneath the North Atlantic's economic, technological, political and military complacency.

Viewed as a moral and political exhortation and an expression of hope for a better future, *ubuntu* – just like *humanism*, to be discussed below – creates a moral community, admission to which is not necessarily limited by biological ancestry, nationality, or actual place of residence.³⁹ To participate in this moral community, therefore, is not a matter of birthright in the narrower, parochial sense. If birthright comes in at all, it is that of any member of the human species to express concern vis-à-vis the conditions under which their fellow humans must live, and to act on that basis.⁴⁰ This moral community consists of people sharing a concern for the present and future of a particular local or regional society, seeking to add to the latter's resources, redressing its ills, and searching its conceptual and spiritual repertoire for inspiration, blueprints, models, and encouragement in the process. Thus, *ubuntu* cannot exist in a society driven by purely positivistic principles which form the mainstream thinking of the West. The success of *ubuntu* in Africa will only be had if principles of African natural law are maintained. In fact, the concept in itself embodies African traditional law principles which have to be enforced from an Afrocentric perspective in order to integrate societies divided by colonialism and apartheid. In South Africa, this is referred to as the *programme of the African renaissance*.⁴¹

38 Van Binsbergen, WMJ. 2001. "Ubuntu and the globalisation of southern African thought and society". In Van Binsbergen, WMJ (Ed.). *Intercultural encounters: African and anthropological lessons towards a philosophy of interculturality*. Berlin/ Muenster: LIT, p 6.

39 (ibid.:8).

40 Incidentally, the inclusive principle identified is part of African societal normative systems at village level, where, for instance, every adult has the obligation, but also the right, to guard over the interests of all children, regardless of the specific genealogical ties between adult and child.

41 Van Binsbergen, WMJ. 2010. *Ubuntu and the globalisation of southern African thought and society*. Available at <http://www.shikanda.net/general/ubuntu.htm>; last accessed 12 June 2010. See also Mbeki, G. "Towards the African renaissance". In

Ubuntu has to be aided by the central concept of Afrocentricity, a notion which itself seeks to protect African values, thus creating such moral community for the revitalisation of African morals and values. This includes the cultivation of concepts such as *ubuntu*, focusing not on a particular locality or region, but on the African continent as a whole.⁴² The people implicated in this way may be expected to identify with each other and consolidate the pursuit of their concern.⁴³ Whoever sets out to publicly deconstruct and even debunk the available conceptual and spiritual repertoire, dissociates from this moral community, rents its fabric, and jeopardises its project and the project of African integration.

Humanism: African Christian jurisprudence?

In 1967, Kenneth David Kaunda, during his presidency of Zambia, declared his policy of humanism, which was a mixture of Christian ethics and socialism. The policy evolved into a school of philosophical thought now widely referred to as *Christian humanism*. Indeed, Kaunda called himself a “Christian humanist”.⁴⁴ This was a Christian philosophy with an African flavour because it was heavily laden with African natural law principles. In this philosophical concept, Kaunda stressed the importance of the centrality of humanity while embracing a progressive conception of Christian jurisprudence in an African context that incorporated principles of African culture. Kaunda is one of the few black African humanists. Bill Jones makes the point that black humanists reflect upon their own circumstances when developing their world view:⁴⁵

... black Humanism emerges as part of a debate that is internal to black life and thought. It is not a spin-off of the enlightenment, the scientific revolution or, as Deotis Roberts has suggested, a borrowing from Comte. Rather, as Benjamin Mays, an eminent representative of black Christian theism, has correctly perceived, black incredulity about the divine, as well as agnosticism and atheism “do not develop as the results of modern science, nor from the observations that nature is cruel and indifferent; but primarily because in the social situation, [the black American] finds himself hampered and restricted ... Heretical ideas of God develop because in the social situation the ‘breaks’

Hadland, A & J Rantao (Eds). *The life and times of Thabo Mbeki*. Rivonia: Zebra/Southern/New Holland Struik; Diop, CA. 1996. *Towards the African renaissance: Essays in African culture and development 1946–1960*. London: The Estate of Cheikh Anta Diop & Karnak House, pp 33–45.

42 Van Binsbergen (2010:10).

43 See Asante, MK. 1987. *The Afrocentric idea*. Philadelphia: Temple University Press, p 24.

44 *The Economic Justice Monitor*, 1998, 1(13):3. See also Smith, RD. 1999. “Missionaries, church movements, and shifting religious significance in the state of Zambia”. *Journal of Church and State*, 41(3):525–550.

45 Jun, NA. 2007. “The role of humanism in promoting African unity and identity”. Available at <http://www.iheu.org/node/1568>; last accessed 23 March 2011.

seem to be against the Negro and the black thinkers are unable to harmonize this fact with the God pictured by Christianity.

From the foregoing it is easy to see that humanism and *ubuntu* are not primarily factual descriptions. These concepts essentially express the speaker's dreams about norms and practices that allegedly once prevailed in what are now to be considered peripheral places,⁴⁶ while the speaker her-/himself is situated at or near the national or global centre. Van Binsbergen⁴⁷ postulates that such dreams about the past and the periphery are articulated not because the speaker proposes to retire there personally or wishes to exhort other people to take up effective residence there, but because of their inspiring modelling power with regard to local, national and even global issues – in other words, because of these dreams' alleged persuasive/perlocutionary nature outside the peripheral domain in which they are claimed to originate and to which they refer back. As he puts it, –⁴⁸

[i]f, thirty years later, I have much less difficulty in identifying, in my capacity as a social actor in a concrete Southern African setting, with Zambian humanism, and with *ubuntu*, it is because I have enjoyed, for these many years, the (part-time) membership of the kind of local communities by distant reference to these two ideologies have been constructed in the first place.

Throughout the 1970s and 1980s, Africa learnt that humanism was not so much a legally binding system of law but more an implicit and diffuse value system which informed the lives of the people. It was in terms of this very value orientation that Africans were allowed to share their lives – despite frequent transgressions both on the part of the colonisers and the colonised, and on the part of apartheid enforcers and the oppressed. This admission on both sides of the communities has been one of the greatest sources of pride and joy that underline humanism – as it does *ubuntu*. From this, there is no doubt that the success of humanism can only be realised if principles of traditional law in an African context have been revitalised and embraced.

Negritude: The flavour of being African

In 1990, Leopold Sedar Senghor, the former Senegalese President, was elected to the International Academy of Humanism. The Academy is composed of humanists that are committed to free inquiry, the scientific methods of investigation, and the furthering of humanist ethical values and principles. Senghor was largely responsible for popularising the term *negritude*, a way of

46 Notably, within the intimacy of allegedly closely knit villages, urban wards, and kin groups.

47 Van Binsbergen (2010:10).

48 (ibid.:10).

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identifying with 'blackness' without having to draw upon culture, language, or nationality.⁴⁹ *Negritude*, as interpreted by Senghor, encompasses –⁵⁰

... the whole of the values of civilization – cultural, economic, social, and political – which characterize the ... Negro African World.

Senghor admitted that negritude was spirit-centred and marked by a characteristic rhythm and symbolism:⁵¹

There is a certain flavor, a certain odor, a certain accent, a certain black tone inexpressible in European ... [languages].

Inspired by African values, and elements of African traditional law in a world of competing legal perspectives, Senghor's particular brand of negritude was largely a neo-African cultural challenge in which he equated cultural by-products such as art as a marker of civility.⁵² This connects clearly to Okafor's assertion that African jurisprudence can only be understood in the context of African ontology.⁵³ Once this happens, we are apt to have claims that *ubuntu*, humanism or negritude are racist. This is what happened to Senghor, because negritude surfaced partly from French colonial rejection. Therefore, negritude could be regarded as a product of an African inferiority complex, although Senghor retorted that negritude was neither self-hatred nor racialism.⁵⁴ Yet, considering Senghor's negritude against the Western notion of a universal civilisation, it becomes clear that his quest "to assimilate, not be assimilated" indicates a more inclusive civilisation rather than sheer mimicry of Western concepts.⁵⁵

Senghor's cultural policies in Senegal reflect that the negritude schemata is fully aware of the Africans' potential power to create and define their own images.⁵⁶ For example, inaugurating the Ecole de Dakar, a school of art in Senegal, it was clear that he wanted Africa to have "a certain active

49 Wilder, G. 2005. *The French imperial nation-state: Negritude and colonial humanism between the two World Wars*. Chicago: University of Chicago Press, p 32.

50 Colvin, LG. 1981. *Historical Dictionary of Senegal*. Metuchen, NJ: The Scarecrow Press, Inc., p 229.

51 Vaillant, JG. 1972. "Perspectives on Leopold Senghor and changing the face of negritude". *ASA Review of Books*, 2:158.

52 Sidney, L & RDG Kelly (Eds). 1994. *Imagining home: Class, culture, and nationalism in the African diaspora*. London: Verso, p 87.

53 Okafor (1984:161).

54 (ibid.:162).

55 Bunnin, NEP & E Tsui-James (Eds). 1996. *The Blackwell Companion to Philosophy*. Cambridge, MA: Blackwell Publishers Ltd, p 575

56 Campbell, CZ. 2006. "Sculpting a pan-African culture in the art of negritude: A model for African artist [sic]". *The Journal of Pan African Studies*, 6:33.

presence in the world, or better, in the universe”.⁵⁷ This indicates the spiritual and cosmological link between African values and African identity and culture. In this light, Senghor called African art a constructive “spiritual food”, parallel with the aim of being.⁵⁸ Skurnik argued that Senghor’s artistic vision propelled Africans from mere consumers/recipients to creators/producers of a civilised world.⁵⁹ Showing the foundation of negritude as African natural law, Senghor illustrates that African art held the possibilities of dignity, necessity and sustenance for the future via negritude,⁶⁰ with his stance on African culture catalysing a national Senegalese identity within African nationalism and African socialism.⁶¹ Therefore, African socialism can be regarded as an offshoot of African traditional law – an interesting relationship which needs deeper analysis.

Consciencism: The principle of African liberty?

Nkrumah’s (1970) publication entitled *Consciencism: Philosophy and ideology for de-colonization with particular reference to the African revolution*⁶² is pre-eminently a work in socio-political philosophy, but it remains helpful in exhuming some important concepts of African traditional legal thought in a world of competing perspectives. Nkrumah’s conception of *African particularity* does not warrant the presumption that African and European cultural differences are mutually exclusive. Rather, as Oruka insightfully observes, –⁶³

... one remarkable characteristic of this [African professional] philosophy is that it employs techniques commonly associated with European or Western philosophy. Yet, contrary to the general claim, such techniques are not unique to the West.

Consciencism formed the foundation of African nationalism, which drove the process of decolonisation. Hence, the underlying principle is that of the human right to liberty.

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- 57 Senghor, LS. 1995. “Negritude: A humanism of the Twentieth Century”. In Hord, Frederick L & Jonathon Scott Lee (Eds). *I am because we are: Readings in black philosophy*. Amherst, MA: University of Massachusetts Press, p 46.
- 58 (ibid.).
- 59 Skurnik, WAE. 1965. “Leopold Sedar Senghor and African socialism”. *The Journal of Modern African Studies*, 3:365.
- 60 Campbell (2006:34).
- 61 Skurnik (1965:367).
- 62 Generally, Nkrumah, K. 1970. *Consciencism: Philosophy and ideology for de-colonization with particular reference to the African revolution*. London/Accra/London: PANAF Books/Henstev Publications Ltd/Heinemann, p 86.
- 63 Odera Oruka, H. 1983. “Sagacity in African philosophy”. *International Philosophical Quarterly*, 23: 391; McClendon, JH. 2003. “Nkrumah’s consciencism as philosophical text: Matters of confusion”. *Journal of African Philosophy*, 3:48.

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The notion of *consciencism* is helpful in the implementation of integration as regards regions of the African continent in general. Nkrumah founded the Organisation of African Unity (OAU) with this philosophical thought underlying the process. To Nkrumah, the process of decolonisation was to be followed by unity among the decolonised.⁶⁴ He felt that the decolonisation process also had to permeate the school curricula. This was because the curricula in most independent African states were starved of sustenance in subjects such as history, as students were introduced to Greek and Roman history – the cradle of modern Europe – only. Students were also encouraged to treat this Greek and Roman story of humankind together with the subsequent history of Europe as the only worthwhile history.⁶⁵ Indeed, Greek and Roman history is anointed with a universalist flavouring which titillates the palate of certain African intellectuals and politicians so agreeably that they become alienated from their own immediate society. Indeed, this placation or pacification of traditional African law cannot lead to sustainable regional and continental integration.

African history, according to Nkrumah, would conscientise the African mind and instil a spirit of African nationalism in the hearts of those who appreciated that history.⁶⁶ Therefore, it is important to learn African history and the philosophy that comes with it. This will help shed the scepticism that accompanies the existence of an African philosophy of law. Because of Nkrumah it is clear that, once someone has come to appreciate African philosophical thought, s/he will be in a position to champion regional and continental integration based on the laws and the values that underlie it – being values which are home-grown. This appreciation will then lead to an integrated continent with people who know where they are heading in regard to the protection of their heritage and, especially, legal philosophical thought, which is necessary for a productive society. Furthermore, the dependence on African values for continental and regional integration will ensure an Africology of knowledge production⁶⁷ necessary for further development and appreciation of those other competing perspectives.

Notably, Nkrumah's philosophical practice, from an ethnophilosophical assessment, more approximates the Western prototype – although it assumes the character of an African Marxist philosophical text. In this

64 Nkrumah (1970:88).

65 (ibid.).

66 (ibid.:88).

67 This is “the scientificity of studying and generally investigating historical phenomena in which African achievements are properly recognised and appropriated as such by all humanity;” see Nabudere, DW. 2006. “Towards an Africology of knowledge production and African regeneration”. *International Journal of African Renaissance Studies*, 1:7.

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sense, Nkrumah's stance opposes the bourgeois academic philosophy⁶⁸ of the West. His professional philosophical outlook has a dialectical relation to ethnophilosophy. McClendon comments correctly that –⁶⁹

Nkrumah's adoption of the Marxist philosophical problematic over and against African metaphysical exclusivism was the *tour de force* that sustained his particular professional mode of discourse.

McClendon adds that –⁷⁰

[n]onetheless, when particularity is conflated with African exclusivism, we discern that texts in African philosophy assume the determinate character of ethnophilosophy. For instance, WE Abraham's *The Mind of Africa* and/or Julius Nyerere's *Ujamaa* are closer to ethnophilosophy. Nkrumah departed from this philosophical tradition and its idealist ontological foundation. Those readers who identify a philosophy of particularity with ethnophilosophy are bound to be lost when approaching his text. For in *Consciencism*, rather than describe how the Akan conceptualizes the nature of being as pivotal to philosophical practice, Nkrumah instead scrutinized and inquired into such philosophical problems as the contradiction between materialism and idealism and the dialectical process of categorial conversion. [Emphasis in original]

Clearly, that the intrinsic value of African moral and value systems is uppermost for Africans who have suffered the scourges of colonialism and apartheid. Their clarion call – “Philosophy for the sake of philosophy” – means African legal philosophical thought should not be lowered from the cultural clouds of speculation into the contaminated terrain of material practice.⁷¹ Nkrumah himself writes and repeats that philosophy is a purely legal and cultural product not to be used as a means to any other end, and that it is a product of a specific legal and cultural heritage.⁷² Given that some philosophers philosophise about African philosophy from outside, Nkrumah says that such philosophies are bereft of African social, legal and political conditions; such conceptions of philosophy can only assume an alienated form, an exclusivist approach, which will not aid in the revitalisation of African values and moral systems in a world of competing perspectives.⁷³ Thus, Nkrumah and Kaunda, as the Fathers of Africa, have their theories and ideologies married here. The commonality in the two philosophical approaches is a clear reflection of the value of African ontology, the principles of African value systems, and traditional law in contemporary African jurisprudence. These approaches can be reinvigorated and used by contemporary African leaders to achieve unity and tolerance of diversity – and, hence, cohesion and integration.

68 McClendon (2003:3).

69 (ibid.).

70 (ibid.:4).

71 (ibid.).

72 Nkrumah (1970:5, 55, 63).

73 (ibid.:55).

Afro-glocalisations: 'Thinking global' and acting as legal pluralist Africans

Having looked at African traditional law from a global jurisprudential perspective, and having looked at African attempts at revitalising African moral systems, how can we now develop jurisprudence inclusive of global as well as local perspectives? In other words, how can Africa revitalise its value and moral systems and include competing perspectives? Is it possible to be Afrocentric and global at the same time? In this modern world, where the Bretton Woods institutions and other Western donor institutions always speak of 'good governance' when it comes to the extension of credit and aid to Africa, is it possible to balance competing legal perspectives? Or, at least, is it possible for Africa to accommodate universal human rights principles in the context of African traditional law, and African ontology and epistemology? The theory below seeks to strike this balance by advocating a consciousness of legal plurality in the treatment of competing perspectives, and in the creation of a viable environment for the revitalisation of African moral and value systems for sustainable continental and regional integration.

Acceptance of universal principles of law – or at least of universal principles of human rights law – has been advocated as being pro-development, while traditional systems are seen as too archaic to accommodate such progress. This Western idea promotes the notion that all legal systems, whether unitary or plural, are obliged to conform to all so-called universal standards of human rights. For this reason, what is wrong in African traditional thought should be purged and cast asunder. In this view, the West and its jurisprudence are to be taken as a universal and conclusive referent in all legal discourses. This perspective ignores the fact that the Western legal thought is a positivism-obsessed centre of cultural imperialism, reflected in the following example of disastrous advice given to the Ethiopian Government by Western experts:⁷⁴

Modernise as fast as you can, get rid of anything African as fast as possible, and join us, the West, on the global train through history, which alone leads to development.

However, the other competing perspective is that, if the legal system of the larger society respects human rights norms, and if indigenous people accept these norms, there is no need to maintain legal pluralism. But even where there is a consensus on human rights norms, there may still be a valuable role for legal pluralism. These are competing perspectives which should be married, and the marriage should be characterised by constant negotiation in an uneasy yet feasible pluralism.

74 See Menski. W. 2006. *Comparative law in a global context: The legal systems of Asia and Africa* (First Edition). Cambridge: Cambridge University Press, p 491.

Against this backdrop, it is trite to consider that African legislators and political leaders have to wear pluralistic legal goggles in legal reforms and governance, respectively. This position is supported by Menski's tripartite and tetrahedron theory of law.⁷⁵ Menski suggests that law everywhere is a kind of superstructure, built out of and feeding on elements that may only partly be recognised as 'legal', such as statist power, morality and ethics, socio-economic norms, and historical structures.⁷⁶ Menski illustrates this in a triangular structure that incorporates the three major theories of law that have been developed over time in many different more or less pure manifestations.⁷⁷ Diagrammatically, this theory is presented as follows:

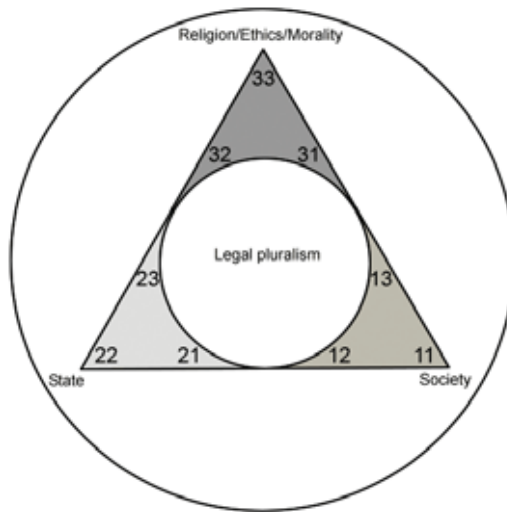


Figure 1: Menski's Triangular Interactive Model of Jurisprudence

Menski's Tripartite Theory of Law

The Triangular Interactive Model of Jurisprudence⁷⁸ constitutes the internally plural semi-autonomous field of all law representing global legal realism, with no single angle dominating any of the others. This is a good environment in which African dignity can recuperate and African moral systems can be revitalised. This pluralism, graphically represented in a series of triangles and circles (see

75 Menski, W. 2008. *Comparative law in a global context: The legal systems of Asia and Africa* (Second Edition). Cambridge: Cambridge University Press, p 611.

76 Menski (2008:612).

77 (ibid.).

78 (ibid.:445).

Figure 1),⁷⁹ shows natural law at the apex, embodying religion/morality/ethics. Legal positivism represents state laws in the bottom left corner, while societal values and socio-legal approaches arise from the bottom right corner. In the explanations of this tripartite theory of law, Menski depicts legal uniformity as a myth and global uniformisation as a partial reality. Since the world will never have one uniform law, and there is no global agreement on the definition of *law*, a “plurality-conscious negotiation of competing perspectives in a spirit of liberality”⁸⁰ seems necessary. While positivism has reigned for many decades, the current article advocates additional recognition of old and new natural laws as *law*, and highlights socio-cultural normative systems in particular as legal inputs. Thus, *law* becomes a complex net of constant negotiation and compromise between competing legal facts of different strengths, reflected in official legal recognition or unofficial legal presence.

Negotiating processes may lead to ‘perfect justice’, perhaps near the middle of the triangle, the arena of legal pluralism, signifying all those scenarios where no single source of law dominates to the exclusion of others.⁸¹ ‘Perfect justice’ is a jurisprudence agreeable to all the people in the various interactive corners of the triangle. Menski argues that ‘perfect justice’ remains a constant challenge: the desirable equilibrium is inherently unstable.⁸² The dynamic principle of interaction through constant renegotiation and compromise indicates that a postmodern, globality-conscious legal theory needs to be multidisciplinary and multidimensional, always conscious of multiple differences and competing claims. Such a theory can, thus, be a vehicle of sustainable regional and continental integration.

Menski developed his theory further and added a new dimension to it. In the tetrahedron shown diagrammatically in Figure 2, Menski builds globalisation into the legal structure, so that the image of the semi-autonomous plural field of law now has four corners, and takes the shape of a kite that now soars into SADC skies.⁸³ The more appealing presentation of the kite stands as shown in Figure 2.

Menski’s Tetrahedron Theory of Law

This theory explains that globalisation is still treated as a kind of extralegal force that impacts on law, but it is not part of law. Modernism, globalisation and/or international law are thus woven into the pluralism which any legislator or law reformer should consider. Again, like its predecessor, the triangle, the tetrahedron constitutes the internally plural, semi-autonomous field of all law,

79 (ibid.:185–189, 612).

80 (ibid.:5).

81 (ibid.:186).

82 (ibid.:185).

83 (ibid.:13).

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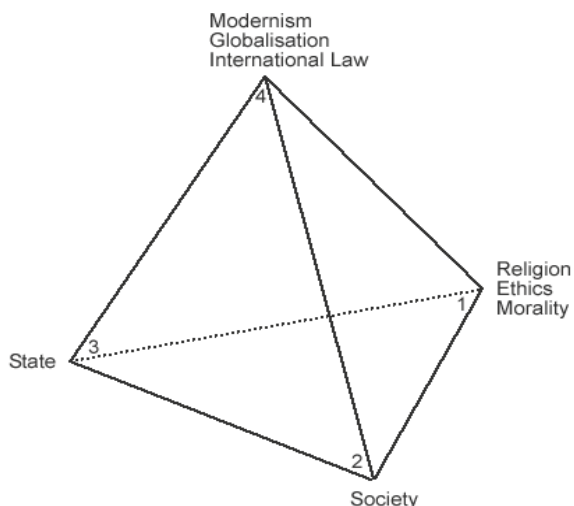


Figure 2: Menski's Tetrahedron Theory of Law

representing global legal realism with no single angle dominating any other. This is a workable system insofar as Africans are allergic to being preached to about international principles of law which are not adaptable to their cultural orientation. Thus, the tetrahedron model fits the once-refuted cultural relativism, which has found universal human rights principles being rejected as “monsters”⁸⁴ in Namibia and elsewhere.

In a more plural perspective, Menski vigorously challenges the barely hidden undercurrent of denial of African laws and their potential contributions to jurisprudence that is based on specific cultures. Borrowing from his mentor, Masaji Chiba, Menski further elaborates that African laws involve different ethnic markers or “legal postulates”.⁸⁵ Furthermore, incorporating Patrick Glenn’s chthonic perspective, Menski’s Africa-conscious legal theorising recognises African cultural concepts as forms of natural law.⁸⁶ Despite the onslaughts of modernity, African laws remain a living reality, relevant to their people – hence the resilience and huge potential for being a vehicle for African unity. Surely, doing away with everything African ‘as quickly as possible’ would disturb the process of negotiation between the four angles in this theoretical

84 See Menski, WF. 2010. “Monsters, legal pluralism and human rights in Africa”. In Hinz, MO & C Mapaura (Eds). *In search of justice and peace: Traditional and informal justice systems in Africa*. Windhoek: Namibia Scientific Society, pp 448ff.

85 Chiba (1993:203); cited in Menski (2008:613).

86 Generally, see Glen, PH. 2004. *Legal traditions of the world: A sustainable diversity of law* (Second Edition). Oxford: Oxford University Press.

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model. Law minus culture cannot be good law: it ignores the factual basis of global legal pluralism and shuts the law reformer's eyes to reality. Thus, African laws are supposed to be characterised according to their own internal characteristics, and not according to imposed criteria.

Does Menski's Tetrahedron Theory of Law have any relevance to the revitalisation of African value systems for sustainable regional and continental integration? Before an attempt is made to answer this question, it should be mentioned that this theory was developed by a person seated in London wearing the goggles of legal pluralism. Furthermore, the theorist was conversant with Asian laws, and had a special interest in and had done extensive research on African laws and value systems. Against this backdrop, Menski depicts legal uniformity as a myth and global uniformisation as partial reality. The message to Africa is that the recognition or confirmation of African law in Western-styled constitutions across the African continent does not mean that law reformers should embark on harmonisation of received law with traditional laws. African lawyers should instead balance global systems with African traditional systems, but cautiously so, because simplistic arguments about returning to purely traditional African values and structures are just as illusory.

In this light, Africans should have a human-centred, participatory, bottom-up approach in African laws, based on trial and error, not on prearranged schemes brought in from foreign jurisdictions. Therefore, the position of competing perspectives implies that one cannot be forced to subscribe to one particular approach or perspective without losing global validity and the link with reality. The central task is to cultivate respect for the in-built need for negotiation around and beyond competing perspectives. Just as African law of the past was never just about custom, African laws of the future cannot just be about state-made laws or international norms. Menski's theory can be reflected in the context of some of eminent African statesmen whose African philosophical thought remains relevant,⁸⁷ and should be married with African philosophical thought in a way that creates unity of thinking and action for the betterment of Africa and its people.

Conclusion

This article has attempted to show that law is not just an attribute of human corporate existence: it is also a cultural phenomenon, admitting in its trail the characteristics of cultural distinctions and pluralisms. Just as there can be competing ideologies in the same society, so there can be opposing ideologies between different societies. But, whereas African natural law exists, it has tended to be overshadowed by Western scepticism about the existence of African jurisprudence. Indeed, positivism is overwhelming in many African

87 For example, Nkrumah's consciencism and Kaunda's humanism, as explained above.

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legal discourses, but it is apparent that it is not eradicating the principles of autochthonous African law. Eurocentrism opposes Afrocentrism, and the friction can be felt across the continent in various ways. Thus, while societies with different social systems can coexist, their ideologies have to interact in an uneasy pluralism. The argument on the proper way to revitalise African value systems for sustainable integration in a globalised world of competing jurisprudential perspectives shows that there is such a thing as peaceful coexistence between states with different social and legal systems; however, as long as oppressive classes or ideologies exist, there can be no such thing as peaceful coexistence between opposing ideologies.

The Western world, once taken as a universal referent, has been depicted as a positivism-obsessed centre of cultural imperialism which cannot provide for sustainable continental and regional integration. The article has shown that Africa, as a product of colonialism and imperialistic ambition, has contributed to the loss of African values. Without dwelling on debates surrounding the effects of colonialism, the argument focused more on African traditional law and modern state law, pointing out a factual situation of intrinsic legal plurality and philosophical thought evident in all legal systems across the African continent. Borrowing from the theory of legal pluralism, the paper has shown that culture-specific African laws involve different ethnic markers. Thus, modern African legislators and law reformers should look neither East nor West, but where their feet stand: that is where African values lie, and that way, African heritage will never be lost. Against this backdrop, the paper showed how governments across southern Africa have tried to marry the received systems of law with traditional systems by reappropriating their lost dignity and incorporating the once-sidelined traditional African legal systems. The article has further showcased a theory that can provide an environment that is conducive to the revitalisation of African moral and value systems for sustainable continental and regional integration in a globalised world of competing perspectives.

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Drugs and violent crime in southern Africa

Charles Goredema*

The truth is that the illicit drug industry is a symptom of unresolved social problems which generate guerrillas, paramilitaries, drug traffickers and white-collar crimes.

Prof. F Thoumi (2005)¹

Drugs and crime are inextricably linked, but the relationship is not straightforward. Persons may commit crime while under the influence of drugs, (but) they may also do so to fund their drug use.

United Nations (2009)²

Introduction

This article is based on an overview of experiences in southern Africa in the last two decades. It discusses links between the trafficking of illicit drugs and violent crimes. These may be regarded as crimes that promote conflict or that are part of conflict. Literature on the global nature and dimensions of the trafficking and consumption of illicit drugs is vast and regularly updated, but is not necessarily matched by a discussion of how drug markets impact on individual and community security.

This article is concerned with the violent secondary activities that are collateral but axiomatic to drug trafficking. It is inspired by the belief that highlighting links between them may inform more effective and sustainable policies and measures to reduce the influx and trafficking of drugs.

The discussion begins with an overview of the illicit drugs that are encountered in southern Africa, before exploring prominent dimensions of the relationship between the trafficking of illicit drugs and violent crime. This is followed by a discussion of the factors which impact on the link between drug trafficking

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1 Thoumi, Francis. 2005. "Drug policies, reforms, and Columbo–American relations". In Guizado, Álvaro Camacho (Ed.). *Drug trafficking: Perspectives from Europe, Latin America and the United States*. Available at http://www.drugpolicy.org/docUploads/Drug_Trafficking_Europe_Latin_America_United_States.pdf; last accessed 4 April 2011.

2 United Nations Office on Drugs & Crime. 2009. *World Drug Report*. New York: UNODC.

and violent crime, and concludes with some suggestions on interventions to reduce the violent crime which emanates from the trafficking of illicit drugs.

Southern Africa stretches from Mauritius in the east to Angola in the west, and from the Democratic Republic of the Congo in the north to South Africa in the south. The area in question includes Tanzania, which also straddles East Africa. The composition of the Southern Africa Development Community (SADC) approximates the geographical expanse of the subregion.

Socio-economic development, measured in terms of conventional indicators, is unevenly spread through the subregion. However, all SADC member countries share certain fundamental features, including an overwhelming dependence on exported primary commodities, a low manufacturing base, and relatively high levels of social destitution. The colonial heritage, which forms the backdrop to an almost interminable state of transition in most of the subregion, manifests itself in the “unresolved social problems which generate guerrillas, paramilitaries, drug traffickers and white-collar crimes” referred to above. With a few exceptions, all parts of southern Africa are familiar with guerrillas, paramilitaries and white-collar crimes. The illicit drug industry has sought to explore and exploit opportunities in communities already ravaged by these challenges to establish its trafficking routes and markets. Its exploits sometimes precipitate violent interpersonal conflict within the industry as well as with external actors. The conflict impacts on the social, political and economic spheres in which it occurs. This article is premised on the assumption that all violent interpersonal conflict is criminal – or, at least, that such conflict precipitates crime. It also assumes that the capacity to produce or reproduce crime of significant proportions is greater where organised networks are involved.³ Such networks are inclined to resort to violent and ruthless ways of advancing and protecting their interests. Crime, in turn, imposes pressure not just on criminal justice mechanisms, but also on other spheres important to development, such as the cost of doing business, security systems, economic productivity, education, and local government.

Illicit drugs encountered in the region

There is not much dispute as to the main problematic illicit drugs in the region, although there may be disagreement as to the relative magnitude of harm attributable to each type of drug. Cannabis is the most common, probably followed by Mandrax, then cocaine, heroin, hashish, crystal methamphetamine (usually known as *tik*) and ecstasy. Also known as *marijuana*, cannabis is the only drug which is locally cultivated – all others being either imported from elsewhere or manufactured in drug laboratories.

3 Aning, Kwesi. 2009. *Organised crime in West Africa: Options for EU engagement*. Stockholm: International Institute for Democracy and Electoral Assistance.

Cannabis has been grown in mountainous Lesotho for centuries. It is currently also produced in parts of Malawi, South Africa, Swaziland, Zambia and Zimbabwe. There is controversy as to the proportion of output consumed within the region compared with what is exported beyond it.

The impact of cannabis exchange transactions on violent crime does not appear to have been substantially documented. The little that is known is derived from anecdotal cases from other parts of the world.⁴ These indicate that much of the violence is associated with measures to either evade detection by law enforcement agencies or to protect production from theft by competitors or opportunistic thieves.⁵ Producers equip themselves with firearms of various types and strength, or with machetes and knives. The link between cannabis consumption and aggressive behaviour, leading to violent predatory crime, is better established. Violence, aggression, and criminal offences such as robbery and housebreaking are common among adolescent substance users.⁶

Mandrax has been circulating in southern Africa since the early 1980s, having originated from south-east Asia. There have been changes in the modes of Mandrax procurement over the years, partly in response to demand and partly to evade greater police vigilance. Much of the Mandrax encountered in the region in the last decade has been locally manufactured in drug laboratories. The same can be said of the amphetamine-type stimulants tik and ecstasy. Cocaine is smuggled to southern Africa from production sites in South America through various strategies and routes. Heroin and hashish predominantly have south-east Asian origins, in many cases Afghanistan, India, Myanmar or Pakistan. These countries are still considered to be the foremost producers, with Afghanistan and Myanmar the leading sources of opium.

What is the relationship between the trafficking of illicit drugs and violent crime?

About a decade ago, Shaw noted that southern Africa had gradually become “not only a transit point for the movement of illegal commodities, but also a

4 See “Drugs production causing violent crime”. *Guardian Unlimited*, 10 August 2010; available at http://www.policeoracle.com/news/Drugs-Production-Causing-Violent-Crime_25860.html; last accessed 3 November 2010.

5 Parry, C. 1997. “The illegal narcotics trade in southern Africa: A programme for action”. Unpublished paper presented to the South African Institute of International Affairs, Johannesburg, 6 June 1997.

6 Mohasoa, Irene. 2010. “Substance abuse among male adolescents”. Unpublished MA dissertation, University of South Africa, Pretoria, pp 34–35.

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growing consumer of these products”.⁷ Illicit drugs were prominent among the commodities referred to.

Around the same time, Dr Charles Parry of the South African Medical Research Council observed that the illicit drugs trade –⁸

... has the potential for significantly destabilising South African society and further community-initiated confrontation with drug dealers and traffickers is viewed by many as a necessary catalyst for government action.

His remarks may have been prompted by the extended sequence of confrontations between civilian vigilantes and drug merchants that were common in urban South Africa in the mid-1990s. They typically pitted two vigilante groups – People Against Gangsterism and Drugs (PAGAD) and People Against Drugs and Violence (PADAV) – in confrontation with alleged drug dealers. Numerous conflicts occurred, some degenerating into shoot-outs that attracted significant public attention, especially in Cape Town and Port Elizabeth. While they graphically portrayed the dynamics that precipitate violence attributable to drug trafficking, such occurrences do not represent the complete spectrum of conflict-raising points in this sphere.

The point of departure should perhaps be to define *drug-related violent crime*. This may be characterised as crime caused or encouraged by the production of illicit drugs, or by the influence of such drugs, or as the commission of acts of violence in order to support the drug habit or to gain control of or run drug markets.

It has been argued that an unintended but foreseeable consequence of the prevailing pervasive and repressive prohibition regime was to make trading in certain drugs highly profitable.⁹ In addition, prohibition ensures that transactions are highly secretive and fraught with danger. Traders are jittery and inclined to avert the risk of arrest by resorting to corruption and violence.¹⁰

The initial potentially conflict-laden point is that of production. Conflicts that may be associated with the production of imported drugs are beyond the scope of this article. As pointed out above, some cannabis production territories are certainly aggressively protected from prying eyes, including those of law enforcement. Natural defences, such as mountainous terrain, tend to be

7 Shaw, M. 2001. “Towards an understanding of West African criminal networks in Southern Africa”. *African Security Review*, 10(4).

8 Parry (1997).

9 Laniel, L. 2001. “Drugs in Southern Africa: Business as usual”. *International Social Science Journal*, pp 407–414. Available at <http://laniel.free.fr/INDEXES/PapersIndex/issj169ENG.pdf>; last accessed 4 April 2011.

10 United Nations Office on Drugs and Crime. 2009. *World Drug Report*. New York: UN.

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utilised as part of the protection in countries such as Lesotho and Malawi. The greater potential for violent crime, however, stems from the involvement of organised crime networks in the procurement and exchange of cannabis. The use of drugs as currency is still as prominent today as it was several decades ago. Cannabis is used as a means of payment for other commodities, some of them illegally acquired. It is in this respect that –¹¹

... drugs have become part of a regional dynamic involving arms and stolen goods, especially cars and rustled cattle. Here drugs spread in the region by hooking on highly localized illegal; predatory activities, which frequently require arms to be carried ...

The exchange of a consignment of cannabis for two or more head of cattle is not uncommon, as is the exchange of several consignments for a pick-up truck. The conflict connected to the exchange occurs in the acquisition of the cattle or the vehicle in a violent manner – frequently with the use of firearms. The link between the drugs acquired and the violently procured commodity is not tenuous.

The link between drugs and violence is frequently highlighted as being intrinsic to the drug distribution system.¹² Part of the reason is the escalation in the level of resources and technical skills required to operate and maintain supply lines between sources and markets. This is particularly the case in respect of the hard drugs. Lone operators can hardly survive for long, let alone thrive, in the serious drug marketing circles of southern Africa. Organised crime networks dominate. In order to dominate the industry, or geographical marketing areas, these networks use violence and corruption in equal measure to manage risk. In urban South Africa, the use of violence by drug syndicates is strategic rather than haphazard or compulsive. Frequently, it has been used in order to settle disputes among rival distributors or with buyers. So-called drug turf battles in Cape Town tend to occur seasonally, ahead of expected upswings in the market.¹³ Part of the preparation for turf battles is significant armament. Some of these battles are continued in prison, if the protagonists are arrested and convicted. This contributes to a fairly dangerous prison environment. Prison gangs have been a feature of the penal system in several countries for a long time, mainly because of overcrowded facilities that make prison management a nightmare.¹⁴

11 Laniel (2001:409).

12 Fagan, J. 1993. "Interactions among drugs, alcohol, and violence". *Health Affairs*, 12(4):65–79.

13 In Cape Town, turf wars usually peak with the approach of the main tourist season, namely October–March.

14 Kinnes, Irvine. 2000. "From urban street gangs to criminal empires: The changing face of gangs in the Western Cape". *ISS Monograph No. 48*. Pretoria: Institute for Security Studies.

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The conflicts linked to illicit drugs, in the form of violent confrontations between community activists/vigilantes and drug dealers/drug lords, although connected to the criminal drug subculture indirectly, are also intricately linked to it. Mauritius and South Africa have encountered the spectre of the vigilantism that was common in the mid-1990s, but it continues to linger – albeit on a low scale.

PAGAD was formed in 1995 as a community anti-crime group fighting drug trafficking and organised violent crime on the Cape Flats, a sprawling network of suburbs in Cape Town, South Africa. It mobilised a membership that was predominantly Muslim in religious orientation, and included an armed wing called the G-Force. In August 1996, PAGAD organised a series of marches on residences identified either as belonging to drug dealers or as drug distribution outlets. One march resulted in a known drug dealer being shot dead and his body burnt. From then on, PAGAD engaged in incidents that became progressively more violent and that drifted further and further away from PAGAD's initially proclaimed mandate. PAGAD became more militant and assumed an overtly political outlook, denouncing the South African Government for being too close to Western countries, especially the United States Government. Between 1996 and 2000, no fewer than 24 drug lords were murdered, with their deaths attributed to PAGAD's secretive G-Force.

The spiral of violence unleashed by vigilante activism prompted drug dealers to unite in a formation called *The Firm*, which also engaged the services of an outfit of thugs that committed heinous acts of violence against PAGAD members. Following a series of violent activities between the police and PAGAD as well as acts of terrorism attributed to PAGAD, the state clamped down on the group. It turned out that PAGAD had been appropriated by elements that had a political agenda against the government. The fate of PAGAD mirrors that of similar community-based security formations in Nigeria, for example, where the Bakassi Boys vigilante group in the south-east were “hijacked by opportunistic political officials engaged in power struggles between the state and federal governments”.¹⁵

In Mauritius, the Hizbullah Party was implicated in executions of drug dealers in their homes in the late 1990s.¹⁶ More recently, in South Africa, there have once again been intermittent, unstructured expressions of violent reaction to drug trafficking, and the police are perceived to be incapable of effectively dealing with these reactions in some urban localities in South Africa. Such reactions have taken the form of mob-justice-type destruction of residences suspected of being used in marketing drugs.¹⁷

15 Meagher, K. 2007. “Hijacking civil society: The inside story of the Bakassi Boys vigilante group of south-eastern Nigeria”. *The Journal of Modern African Studies*, 45:89–115.

16 Unpublished internal report, Institute for Security Studies, Pretoria.

17 Incidents have been reported in Eldorado Park, Gauteng Province, and Cape Town.

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A subset of conflict witnessed in drug marketing networks in South Africa pits 'floor-crossing' gangsters – that is, gangsters switching allegiances from one organised crime network to another – against their former comrades in vicious battles. One outbreak of hostilities in late 2006 started when a gang boss who had quit The Americans gang, and had joined a rival formation, escaped with a wound to his right shoulder after two men shot at him on a Wednesday morning in the street as he was taking his three children to school.¹⁸ This led to a string of reprisal attacks in the criminal underworld.

An intriguing question is whether the illicit drug industry in southern Africa has linkages to other political conflicts or to terrorism. As noted above, PAGAD was eventually implicated in acts of terrorism. In fairness, PAGAD maintained throughout that such acts were committed in its name by persons who were either rogue elements or impostors. No direct link can be drawn from the implication or association of PAGAD in terrorism to illicit drugs. Moreover, PAGAD itself was never implicated in trafficking drugs.

Insurgent organisations have allegedly been involved in smuggling drugs such as Mandrax into the southern African region from the mid-1980s.¹⁹ In the words of Biswas, –²⁰

[o]ne critical problem arising out of the confluence of two major narco-producing and trading regions – the Golden Crescent and the Golden Triangle – is the cementing of a diabolic relationship between insurgent groups, arms dealers and narco-terrorists. Such a relationship is quite common with the groups operating in the region. Although not all the insurgent groups engage in narco-production or narco-trafficking, it has nevertheless been found that all of them have regularly taxed and extorted money from the traffickers, while providing protection to the latter for conducting trafficking in drugs.

With the end of the Cold War, benefactors to these organisations – such as China, Cuba, France, the Soviet Union, and the United States – disappeared. As a result, such organisations found themselves with funding deficits, and –²¹

... were forced to find alternative sources of funds to remain militarily relevant ... [I]nvolvement in drug trafficking and other criminal activity became a priority as an independent source of revenue.

18 The prominent gangster was Igshaan "Sanie" Davids of The Americans gang.

19 Biswas, A. 2001. "Small arms and drug trafficking in the Indian Ocean region". *University of Mumbai Centre for African Studies Working Paper No. 4*. Available at http://www.mu.ac.in/arts/social_science/african_studies/biswaswp.pdf; last accessed 20 February 2011.

20 (ibid.:4).

21 See the cursory statement in the dispatch of the International Crime Threat Assessment at <http://fas.org/irp/threat/pub45270chap1.html>; last accessed 20 February 2011.

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This kind of pressure is alleged to have motivated large-scale participation in diamond smuggling by the Angolan rebel movement União Nacional de Independência Total de Angola (UNITA), for example. While there are anecdotal indications that some insurgents were involved in smuggling illicit drugs into the SADC region, there is no evidence of such acts being sanctioned by or committed in the interest of any organisation. It is unlikely that the region has cases similar to that of Peru's Sendero Luminoso, or Colombia's Fuerzas Armadas Revolucionarias de Colombia (FARC).²²

Drug merchants might deploy violence as a method of securing avenues for laundering the proceeds of drug trafficking. The regime of measures adopted across the region to detect and combat money laundering, if comprehensively implemented, introduce a new risk – of asset seizure and arrest. The thrust of such measures is to target proceeds of drug trafficking so as to hit traffickers' profits. In the wake of the implementation of laws against organised crime, some drug dealers have lost property to the state. This has triggered a search by drug dealers for further innovative methods of concealing proceeds. Their favourite outlets are in the food sector (restaurants), entertainment industry (gambling, football clubs and nightclubs) and panel-beater operations. In one recent case,²³ the owner of a panel-beating business was approached by a former acquaintance who has since become part of a drug syndicate. In return for refurbishing and retooling his premises, he was asked to allow his accounts to be used by the syndicate to push through some of its funds, on a 'no questions asked' basis. The lawful business conducted by the panel-beaters would then camouflage the infusion of proceeds from drug trafficking. The owner of the panel-beating operation refused to accede to the request – a response that was not well-received by the syndicate. The situation could have degenerated into violent conflict were it not for the intervention of a religious peer.

The illicit drug industry has been connected to the commercial and public transport sectors for many years in several countries in the subregion. The movement of illicit drugs across borders tends to follow the well-beaten trade routes, with the distinction that consignors, transporters, brokers and distributors do not declare consignments. Cannabis and cocaine smuggled into and through Namibia are usually transported by long-distance truck drivers acting as agents of principals in Angola, Namibia or South Africa.²⁴ There is a strong suspicion that some of the drivers deal in drugs as a way of earning extra income.²⁵ Drivers that 'moonlight' in this way face the risk of

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- 22 Gootenberg, P. 2005. "Talking like a state: Drugs, borders, and the language of control". In Van Schendel, W & I Abraham (Eds). *Illicit flows and criminal things*. Bloomington, IN: Indiana University Press.
- 23 The case occurred in Cape Town, South Africa.
- 24 Unpublished internal report, Institute for Security Studies, Pretoria.
- 25 Interviews with the Namibian Police suggest they believe this.

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being blackmailed or threatened if they should decide to withdraw, in a similar manner to state officials that allow themselves to be corrupted by smugglers.

The commuter taxi industry in Lesotho, Malawi, Mozambique and Swaziland has also been a prominent intersection between drugs and markets. Such taxis provide a means by which to transport contraband from points of supply to markets rapidly, and in a relatively inconspicuous manner. Infrequent interceptions point to an established route for the transportation of drugs from production areas such as Nkota Nkota to commercial centres such as Blantyre and Lilongwe in Malawi by commercial trucks and commuter minibus taxis.

Nowhere is the utility of such transportation more graphically illustrated than in South Africa, which has the largest number of taxis in the region. With origins that date back to the early 1900s, the commuter taxi industry has grown to nearly 200,000 vehicles countrywide today. Over the years, it has been afflicted by lawlessness and violence. After numerous conflicts within the industry in the Western Cape Province, and many run-ins with the authorities, the Premier of the Province commissioned an inquiry into the spectre of violence in the industry in 2005. Advocate Dumisa Ntsebeza of the Cape Bar chaired the Commission. A strong link “between taxis, drugs and organised crime” emerged, according to the Commission, and they pointed to evidence that showed —²⁶

... a link with drugs and organised crime in that taxi drivers are used to cart drugs, sometimes sell drugs at the ranks, cart prostitutes to customers, and generally provide attorneys’ fees to people that have been arrested for particular crimes.

The inquiry also found that taxi associations set up ostensibly to bring order to the taxi industry²⁷ “operated like the Mafia, with the power to extort money and murder their opponents”.²⁸

The cash-spinning potential of the commuter minibus taxi business offers a convenient method to launder proceeds of drug trafficking. Involvement in the minibus industry can provide the explanation required for the sudden acquisition of wealth that might otherwise arouse suspicion. Because of its enormous value to the illicit drug industry, the commuter taxi industry is of particular sensitivity to the drug dealers that are involved in it.

26 Republic of South Africa. [Forthcoming]. “The Commission of Inquiry into the Underlying Causes of Instability and Conflict In the Minibus Taxi Industry in the Cape Town Metropolitan Area”. Unpublished, p 112. The Commission was set up by Premier Ebrahim Rasool, and is also referred to as the *Ntsebeza Commission* after its Chairperson.

27 At the time of the inquiry, there were no less than 150 countrywide.

28 Republic of South Africa [Forthcoming].

The use of hit squads to impose dominance over routes is an intermittent practice in the taxi industry.²⁹ The resulting violence has spawned an arms race within the industry, causing the loss of many lives in ‘taxi wars’ over the years. In this regard, the Ntsebeza Commission observed the following:³⁰

The older, more experienced owners are usually responsible for selecting the targets, planning the logistics, recruitment of the hit men and collecting monies to pay for the services of the hit men.

In 2001, Jackie Dugard found that there was not a single urban area in South Africa that had not experienced a taxi war in recent years.³¹

At the social level, there are indications that the recurrent xenophobic tension, which occasionally manifests itself in actual conflict, as occurred on a countrywide scale in South Africa as recently as May 2008, may be linked to perceptions about the role of non-nationals in drug trafficking and related crime. Numerous surveys have revealed that such perceptions are prevalent in two influential sectors: the media, and the police service. Negative stereotypes abound, as the events preceding and surrounding the xenophobic violence in May and June 2008 showed. At various stages, the influx of illicit drugs into South Africa has been blamed on Angolans, the Chinese, the Congolese, Indians, Nigerians or Zimbabweans. Media articles that suggested the widespread involvement of foreigners in criminal activity, including drug trafficking, stoked the flames of xenophobic attacks in certain localities.

What factors impact on the nature and extent of the relationship?

Numerous factors appear to have a bearing on the link between illicit drugs and violent crime. Comparisons may be drawn between illicit drugs and conflict diamonds, although the latter are a subsector of a legitimate industry. The key comparable factors are as follows:

- *The high value of illicit drugs:* Combined with the worsening socio-economic conditions, their high value sustains the attraction of drugs to significant numbers within the region. As drug trafficking is not regulated, the participation of ever-increasing numbers of people offers opportunities for their exploitation by organised criminals and elite players in the industry. The criminalisation of drug marketing helps to maintain the high value of illicit drugs. At the same time, the poverty of

29 Dugard, Jackie. 2001. “From low intensity war to Mafia war: Taxi violence in South Africa (1987–2000)”. *Centre for the Study of Violence & Reconciliation: Violence and Transition Series*, Vol. 4, May.

30 (ibid.).

31 (ibid.).

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many consumers of drugs prompts them to engage in violent crimes in order to buy drugs.³²

- *The involvement of organised crime syndicates and networks in the supply and distribution chain:* Whether the stage concerned is upstream, in transit or at the point of destination, organised crime networks introduce the element of violence into the chain. These networks consider the use of violence as important in ensuring that contracts are honoured. Juan Carlos Garzon, after a study of drug networks in Brazil, Colombia and Mexico, observed “If a drug dealer sells a poor quality product, his punishment may go beyond exclusion from the market ... his punishment could be death”.³³
- *The escalation in drug production, which dates back to the mid-1980s:* This has increased supply-side pressure to open new markets and to muscle existing suppliers out of their ‘territories’. In southern Africa, four related activities have occurred almost simultaneously. The first is the diversification of smuggling methods: traffickers have become quite imaginative in coming up with new methods to evade detection.³⁴ The second is the increase in the local production of some drugs. Notable among these is crystal methamphetamine (tik). Hubschle sums up developments as follows:³⁵

[T]raditionally ingredients for tik, such as ephedrine, have been imported into South Africa from Asia and the final product is made in factories and then distributed to gangs in the Western Cape ... A growing trend, however, is that tik is produced locally from household ingredients, such as bleach. The increasing involvement of gangs producing their own tik means the product is more readily available and gangs no longer rely on foreign connections.

The third development is the regular shifting of routes. In a region littered with numerous entry points into the region and multiple crossing points between various countries, it is relatively easy to constantly change routes. The fourth activity is resorting to several innovative techniques to launder the proceeds of drug trafficking.

- *The coexistence of illicit drugs with localised predatory criminal activities in the region:* Southern Africa is already afflicted by predatory violent crimes such as motor vehicle theft, armed robbery, and cattle rustling.

32 There are regular incidents of robbery of cell-phones, wallets and computers in the neighbourhood of the author’s office, attributed to drug trafficking.

33 Garzon, Juan Carlos. 2008. *Mafia & Co: The criminal networks in Mexico, Brazil and Colombia*. Washington, DC: Woodrow Wilson International Centre.

34 Drugs are concealed in human hair (which is ‘bathed’ in liquid cocaine), shirt collars, motor vehicle panels, fuel tanker ‘false bottoms’, hollowed out Bibles, and vehicle tyres.

35 Hubschle, A. 2010. *Organised crime in Southern Africa: First annual review*. Cape Town: Institute for Security Studies.

The symbiotic connection between motor vehicle theft, armed robbery and drug trafficking has been particularly noticeable in Botswana and Zimbabwe, for example, where stolen vehicles are used as getaway vehicles in armed robberies and to smuggle and transport drugs.³⁶

- *The false implication of immigrants in drug trafficking:* This may partly be attributed to desperation, and partly to propaganda, and has been quite damaging to the social integration of migrants in Botswana and South Africa.
- *The continued minimal regulation of the commuter taxi industry in much of the region:* This continues to open up the industry to infiltration by drug-dealing organised crime syndicates and networks.

What can be done to reduce violent crime emanating from drug trafficking?

Reducing violent crime precipitated by drug trafficking cannot be achieved in isolation from tackling drug trafficking itself. While it is surrounded by considerable emotions, crime reduction appears to be an area devoid of comprehensive, creative initiatives at the subregional level. On account of public denunciation of drug consumption having converged, there is no shortage of political will to make an impact. It appears that, at the very least, the efficacy of existing strategies and measures should be periodically reviewed. The destruction of cannabis plants as a way of curtailing supply, which is regularly done in Lesotho, is only marginally effective, as some plantations are not easy to reach and the process requires substantial resources for the volumes involved. Where successful, curtailing supply in this way decimates the livelihood of thousands of subsistence farmers without offering them any other sources of income.

The destruction of drug laboratories has had substantial success in South Africa, but the picture in other countries is not so positive.³⁷ The sustainability of the strategy is bound to be tested in the long term. As Burris points out, what is more likely to succeed is an approach that moves away –³⁸

... from a primarily criminal-justice policy based on zero tolerance towards a public-health based system dedicated to reducing dangerous consumption, evidence-based prevention, harm reduction and drug treatment services.

The SADC Protocol on Combating Illicit Drug Trafficking, which was adopted in 1996, sets out to encourage action amongst member states that is both

36 (ibid.:47)

37 According to South African Police Services figures, an average of 45 laboratories have been destroyed each year since 2006.

38 Burris, Scott (2009); cited in "What alternative to the war on drugs?". Available at <http://www.scoop.co.nz/stories/GE0902/S00073.htm>; last accessed 4 April 2011.

concerted and based on three major elements: demand reduction, supply reduction, and international cooperation.

Existing literature makes various proposals on optimal methods to claw back the reach of illicit drugs. The first is to shrink the markets for illicit drugs by focusing on demand-side activities. Drug-related violence should be seen for what it is: a phenomenon ancillary to drug consumption. The 2009 World Drug Report by the United Nations Office on Drugs and Crime (UNODC) has noted a fall in the demand for illicit drugs in quite a few areas of the globe. Drug markets need to be identified, and the factors that sustain the profitability of each of them mapped out.

South Africa's National Drug Master Plan targets the youth and communities for demand-reduction initiatives. The youth are to be –

- motivated to refrain from drug abuse
- given the facts and warned of the risks through the school system
- assisted to develop the skills and attitudes to resist drug misuse, and
- given access to a range of advice, counselling, treatment, rehabilitation and after-care services.

Communities should be protected from the health risks and other damages associated with drug misuse, including the spread of communicable diseases, related injuries, and premature death; and the families of drug abusers should access advice, counselling and support services.

Demand-reduction strategies should be based on the review of criminalisation policies, so that where changes can be made, e.g. in the area of decriminalisation of cannabis consumption, they are made. There is evidence that most drug consumption in the region involves cannabis. Suggestions to decriminalise tend to prompt knee-jerk revulsion as the perception is that this would worsen rather than ameliorate crime connected to drug consumption. While there is a strong belief that it might reduce challenges connected to trafficking, there is an apprehension that legalised consumption would precipitate higher levels of violent crime. In rebuttal, it is arguable that legalisation would open the way for managed consumption, as is the case with drugs like alcohol. It may also free up resources to be used against the harder drugs.

The second strategy is to identify and track the sources of funding of illicit drugs. Research by Shaw, among others, has shown that there is a growing consumer market in southern Africa.³⁹ The region is not just a transit territory, which implies the local residence of some importers and merchants. Invariably, they will develop an identifiable investment presence in the form of assets. The most common routes by which drugs enter and exit from the region are well known, as are the manifestations of participation in drug trafficking.

39 Shaw (2001).

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The sources by which smuggling is funded are not so well known, however. In cases involving drugs smuggled in from beyond the region, financial investigations to determine who funds the criminal enterprise, and how and to whom the merchandise was distributed, should be assisted by information from the growing portfolio of asset seizures.

The third strategy is to reorganise the systems of documenting crime in police records in order to capture information on conflict crimes connected to illicit drugs. Quite a few policing agencies retain a *Drug-related crimes* category in their records. This conceivably covers a broad range of crimes that could include theft, robbery, smuggling, assault, money laundering and even kidnapping. It is suggested that there be sub-descriptions that capture details to reflect the illicit drug–collateral crime connections.

The fourth strategy is to regulate the commuter taxi industry more effectively so as to wean it from elements of organised crime. Part of the process should be to improve transparency and accountability in this industry through registration, regular audits, and taxation. Regular audits and taxation may well have a disciplinary effect.

The fifth strategy is to engender greater public confidence in the efficacy of law enforcement, through more visible and abundant policing in currently under-resourced urban communities. There is merit in making more use of community policing forums, and involving organised civil society in strategic planning and law enforcement. The objective would be to minimise the resort to civil vigilantism that unfortunately characterises community responses to crime in under-policed communities. The use of military units in combating the violently resilient drug networks in Latin America appears to be an equally undesirable state-sanctioned alternative form of vigilantism.

SADC Protocol on Gender and Development: Road map to equality?

Mulela Margaret Munalula*

Is it another ‘gender document’?

There have been a substantial number of documents generated by both the Southern African Development Community (SADC) and the African Union (AU) which have either directly or indirectly provided for gender equality. One generation on, very little substantive change has taken place in the lives of southern African women. The hold of patriarchy has as yet not been effectively challenged by the various documents. This begs the question: Is there any need for another document? The answer is “Yes, but let it be the document that finally delivers!”

The SADC Protocol on Gender and Development (hereafter *SADC Gender Protocol*) was signed on 17 August 2008. The Protocol is intended to take the Region a step closer to finding home-grown, concrete ways of achieving gender equity throughout its 15 member countries. By August 2010, only Angola, Lesotho, Mozambique, Namibia, Seychelles, Tanzania and Zimbabwe had ratified the Protocol; the Democratic Republic of the Congo and South Africa were in the process of doing so. For the Protocol to enter into force, two-thirds of the member states need to ratify it. Already the slow rate of ratification is a concern because many of the Protocol’s objectives are required to be met by 2015.

The SADC Gender Protocol is founded on the rights-based approach to development. This approach requires the mainstreaming of human rights in the development process. This means embracing human rights in policies as well as in the implementation of programmes. Gender inequality, which is widespread throughout the SADC region, is one of the problems that a rights-based approach is intended to resolve. Equality, liberty and dignity – particularly the equality, liberty and dignity of women – are a critical part of mainstreaming. The SADC Gender Protocol is, therefore, both a policy document and an implementation framework for mainstreaming gender equality and equity. The Preamble to the Protocol notes that gender equality and equity are fundamental human rights arising out of various international instruments, including the Convention on the Elimination of All Forms of Discrimination against Women and the Protocol to the African Charter on

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Human and Peoples' Rights on the Rights of Women in Africa (hereafter *African Women's Protocol*).

The rationale for a protocol lies in the evident lack of progress by most SADC countries in meeting targets set under non-binding agreements or pursuing substantive law reform to support gender equality. It was considered important to move the region from an era of paying lip service to their regional commitments into one in which they would be compelled to act through the process of an obligatory, action-oriented framework. Such a framework required the support of various instruments already in force; but, because of their number and scope, their content needed to be consolidated into one, comprehensive document. This not only ensures clarity of normative expectation, it also permits the inclusion of and focus on region-specific manifestations of gender inequity.

Thus, the Protocol should result in an increased accountability on the part of member states on issues of gender equality, both domestically and regionally. By creating common normative standards, the Protocol should empower policymakers, service-delivery institutions, human rights activists, and beneficiaries of the stated rights with the legal tools to demand and claim gender equality. The Preamble to the Protocol states that it is committed to drawing up a plan of action setting specific targets and time frames for achieving gender equality and equity in all areas, as well as instituting monitoring and evaluation mechanisms for measuring progress. Implementing the measures is expected to lead to more measurable, comprehensive, relevant and sustainable change across the region. It creates an imperative for taking immediate action.

Consolidating gains and breaking new ground

The substantive content of the Protocol is not new. However, it introduces a new approach to the implementation of gender equality goals and objectives, and articulates areas of inequality not previously conceptualised. The hope is that this fresh approach will result in a breakthrough in the stalemate that seems to characterise attempts in the subregion to move beyond the many commitments made on paper. The revised approach specifically means that SADC states will now be legally bound to speed up efforts towards gender equality. States are not only expected to commit themselves to making far-reaching changes, but they are to achieve them within the time frame provided.

Where the Protocol seeks to break new ground, it sometimes employs shock treatment in order to achieve its mission. This is evident from both its general phrasing and in the thrust of a number of its articles. For instance, the language of the document reverses the trend of placing *men* before *women*, i.e. all references to the two genders now begin with the female gender. All the same, the Protocol is quick to award men the same rights as women, sometimes in surprising new areas such as the provision on paternity leave. Furthermore,

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unlike many women's rights documents, it attempts to recognise that there is little point in addressing women in a vacuum. In this respect the Protocol recognises that the power relationship at the heart of gender discrimination is not always linear. Hence, the Protocol not only addresses men as perpetrators of rights violations, but it also recognises that men, too, may be victims.

The Protocol articulates, in a more nuanced and peculiarly southern African way, a number of violations of women's rights, offering radical and practical ways of addressing such violations, particularly in the area of gender-based violence. Examples include the treatment of victims of violence. Article 20 provides that there needs to be comprehensive testing, treatment and care for survivors of sexual offences in view of the danger of HIV transmission and the issue of sexual harassment. The same Article provides for emergency contraception, access to post-exposure prophylaxis, and social/psychological rehabilitation of perpetrators of gender-based violence. Sexual harassment, which is for the first time clearly articulated in a southern African document,¹ is broadly defined to include a situation in which a power relationship may not be evident. Thus, *sexual harassment* is –

... any unwelcome sexual advance, request for sexual favour, verbal or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another whether or not such sexual advance or request arises out of unequal power relations.

In view of the 'joking relationships' that characterise many Southern African cultures and traditional way of life, the prohibition against sexual harassment is likely to have a marked impact on how people relate to and treat each other.

Furthermore, the Protocol reiterates the thrust of the African Women's Protocol, which is to bridge the public/private divide and enjoin member states to legislate on issues that were previously taboo, such as sexual and reproductive rights. Sexual and reproductive autonomy, which is quite alien to the southern African traditional setting, is accorded recognition and support.

The provision in Article 16 requiring states to carry out time-use studies on the multiple roles played by women has the potential to revolutionise the way in which gross domestic product, at the macro level, and the family's resource base, at the micro level, are valued and understood. The potential for reconceptualising women's labour is strengthened by Article 19(2)(c) and (d), which calls for legislation to remunerate and recognise the economic value of agricultural and domestic work. Despite these radical offerings, it is noted that provisions relating to personal laws throughout the document tend to be more

1 The document determines that it should be eliminated by 2015.

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muted in their wording and content, and that Articles 16 and 19 very likely do not envisage the inclusion of household chores.

A quick review of the Protocol indicates that quite a large number of the substantive provisions contain clear imperatives and time-bound targets. These provisions represent the highlights of the document, and include the following:

- Revision, amendment and repeal by 2015 of all sex/gender discriminatory laws
- Abolition by 2015 of the minority status of women
- Enactment by 2015 of laws to promote equal access to and retention in primary, secondary, tertiary, vocational and non-formal education
- Adoption and implementation by 2015 of gender-sensitive educational policies and programmes
- Ensuring equal participation of women and men in economic policy formulation and implementation by 2015
- Conduct of time-use studies on women's multiple roles in order to facilitate the adoption of policy measures to ease the burden on women by 2015
- Adoption and enactment by 2015 of policies and laws (including affirmative action) to ensure equal access, benefit, and opportunities for women in trade and entrepreneurship
- Revision by 2015 of all laws and policies that determine women's access to, control of and benefit from productive resources
- Revision, amendment and enactment by 2015 of laws and policies to ensure equal access to waged employment in all sectors of the economy
- Enactment and enforcement by 2015 of legislation prohibiting and formally prosecuting all forms of gender-based violence
- Revision by 2015 of criminal laws and procedures relating to sexual violence to not only make them gender-sensitive, but also to provide for post-assault treatment and care (against HIV in particular) and social/psychological rehabilitation
- Adoption of integrated approaches to reduce gender-based violence by half by 2015
- Adoption by 2015 of specific legislation to prevent human trafficking and provide holistic services for survivors
- Enactment by 2015 of legislative provisions and adoption/implementation by 2015 of policies, strategies and programmes which define, prohibit and punish sexual harassment in all spheres
- Adoption and implementation by 2015 of legislative frameworks, policies, programmes and services to enhance gender-sensitive, appropriate and affordable quality health care
- Adoption and implementation of gender-sensitive HIV-prevention legislation, policies and programmes, which should prevent new infections, ensure universal access to treatment, and recognise "equality in" and infuse "equality into" care-giving by 2015

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- Institution of measures to ensure women's equal representation and participation in key decision-making positions in conflict resolution and peace-building by 2015, and
- Promotion of equal representation of women in the ownership of and decision-making structures of the media by 2015.

The not-so-small matter of delivery

The new Protocol is justified by the need to facilitate delivery on state commitments. Thus, the Protocol is expected to contain some clear enforcement mechanisms. These mechanisms also need to exist at both the domestic and regional levels.

The last part of the Protocol, Part Ten, contains the Protocol's implementation framework. In terms of this provision, each state is obliged to institute the requisite legislative framework articulating appropriate remedies to promote gender equality, including adjudication by legally and formally constituted bodies. Secondly, a state budget should allocate the necessary human, technical and financial resources to implement the Protocol. At the regional level, there is a three-tier institutional structure made up of a Committee of Gender/Women's Affairs Ministers overseeing a Committee of senior officials, who in turn supervise a Secretariat. The role of the structure is to monitor and evaluate the implementation of the Protocol through national action plans and analysis of data and biennial reports supplied by the state parties.

A holistic reading of the delivery-oriented provisions of the Protocol shows that the targets and time frames are the main impetus behind the expected action plans. The domestic legal systems of each member state are to undergo reform and create suitable dispute resolution and adjudication facilities to enforce the protection of rights and punishment of violations. The reforms will be enforced through monitoring and evaluation as well as reporting by member states. Much is expected of these domestic legal systems, which are the sole source of rights-related justice.

Not quite there, but there is hope

Employing the 'gender' as opposed to a 'women's rights' perspective and the couching of the text in language that is accessible shows the extent to which the Protocol seeks to be a 'popular' document. However, crucial political elements of 'gender' as a relational/power concept may as a result have been lost 'in translation' and compromise. For instance, in Article 1, the interpretation clause, *gender* is defined as the roles, duties and responsibilities which are culturally ascribed to women, men, girls and boys. This definition omits the hierarchical power relationship that is embedded in the conceptualisation and manifestation of gender differentiation and, therefore, limits the extent to which the Protocol can deliver change.

ARTICLES

Despite the range of substantive changes demanded by the Protocol, many of them seem to be in areas that lie in the public domain. This may result in only 'formal' fulfilment of its objectives. Yet, equality in the public domain is problematic largely because member states do not deal with the underpinning private domain issues that the Protocol is soft on. As long as the Protocol compromises on discrimination in the private arena, patriarchy will continue to flourish. Indeed, the Protocol recognises this in its Preamble, where it states that social, cultural and religious practices, attitudes and mindsets continue to militate against the attainment of gender equality. That being the case, the Protocol does precious little to resolve the problematic hierarchy that characterises many practices and beliefs.

Moreover, constitutional and, consequently, legalised discrimination in the name of custom, culture, and religion is a feature of too many constitutions in the SADC region. Yet, Article 4 on constitutional and legal rights merely asks states to "endeavour", by 2015, to enshrine gender equality and equity in their constitutions and to ensure that it is not compromised by law or practice. Hence, Article 6(1) – on the revision, amendment and repeal of discriminatory laws by 2015 – evidently targets statutory rather than customary laws because Article 6(2)(c), on enacting and enforcing legislative and other measures to eliminate practices which are detrimental to women by prohibiting and punishing them, not only avoids all mention of customary law, but also provides no time frame within which to take action.

Article 7, on access to justice – one of the most crucial provisions of the Protocol – is equally disappointing in its phrasing and lack of imperatives or time frames within which to act. Phrases like "put in place legislative and other measures which *promote*"¹ and "measures shall ensure the *encouragement* of all public and private institutions"² are unlikely to yield any results within the foreseeable future. Equality before the law is clearly not prioritised, thereby diminishing the potency of all the other rights in the Protocol. Since the national justice system is the last resort in any attempt to enforce rights provided by the Protocol, the weakness of this Article is profound.

The absence of imperatives and time frames is also evident in Article 8, on marriage. Despite the fact that the region faces a serious problem of 'child marriages' and 'child mothers', the Article does not set out to definitively ban child marriages. Rather, it allows the state to enact legislation that permits marriage under the age of 18. To be fair, this may be inspired by the need to cater for situations in which marriage may be seen as the best option, e.g. where a teenager is pregnant, but it is detrimental to efforts to ensure that girls stay in school until they complete their programme of study. It in fact perpetuates a patriarchal sense of morality.

1 Emphasis added.

2 Emphasis added.

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Despite the fact that property adjustment upon the dissolution of marriage is also one of the major areas of gender inequality, the equitable sharing of property – as it is couched under Article 8(3)(b) – is subjected to the very feature that has made it so problematic in the past: the ‘choice’ of marriage regime.³ The real danger of Article 10(1)(f) emanates from four words: “property of her husband”. The words are problematic for two reasons. Firstly, they reinforce the common belief that, in the traditional southern African setting, property accumulated during the marriage belongs to the male spouse because he is the head of the household and/or is the main source of the family’s income. Therefore, the words cannot be reconciled with the concept of *matrimonial property* as property jointly owned by the parties to the marriage. Secondly, the words are completely alien to the thrust of the document, which is to take a gender-sensitive approach that promotes women’s equality.

Article 12, on political representation, again employs the phrase “shall endeavour”, thus immediately watering down the impact of the 2015 deadline for the achievement of equal representation in decision-making. This Article is further undermined by Article 13, on participation in electoral processes, which are the bedrock upon which representation is founded: the latter Article has no clear imperatives and no time frames at all.

Article 18, on equal access to productive resources, creates strong rights on paper, but it does not seem to create a responsibility on the part of the state to go beyond law and policy reform and actually ensure delivery, on an equality basis, of life-sustaining resources such as water and land – despite the fact that most of these resources are in the hands of the state.

If there is any doubt that the Protocol is soft on gender discrimination perpetrated in the name of culture and custom that doubt is eliminated by Article 21, which states that –

States Parties shall take measures including legislation, where appropriate, to discourage traditional norms, including social, economic, cultural and political practices which legitimise and exacerbate the persistence and tolerance of gender based violence with a view to eliminate them.

There is no definite target or time frame for the elimination of such practices.

But regardless of all the weaknesses identified, there is light at the end of the tunnel. It comes from the provisions on gender-based violence. Part Six of the

3 There is an assumption that women choose to get married under a particular matrimonial regimen and their matrimonial rights may be diminished under the regime because they have exercised a choice. The reality is that women marry under the regime that governs the space in which they are located and the state has a responsibility to ensure that that all marriage regimens share the basics of equality.

Protocol is devoted to gender-based violence and it does offset some of the concerns raised above to some extent. Article 20(1)(a) provides that “States Parties shall[,] by 2015, enact and enforce legislation prohibiting all forms of gender based violence”. The definition of *gender-based violence* under the United Nations Convention on the Elimination of All Forms of Violence Against Women is all-encompassing, and includes physical, sexual and psychological harm or suffering, whether occurring in the victim’s private or public life, and whether perpetrated within the family, within the community, or by the state. By roundly condemning gender-based violence and linking it to HIV and AIDS, many of the negative customary laws and practices may be tackled; it is a way of evading patriarchy and traditionalists who seek to undermine gender equality by arguing that doing away with traditional southern African customs and practices, regardless of how harmful they may be, panders to the Western concept of *human rights* and alienates Africans from their roots. ‘Sucking’ the ‘violence’ out of custom and tradition can make the practice thereof less problematic for women.

The jury is still out

It is too early to predict whether the Protocol will achieve its desired ends. Much will depend on the ability of southern Africans to change long-held attitudes. Without that change in attitude, the proposed law reform processes will not take place; nor will those that do take place result in gender-sensitive laws and gender-sensitive justice delivery systems. Groundwork to change mindsets will have to precede constitutional and other prescriptive law reforms.⁴ If the Protocol’s deadlines are to be met, the groundwork should include state-sponsored proscriptive laws that operate by forcing change. Proscriptive as well as prescriptive/protective laws need to be exploited by the implementers of the Protocol in order to eliminate harmful behaviour, even as change in mindsets is nurtured.

4 Constitutional reforms carried out recently in one of the SADC countries which were intended to bring about a more democratic order failed to end constitutional protection of discriminatory private or customary laws because of popular traditionalist arguments that portray gender equality as an alien notion.

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Review of the role, functions and terms of reference of the SADC Tribunal

Werner Scholtz

Background

The SADC Tribunal has on various occasions found that the Government of Zimbabwe is in breach and contempt of the previous orders of the court.¹ In August 2009, the Zimbabwean Government issued a legal opinion which challenged the legality of the Southern African Development Community (SADC) Tribunal and disputed its power to enforce decisions. Furthermore, the Zimbabwean Government announced its withdrawal from any legal proceedings involving the Tribunal until the Protocol on Tribunal and the Rules of Procedure Thereof (*Tribunal Protocol*) was ratified by at least two-thirds of the bloc's membership. Hence, the SADC Council of Ministers recommended the review of the role, functions and terms of reference of the Tribunal. Thus, the communiqué of the 30th Jubilee Summit of SADC Heads of State and Government announced the Summit's decision that a review of the role, functions and terms of reference of the SADC Tribunal should be undertaken and concluded within six months. Furthermore, the Summit did not renew the tenure of office of five members whose terms had expired, and it did not replace them and Zimbabwe's withdrawn Member. This meant that the Tribunal would be unable to accept new cases since it did not comply with the requirements concerning the composition of the Tribunal in terms of Article 3 of the SADC Tribunal Protocol. The decision of the SADC Summit accordingly constituted a suspension of the Tribunal's operation.

Scope of the study

On 9 September 2010, the SADC Secretariat commissioned a study on the review of the role, responsibilities and terms of reference of the SADC Tribunal

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1 *Mike Campbell (Pty) Limited & Others v The Republic of Zimbabwe*, SADC (T) 11/2008; *William Michael Campbell & Another v The Republic of Zimbabwe*, SADC (T) 03/2009.

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and invited consultants to submit proposals to conduct the study. The study was required to address –

- the jurisdiction of the Tribunal
- the interface between Community law and national laws in SADC
- the mandate of the existing appeals chamber of the Tribunal
- the recognition, enforcement and execution of the Tribunal's decisions
- the qualifications and the process of nomination and appointment of judges
- the lack of clarity in some provisions of the SADC Treaty and the Tribunal Protocol
- the tendency by member states to give primacy to domestic laws/ jurisdiction over SADC law, and
- the reluctance of member states to relinquish some aspects of their sovereignty to SADC.

It is accordingly the aim of this note to highlight briefly the substantive issues in the Tribunal Protocol that will be subjected to the review process. It is not the intention of the author to comment on these issues, but rather to present an exposition of them.

It is important to reflect on the legal status of the Tribunal Protocol and the Tribunal itself in the light of the concerns raised by Zimbabwe in this regard. It should also be borne in mind that the establishment of the Tribunal is not subject to the ratification of the Protocol, since Article 9(1)(f) of the SADC Treaty states that the Tribunal is “hereby established”. Thus, the Treaty has established the Tribunal and its decisions are final and binding in accordance with Article 16(5).

The Protocol regulates the operational matters provided for in Article 16(2) of the Treaty. Article 38 of the Tribunal Protocol, however, requires ratification by two-thirds of the member states prior to its entry into force. Furthermore, in 2001, the SADC Treaty was amended to make the SADC Tribunal an integral part of both the Treaty and the institution of SADC. Article 16(2) 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.

Article 22 deals with issues such as the signature, ratification and entry into force of Protocols. It is, therefore, possible to argue that the Treaty has done away with the requirements in Article 38 of the Tribunal Protocol. However, the Treaty cannot determine a member state's constitutional ratification procedure, which is dependent on constitutional municipal law. In terms of section 111(B) of the Constitution of Zimbabwe, parliamentary approval as well as legal

enactment is required before a treaty becomes municipal law. This would imply that member states have obligations in terms of the Tribunal Protocol on the international plane, but fulfillment of constitutional requirements is required in order to ensure domestic application. Zimbabwe may not appeal to the fact that it has not complied with its constitutional ratification requirements as justification for non-compliance with the Tribunal Protocol.² The review, therefore, needs to clarify this complex issue.

Part III of the Tribunal Protocol contains provisions on the jurisdiction of the Tribunal. Article 14 stipulates that the Tribunal has jurisdiction concerning disputes based on SADC legal instruments and other agreements which confer jurisdiction on the Tribunal. In terms of Article 15, the Tribunal has jurisdiction over legal and natural persons and member states. Article 15(2) contains an exhaustion of local remedies rule, which pertains to persons. Furthermore, the Tribunal may make preliminary rulings upon request by domestic courts,³ possesses advisory jurisdiction,⁴ and functions as a labour tribunal.⁵ The Tribunal also has an appellate function in relation, for instance, to the trade panels established in terms of Article 31(b) of the SADC Protocol on Trade.⁶ In general, the jurisdiction provisions are similar to those of other international adjudicative bodies. Article 26 of the European Convention on Human Rights as well as article 50 of the African Charter on Human and Peoples' Rights also provide for the exhaustion of local remedies. In terms of Article 96 of the United Nations Charter, the International Court of Justice has advisory jurisdiction.

The relationship between international and municipal law is a complex issue. It should be borne in mind that it is the constitutional law of a state that determines the role of international law in a municipal legal system. The Zimbabwean Government, in the aforementioned *Campbell* case, relied on Section 16B of Amendment 17 of its municipal law to justify its non-compliance with international law. The latter approach contravenes Article 27 of the Vienna Convention on the Law of Treaties.

It is also important to clarify the relationship between municipal and Community law. Various issues arise in this context, such as –

- the effect of Tribunal decisions on municipal law
- the review of the decisions of municipal courts by the Tribunal, and
- the role of the Tribunal in guiding domestic courts on the application of Community law in terms of the preliminary procedure provided for in Article 16 of the Tribunal Protocol.

2 Article 27, Vienna Convention on the Law of Treaties.

3 Article 16, Tribunal Protocol.

4 Article 20, Tribunal Protocol.

5 Article 19, Tribunal Protocol.

6 Articles 14(b) and 20A, Tribunal Protocol.

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Thus, the Zimbabwean High Court's refusal to register the decision of the SADC Tribunal⁷ provides a good example of the relationship between municipal courts and the Tribunal and the relationship between municipal and SADC law. This issue also invokes the recognition and enforcement of the Tribunal's decisions through Article 32 of the Tribunal Protocol, which provides for a domestic civil law procedure governing the registration and enforcement of foreign judgments in the territory of the state in which the judgment is to be enforced. This enforcement mechanism was used in the North Gauteng High Court of South Africa, which was approached to register the decisions of the SADC Tribunal of 28 November 2008 and 5 June 2009.⁸ The reaction of the Zimbabwean Government to the Tribunal's decision indicates the tendency by member states to give primacy to municipal law/jurisdiction over Community law. In this regard, Article 6(5) of the Treaty is instructive since it reads that "Member States shall take all necessary steps to accord this Treaty the force of national law".

Also, the enforcement mechanisms of the Tribunal may prove to be ineffective. In terms of Article 32(4) of the Tribunal Protocol, any party may refer to the Tribunal a state's non-compliance with a Tribunal decision. In accordance with subparagraph (5) of that Article, the Tribunal may report a finding of failure to comply with a Tribunal decision to the Summit "for the latter to take appropriate action". Article 33(1) of the Treaty states that appropriate action may be in the form of the imposition of sanctions against a member state which is in non-compliance. However, subparagraph (2) of the latter Article determines that the sanctions are not specified since it is the responsibility of the Summit to determine them on a case-by-case basis. This provision is an example of a matter on which the SADC instruments are unclear and deserve urgent attention and clarification. The non-specification of sanctions may create uncertainty and impede the imposition of punitive and/or other measures. The Summit is SADC's supreme policymaking body. It consists of the Heads of State or Government of all member states, and meets on an annual basis. The consensual nature of the decisions of the Summit may also present an obstacle to the imposition of such measures.⁹

In relation to the Tribunal's appeal chamber, it may be useful to explore the possibility of expanding the appellate jurisdiction in order to provide for a further instance of appeal in the context of the SADC legal regime.

The appointment of judges is also a very important issue, and reference to international practice may be useful here.

7 *Gramara (Private) Limited & Colin Bailie Cloete v Government of the Republic of Zimbabwe & Attorney-General of Zimbabwe & Norman Kapanga*, HH-169 2009.

8 *Louis Karel Fick & Others v Government of the Republic of Zimbabwe*, Unreported Case No. 7781/2009 (NGHC), decided on 25 February 2010.

9 Article 10(8), Tribunal Protocol.

Review of the roles, functions and terms of reference of the SADC Tribunal

Lastly, the Zimbabwean Government's response following the above-mentioned *Campbell* case illustrates the reluctance of states to surrender some aspects of their sovereignty to SADC. The 'pooling of sovereignty' is important for regional integration, and states should be aware that sovereignty is not absolute: it has evolved in response to the needs of the international community.

The de facto suspension of the Tribunal subsequent to Zimbabwe's non-compliance with its orders creates the impression that SADC members are not committed to regional integration under the auspices of SADC. Conversely, the establishment by the same member states of an independent Tribunal with wide jurisdiction affirms that SADC is a system based on law and order and respect for the rule of law.

Shortly before this edition was printed, the Summit decided at an extraordinary session not to reappoint members of the Tribunal, whose terms of office expired in August 2010. The Summit further decided against the replacement of the current members of the Tribunal, whose terms expire in October 2011.¹⁰ These decisions were taken after a review of the abovementioned study of the SADC Tribunal. However, it seems that the recommendations of the independent experts support the competence of the Tribunal to deal with the case against Zimbabwe. Furthermore, the Summit mandated the Ministers of Justice/Attorneys General to initiate a process aimed at amending the Tribunal Protocol, which would exclude the locus standi of SADC citizens.¹¹

10 <http://www.newera.com.na/article.php?articleid=38834&msg=error2&dbtype=New>; last accessed 23 May 2011.

11 <http://www.globalissues.org/news/2011/05/22/9750>; last accessed 23 May 2011.

CASE REVIEWS

Barry Gondo & 8 Others v The Republic of Zimbabwe, SADC (T) 05/2008

Ashimizo Afadameh-Adeyemi*

In this dispute, the Southern African Development Community (SADC) Tribunal was called upon to determine the compatibility of certain provisions of the respondent's national legislation with its obligation under the SADC Treaty.

The facts of the case are as follows. The applicants were victims of violence inflicted on them by the National Police and National Army of the Republic of Zimbabwe. The applicants sought remedies in the national courts of Zimbabwe and were successful in their claims. These courts awarded the applicants damages for the violence suffered at the hands of the respondent's security agents. However, the respondent failed to comply with the orders of its courts, and the applicants were unable to enforce the judgment because section 5(2) of the State Liability Act [Cap 8:14] prevented the execution of judgments against the respondent's property.

The applicants contended at the SADC Tribunal that section 5(2) of the said Act was incompatible with the respondent's obligation under Articles 4(c) and 6(1) of the SADC Treaty because the provisions of the said section 5(2) prevented the respondent from ensuring that effective remedies were available to the applicants. The applicants also contended that the respondent's failure to ensure the availability of effective remedies amounted to a breach of the principles of human rights provided for in Articles 4(c) and 6(1) of the SADC Treaty.

The applicants therefore sought three reliefs against the respondent. The reliefs were as follows:

- A declaration that the respondent was in breach of the SADC Treaty since it had failed to comply with the orders of its national courts
- A declaration that section 5(2) of the State Liability Act was in breach of the SADC Treaty in so far as it provided that state property could not form the subject matter of execution, attachment or process to satisfy a judgment debt, and
- Such further and alternative reliefs as the Tribunal might deem fit.

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In determining whether the respondent was in breach of the SADC Treaty, the Tribunal restated its position in *Mike Campbell (Pvt) Ltd v The Republic of Zimbabwe*¹ to the effect that Articles 4(c) and 6(1) of the SADC Treaty created an obligation on member states to respect, protect and promote human rights, democracy and the rule of law. The Tribunal held that the right to effective remedy was a fundamental right embraced by the concept of *rule of law*.² In other words, where a state failed to provide effective remedies, it breached its obligation to uphold the rule of law. Relying on the provisions of the International Covenant on Civil and Political Rights (ICCPR), the Tribunal held that the provisions of Article 2(3) of the ICCPR, when read in conjunction with its Article 5, prohibited any legislation or conduct which might render remedies ineffective, might obstruct the implementation of judicial remedies, or might provide state immunity from the enforcement of court orders.³

Drawing from the jurisprudence of the European Court of Human Rights, the Constitutional Court of South Africa, the African Commission on Human and Peoples' Rights, and citing Article 7(1) of the African Charter on Human and Peoples' Rights, the Tribunal concluded that the respondent was in breach of its obligation under Articles 4(c) and 6(1) of the SADC Treaty. In arriving at its decision, the Tribunal was of the opinion that the respondents' failure to provide effective remedy amounted to a contravention of the fundamental human rights principles enunciated in the said Articles of the SADC Treaty.

In determining the effect of section 5(2) of the State Liability Act, the Tribunal pointed out that the Constitutional Court of South Africa had declared a similar provision unconstitutional in that it elevated the state above the law. The Tribunal also took into consideration the non-discriminatory provisions of Article 26 of the ICCPR and its interpretation by the Human Rights Committee in General Comment No. 18. The Tribunal opined that section 5(2) of the Act was discriminatory in terms of Article 26 of the ICCPR, because it treated judgment creditors who had obtained judgments against the respondent differently from creditors who had obtained judgment against private litigants. Therefore, the Tribunal stated that section 5(2) of the Act also contravened the principle of equality and equal protection enunciated in Article 3(1) and (2) of the ACHPR because it prevented the law from been equally enforced and did not accord equal protection to all parties. In this regard, the Tribunal found that section 5(2) of the Act was in breach of the respondents' obligation under

1 *Mike Campbell (Pvt) Ltd v The Republic of Zimbabwe*, SADC (T) 2/2007.

2 *Gondo*, p 4. The Tribunal identified other fundamental rights embraced by the rule of law concept to include the right of access to an independent and impartial court or tribunal; the right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation; the right to equality before the law; and the right to equal protection by the law.

3 *Gondo*, p 5.

Articles 4(c) and 6(1) of the SADC Treaty, and that granting the state immunity from the execution of judgment debt had an adverse effect on the rule of law.

Having found that the respondent was in breach of its SADC Treaty obligations, the Tribunal proceeded to consider the revalorisation of the damages awarded to the applicant by the respondent's national courts. The application for revalorisation was based on the fact that the respondent's currency had depreciated over the years. In arriving at its decision to grant the applicants' request for revalorisation, the Tribunal relied on another decision by the South African courts⁴ and, most importantly, on Article 12(h) of the SADC Charter of Fundamental Social Rights. The Tribunal held the view that the Charter of Fundamental Social Rights provided for revalorisation in that it allowed for adequate inflation-adjusted compensation. As such, the Tribunal found that the damages awarded the applicants needed to be revalorised in the interest of justice. However, the Tribunal left the process of adjustment to be mutually concluded by the respondent's and applicants' agents.

While the Tribunal's jurisdiction to resolve disputes that have a human rights component is not disputed, it is also important for the Tribunal to clarify and justify its application of human rights legislation that does not directly fall within the SADC body of laws. For example, the Tribunal concluded that section 5(2) of the State Liability Act was discriminatory in content under Article 26 of the ICCPR.⁵ The question that arises is whether a breach under the ICCPR necessarily incurs liability under the SADC regime, taking into consideration that the ICCPR has its own complaint mechanism. It is important for the Tribunal to clarify between instances when it uses other international instruments that do not form part of the body of SADC laws as interpretative tools, and instances when such instruments are employed as the basis for arriving at a decision. In the case of the latter, the Tribunal may have to justify the applicability of such international instruments – particularly where they are not part of customary international law.

The overall judgment in the *Gondo* case reflects the Tribunal's willingness to protect, at all costs, the fundamental human rights principles provided for in the SADC Treaty. To this end, the Tribunal was obliged to use other legislation not provided for within the SADC body of laws to interpret the respondent's human rights obligations under the SADC Treaty. There has been a great deal of debate as to the applicability of human rights instruments such as the African Charter on Human and Peoples' Rights by the SADC Tribunal. These debates will continue to exist, particularly where a member state tries to justify not complying with a Tribunal decision. In order to strengthen the Tribunal's human rights mandate, therefore, and to develop an unquestionable SADC body of human rights law, it is imperative for member states to adopt a SADC human rights instrument.

4 *Eden & Another v Pienaar* 2000 (1) SA 158 (WLD).

5 *Gondo*, p 12.

CASE REVIEWS

Revisiting locus standi and the grounds for jurisdiction of the SADC Tribunal in *United Republic of Tanzania v Cimexpan (Mauritius) Ltd, Cimexpan (Zanzibar) Ltd & Ajaye Jogoo, SADC (T) 01/2009*

Olufolahan Adeleke*

In a unanimous judgment of the Tribunal delivered on 6 June 2010 with Justice Pillay presiding and delivered by Justice Luis Mondlane, the Tribunal affirmed rules governing the jurisdiction of the Tribunal and locus standi of applicants before the Tribunal. The ruling dealt with three preliminary objections brought by the Republic of Tanzania to the main case that had been instituted by the respondents to have a deportation order made against the third respondent rescinded.

Briefly, the main application arose from a memorandum of understanding which the Government of Mauritius had entered into with the Government of Zanzibar. The third respondent, who is the Director of Cimexpan (Mauritius) Ltd (the first respondent), started investment operations in Zanzibar by signing a concession contract with the Government of Zanzibar through a joint venture, thus establishing a new company named *Cimexpan (Zanzibar) Ltd* (the second respondent). In a letter dated 21 September 2003, the Government of Zanzibar informed the first respondent that the contract had been terminated. Subsequently, the applicant deported the third respondent.

Once a preliminary objection is raised, the substance of the case may only be considered after the Tribunal has examined the application pertaining to the preliminary objection. The applicant contended that the Tribunal had no jurisdiction over the matter since the respondents had not exhausted local remedies and had no standing to institute proceedings before the Tribunal. The applicant further objected that the application did not disclose international delinquency so as to render the applicant liable under international law. The third objection was that the Tribunal could not grant the order sought because the application in the main case did not accord with Articles 14 and 15 of the Protocol on Tribunal.

The Tribunal, starting with the third objection and upon evaluation of Articles 14 and 15, concluded that it indeed had jurisdiction in this case because the application was between legal persons and a natural person, on the one hand, and a SADC member state, on the other.

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Most states are quick to challenge the jurisdiction of the SADC Tribunal whenever matters are brought before it, but it is important to note that the jurisdictional extents and limits of the Tribunal are clearly set out in the Tribunal Protocol. The Protocol gives the Tribunal complete judicial independence. Moreover, the move away from political control of the Tribunal is solidified by Articles 15 and 18 in the Protocol, allowing natural and legal persons to bring cases to the Tribunal. Thus, a person can bring a case against another person under Community law directly to the Tribunal if the other party so agrees. Persons may also sue the Community over the legality, interpretation or application of Community law. In addition, a person may bring a member state to the Tribunal in connection with Community law or the state's obligations under such law once national remedies have been exhausted, thus making the Tribunal a final court of appeal for matters relating to Community law.

On the first preliminary objection, namely that the Tribunal had no jurisdiction because the respondents had not exhausted local remedies and had no standing to institute proceedings, the Tribunal acknowledged that the principle of exhaustion of local remedies was not unique to the Protocol, but was a common feature of regional and international conventions. According to the principle, individuals are required to exhaust local remedies in the state's municipal law before they can bring a case to a regional or international judicial body.

The respondents claimed that they had exhausted all available remedies, but did not place any evidence to support this claim before the Tribunal. They further stated that, since the deportation of the third respondent, they could not seek any remedy within the applicant's territory.

The Tribunal stated that deportation alone did not amount to denial of access to the courts within the applicant's territory. The Tribunal concluded that all legal avenues within Tanzania had not been explored to contest the deportation order, and that the third respondent could have hired the services of legal advisers in the applicant's territory without being physically present therein to challenge, by judicial review, the deportation order made against him. The Tribunal subsequently held that the respondents had not exhausted local remedies and, therefore, did not have locus standi to institute proceedings before the Tribunal. The Tribunal's decision affirmed an earlier decision it had made in *Mike Campbell (PVT) Ltd and Others v The Republic of Zimbabwe*,¹ where it reiterated the principle that the Tribunal's jurisdiction only came into effect after the exhaustion of local remedies.

It is important to note that the SADC Tribunal is a legal avenue of last resort and cannot be used to supplement the legal processes of a signatory state.

1 SADC (T) 2/2007.

United Republic of Tanzania v Cimexpan (Mauritius) Ltd, Cimexpan (Zanzibar) Ltd & Ajaye Jogoo

The Tribunal is already faced with challenges regarding the enforceability of and compliance with their decisions, and pronouncing on cases that have not been exhausted locally in a signatory state would only create further reason for signatory states to disregard the Tribunal's decisions with impunity. In the above-mentioned *Campbell* case heard by the Tribunal, not only did the executive arm of the Government of Zimbabwe publicly denounce the Tribunal's jurisdiction, but the courts also – in two separate judgments in Zimbabwe – found the Tribunal's decision not to be binding on the country.

In the first of these judgements, namely in *Gramara v Republic of Zimbabwe*,² the court was asked to determine whether the Tribunal was endowed with the requisite jurisdictional competence in the above-mentioned *Campbell* case; and secondly, whether the recognition and enforcement of the Tribunal's decision in that case would be contrary to public policy in Zimbabwe. The court held that since the Tribunal's decision challenged the decision of the Supreme Court of Zimbabwe, recognising the Tribunal's decision would undermine the Zimbabwean court's authority and would, therefore, contravene Zimbabwe's public policy – notwithstanding the international obligations of the Zimbabwean Government.

In the second judgement, i.e. in the case of *Etheredge v Minister of National Security*,³ the Zimbabwean court held that the Tribunal Protocol did not intend to create a forum that would be superior to the courts in the subscribing countries. The court held further that it had superior jurisdiction to the Tribunal.

The local courts' decisions in both of these cases are incorrect since the fundamental tenet of international law is that of *pacta sunt servanda*, namely that every party to a treaty in force is required to perform its obligations thereunder in good faith and, as a corollary to that obligation, such party is not permitted to invoke the provisions of its internal law, including its constitution, as justification for its failure to perform under such treaty.⁴ These cases nevertheless demonstrate the importance of the Tribunal in ensuring it acts within its jurisdiction and only grants *locus standi* to applicants within the strict parameters of the Protocol in order to have the Tribunal's judgments enforceable in the respective signatory states.

On the second preliminary objection to the rescission of the deportation order, the thrust of the applicant's objection involved issues pertaining to the admission and expulsion of aliens, and to expulsion resting within the powers of the state. The respondents also claimed that, during the process of the third respondent's deportation, he was subjected to torture.

2 HH 169–2009.

3 2009 HC 3295/08.

4 See Articles 2b and 27 of the Vienna Convention on the Law of Treaties (1969).

CASE REVIEWS

The Tribunal, after examining the definition of *torture* as defined in the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,⁵ decided that the respondents had not adduced any evidence to substantiate their allegations of torture or ill treatment that may have constituted an offence under international law. Therefore, the Tribunal was unable to determine whether the third respondent had in fact been subjected to torture or other cruel, inhuman or degrading treatment or punishment. The Tribunal further determined that the right to admit or to expel an alien remained squarely within the preserve of the applicant's sovereignty – subject to the observance of minimum human rights standards – for the treatment of aliens. The Tribunal subsequently held that the respondents had not substantiated their allegations of torture or ill-treatment so as to render the deportation order made against the third respondent an international delinquency.

The Tribunal's reference to the Convention Against Torture is noteworthy as it demonstrates that not only SADC Treaties and Protocols are applicable in the Tribunal: reliance can also be placed on other regional and international instruments.

5 United Nations General Assembly Resolution 39/46.

BOOK REVIEW

Trade Policy: A Handbook for African Parliamentarians; Commonwealth Secretariat, London: Commonwealth Secretariat, 2001

Trudi Hartzenberg*

Parliaments play a very important constitutional and democratic role in a modern democracy. The monitoring, review and oversight functions by Parliaments form an important part of the checks and balances essential to a robust trade policy process. The trade-policymaking process covers distinct areas of policy formulation, trade negotiations, implementation and management. Parliamentarians are accountable to their constituencies, and provide a window of transparency to the general public on trade policy strategy. In addition, of course, the country's constitution articulates the role of Parliament in the domestic incorporation of international (trade) agreements. As such, the specific role of the legislature is delineated from that of the executive in the policymaking process.

Parliamentarians come from different walks of life. This means that not all will be conversant with the current global and regional trade agenda or the specific instruments that are available to governments in pursuit of the specific objectives of trade policy.

This book, *Trade Policy: a Handbook for African Parliamentarians*, provides a very useful reference guide geared specifically to parliamentarians in Africa. The Handbook starts with the basics of international trade and covers the following questions:

- Why countries trade
- How governments can influence the impact that trade has
- How Parliament can play a role in ensuring that trade negotiations reflect the development priorities of the country, and
- How parliamentarians can monitor the trade policy process, ensure that trade agreements are incorporated into domestic law, and that the benefits of the agreements are realised.

The Handbook also offers a compact course on international trade theory and policy for parliamentarians. An important contribution made by the Handbook is its review of regional trade agreements, the scope and coverage of modern

* Trade Law Centre for Southern Africa (tralac).

BOOK REVIEW

regional trade agreements, and developments on Africa's regional integration

agenda. The Handbook is an accessible reference providing an important source of data on the various regional economic communities and the status of their trade and regional integration agendas. It deals very concisely with some of the important current regional integration challenges in Africa, including those concerning overlapping memberships of regional economic communities, the preoccupation with the linear textbook model of regional integration, and challenges associated with the implementation of regional trade agreements. The review of Africa's regional integration agenda presents parliamentarians with quality analyses that can inform their monitoring of developments in regional integration.

Another very useful contribution by the Handbook is its Glossary of Trade Terms. This collection of terms that are commonly used in trade policy debates is continually expanding as the trade agenda extends beyond the traditional scope of 'trade in goods'.

To remain relevant, however, the Handbook will have to be updated regularly. The Commonwealth Secretariat has sought to address the issue of relevance and updates by developing an online version of the Handbook. The latter is available on the Commonwealth Secretariat's website at www.thecommonwealth.org.

APPENDIX

PROTOCOL ON TRIBUNAL AND RULES OF PROCEDURE THEREOF



SADC Tribunal

* This document was sourced from the SADC Tribunal website (http://www.sadc-tribunal.org/docs/Protocol_on_Tribunal_and_Rules_thereof.pdf; last accessed 19 April 2011).

APPENDIX

PROTOCOL ON TRIBUNAL AND RULES OF PROCEDURE THEREOF

APPENDIX

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PREAMBLE

WE, the Heads of State or Government of:

The Republic of Angola
The Republic of Botswana
The Democratic Republic of Congo
The Kingdom of Lesotho
The Republic of Malawi
The Republic of Mauritius
The Republic of Mozambique
The Republic of Namibia
The Republic of Seychelles
The Republic of South Africa
The Kingdom of Swaziland
The United Republic of Tanzania
The Republic of Zambia
The Republic of Zimbabwe

DESIRING to conclude the Protocol on the Tribunal established by Article 9 as read with Article 16 of the Treaty,

HEREBY AGREE as follows:

PART I
Preliminary
ARTICLE 1¹
DEFINITIONS

1. In this Protocol terms and expressions defined in Article 1 of the Treaty shall bear the same meaning unless the context otherwise requires.
2. In this Protocol, unless the context otherwise requires;
 - "Appeal" means a dispute relating to the legal findings and conclusions of a panel established under a Protocol referred to the Tribunal for appellate decision by a party to a dispute in terms of Article 20A²;
 - "Member" means a Member of the Tribunal appointed in terms of Article 4 of this Protocol;
 - "President" means President of the Tribunal elected in terms of paragraph 1 of Article 7 of this Protocol;
 - "Rules" means the Rules of Procedure referred to in Article 23 of this Protocol.

¹ The original text of Article 1 was amended and replaced through Article 1 of Agreement Amending the Protocol on the Tribunal of 3 October, 2002.

² The definition of 'appeal' was added by Article 1 of the Agreement Amending the Protocol on the Tribunal of 17 August, 2007.

PART II
Organisation

ARTICLE 2
CONSTITUTION OF THE TRIBUNAL

The Tribunal of the Community (hereinafter referred to as "the Tribunal"), is hereby constituted in terms of Article 16 of the Treaty and shall function in accordance with the provisions of the Treaty and this Protocol.

ARTICLE 3
CONSTITUTION AND COMPOSITION

1. The Tribunal shall consist of not less than ten (10) Members, appointed from nationals of Member States who possess the qualifications required for appointment to the highest judicial offices in their respective Member States³ or who are jurists of recognised competence.
2. The Council shall designate five (5) of the Members as regular Members who shall sit regularly on the Tribunal. 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.
3. The Tribunal shall be constituted by three (3) Members; provided that the Tribunal may decide to constitute a full bench composed of five (5) Members.
4. The President shall be responsible for selecting the Members who shall constitute the Tribunal for the purpose of hearing any case brought before it.
5. On a proposal from the Tribunal, the Council may increase the number of Members.

³ Amended by Article 2 of the Agreement Amending the Protocol on the Tribunal of 3 October, 2002

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6. No two or more Members⁴ may, at any time, be nationals of the same Member State⁵.

ARTICLE 4

NOMINATION, SELECTION AND APPOINTMENT OF MEMBERS

1. Each Member State⁶ may nominate one candidate having the qualifications prescribed in Article 3 of this Protocol.
2. Due consideration shall be given to fair gender representation in the nomination and appointment process.
3. The Members shall be selected by the Council from the list of candidates so nominated by Member States⁷. Nominations for the first appointment shall be called within three (3) months, and the selection shall be held within six (6) months, of the date of entry into force of this Protocol.
4. The Members shall be appointed by the Summit upon recommendation of the Council.
5. Where a Member is appointed to replace a Member whose terms of office has not expired, the Member so appointed shall serve for the remainder of his or her predecessor's term.
6. Any appointment to fill a vacancy referred to in paragraph 5 shall be conducted within three (3) months of the vacancy occurring. The procedure referred to in the preceding paragraphs shall apply *mutatis mutandis*.

⁴ Amended by Article 2 of the Agreement Amending the Protocol on the Tribunal of 17 August, 2007

⁵ Amended by Article 2 of the Agreement Amending the Protocol on the Tribunal of 3 October, 2002.

⁶ Amended by Article 2 of the Agreement Amending the Protocol on the Tribunal of 3 October, 2002

⁷ Amended by Article 2 of the Agreement Amending the Protocol on the Tribunal of 3 October, 2002.

ARTICLE 5

SOLEMN DECLARATION

Every Member shall, before taking up his or her duties, make a solemn declaration in open session that he or she will carry out his or her duties independently, impartially and conscientiously.

ARTICLE 6

TENURE OF OFFICE OF MEMBERS

1. The Members shall be appointed for a term of five (5) years and may only be re-appointed for a further term of five (5) years. However, of the Members initially appointed, the terms of two (2) of the regular and two (2) of the additional Members shall expire at the end of three (3) years. The Members whose term is to expire at the end of three (3) years shall be chosen by a lot to be drawn by the Executive Secretary immediately after the first appointment.
2. In the event that the draw of a lot is not done pursuant to paragraph 1, for Members of the Tribunal whose term of office is to expire at the end of three years, their term of office shall be deemed to be extended for a period that would have elapsed between the date of first appointment and the date of making the draw⁸.
3. The Head of Legal Affairs Unit shall, in consultation with the Head of Human Resources Unit, advise the Executive Secretary to draw a lot as referred to in paragraph 1⁹.
- 4¹⁰ Subject to paragraph 5 of this Article, the Tribunal shall sit when required to consider a case submitted to it. The Members shall, therefore, not be appointed on a full-time basis.

⁸ The text of this paragraph was introduced by Article 2 of the Agreement Amending the Protocol on the Tribunal of 17 August, 2008.

⁹ The text of this paragraph was introduced by Article 2 of the Agreement Amending the Protocol on the Tribunal of 17 August, 2008

¹⁰ The paragraph was renumbered by Article 2 of the Agreement Amending the Protocol on the Tribunal of 17 August, 2008.

APPENDIX

5¹¹ On the recommendation of the President, the Council may at any time decide that the workload of the Tribunal requires that the Members should serve on a full-time basis. In that event:

- (a) existing Members who elect to serve on a full-time basis shall not hold any other office or employment; and
- (b) the Members subsequently appointed shall not hold any other office or employment.

ARTICLE 7 THE PRESIDENT

1. The Tribunal shall elect its President for a term of three (3) years.
2. If the President is temporarily absent or otherwise unable to carry out his or her functions, the other Members shall elect an Acting President.

ARTICLE 8 RESIGNATION AND TERMINATION OF OFFICE

1. The President may at any time resign his or her office by a letter to the Council delivered through the Executive Secretary.
2. A Member other than the President may at any time resign his or her office by a letter delivered to the President for transmission to the Council through the Executive Secretary.
3. No Member may be dismissed unless in accordance with the rules.
4. Notwithstanding the expiration of his or her term of office, a Member shall continue to hear and to complete those cases partly heard by him or her.

¹¹ The paragraph was renumbered by Article 2 of the Agreement Amending the Protocol on the Tribunal of 17 August, 2008.

ARTICLE 9

DISQUALIFICATION OR RECUSAL

1. No Member may exercise any political or administrative function, or may hold any political office or any office in the service of a Member State¹², the Community or an organisation or engage in any trade, vocation or profession or any other occupation which might interfere with the proper exercise of his or her judicial functions, impartiality or independence.
2. No Member may participate in the decision of any case in which he or she has previously taken part as an agent, a representative or an adviser, or as a member of a national or international court or tribunal or in any other capacity or in any matter in which a Member State¹³ of which he or she is a national is a party to a dispute before the Tribunal.
3. Any dispute regarding the provisions of paragraphs 1 and 2 of this Article shall be resolved by a decision of the Tribunal sitting without the Member concerned.

ARTICLE 10

IMMUNITY FROM LEGAL PROCEEDINGS

The Members shall be immune from legal proceedings in respect of anything said or done by them in their judicial capacity. They shall continue to enjoy such immunity after they have ceased to hold office.

¹² Amended by Article 4 of the Agreement Amending the Protocol on the Tribunal of 3 October, 2002.

¹³ Amended by Article 4 of the Agreement Amending the Protocol on the Tribunal of 3 October, 2002.

APPENDIX

ARTICLE 11 TERMS AND CONDITIONS OF SERVICE AND SALARIES OF MEMBERS

The terms and conditions of service, salaries and benefits of the Members shall be determined by the Council.

ARTICLE 12 REGISTRAR

1. The Tribunal shall appoint a Registrar who shall, subject to overall supervision of the President, be responsible for the day to day administration of the Tribunal.
2. The Tribunal shall employ such other staff as may be required to enable it to perform its functions.
3. The terms and conditions of service, salaries and benefits of the Registrar and other staff shall be determined by the Council on the recommendation of the Tribunal.

ARTICLE 13 SEAT OF THE TRIBUNAL

The Tribunal shall have its seat at a place designated by the Council, provided it may in any particular case sit and exercise its functions anywhere within the Community if it considers it desirable.

PART III
Jurisdiction

ARTICLE 14
BASIS OF JURISDICTION

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 States¹⁴ may conclude among themselves or within the community and which confer jurisdiction on the Tribunal.

ARTICLE 15
SCOPE OF JURISDICTION

1. The Tribunal shall have jurisdiction over disputes between Member States¹⁵, and between natural or legal persons and Member States¹⁶.
2. No natural or legal person shall bring an action against a Member State¹⁷ unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction.
3. Where a dispute is referred to the Tribunal by any party the consent of other parties to the dispute shall not be required.

¹⁴ Amended by Article 5 of the Agreement Amending the Protocol on the Tribunal of 3 October, 2002

¹⁵ Amended by Article 6 of the Agreement Amending the Protocol on the Tribunal of 3 October, 2002

¹⁶ Amended by Article 6 of the Agreement Amending the Protocol on the Tribunal of 3 October, 2002

¹⁷ Amended by Article 6 of the Agreement Amending the Protocol on the Tribunal of 3 October, 2002

APPENDIX

4. An appeal before the Tribunal pursuant to Article 20A shall be limited to issues of law and legal interpretations developed or covered in the report of a panel established in terms of the relevant Protocol¹⁸.

ARTICLE 16 PRELIMINARY RULINGS

1. Subject to the provisions of paragraph 2 of this Article, the Tribunal shall have jurisdiction to give preliminary rulings in proceedings of any kind and between any parties before the courts or tribunals of Member States¹⁹.
2. The Tribunal shall not have original jurisdiction but may rule on a question of interpretation, application or validity of the provisions in issue if the question is referred to it by a court or tribunal of a Member State²⁰ for a preliminary ruling in accordance with this Protocol.

ARTICLE 17²¹ DISPUTES BETWEEN MEMBER STATES AND COMMUNITY

1. Subject to the provisions of Article 14 of this Protocol, the Tribunal shall have exclusive jurisdiction over all disputes between Member States and the Community.
2. A dispute between a Member State and the Community may be referred to the Tribunal either by the Member State or by the competent institution or organ of the community.

¹⁸ The text of this paragraph was introduced by Article 3 of the Agreement Amending the Protocol on the Tribunal of 17 August, 2007.

¹⁹ Amended by Article 7 of the Agreement Amending the Protocol on the Tribunal of 3 October, 2002.

²⁰ Amended by Article 7 of the Agreement Amending the Protocol on the Tribunal of 3 October, 2002.

²¹ The original text of Article 17 was amended and replaced through Article 8 of Agreement Amending the Protocol on the Tribunal of 3 October, 2002.

ARTICLE 18²²
**DISPUTES BETWEEN NATURAL OR LEGAL PERSONS AND
COMMUNITY**

1. Subject to the provisions of Article 14 of this Protocol, the Tribunal shall have exclusive jurisdiction over all disputes between natural or legal persons and the Community.
2. A dispute between a natural or legal person and the Community may be referred to the Tribunal either by the natural or legal person or by the competent institution or organ of the Community.

ARTICLE 19
DISPUTES BETWEEN COMMUNITY AND STAFF

Subject 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.

ARTICLE 20
ADVISORY²³ OPINIONS

The Tribunal shall have jurisdiction to give advisory opinions, which may be requested by the Summit or by the Council in terms of paragraph 4 of Article 16 of the Treaty.

²² The original text of Article 18 was amended and replaced through Article 9 of Agreement Amending the Protocol on the Tribunal of 3 October, 2002.

²³ Amended by Article 4 of the Agreement Amending the Protocol on the Tribunal of 17 August, 2007.

ARTICLE 20A²⁴
APPELLATE JURISDICTION

1. The Tribunal shall have appellate jurisdiction in any dispute relating to the legal findings and conclusions of a panel established under a Protocol referred to it by a party to the dispute.
2. Only a party to a dispute, may appeal a panel report. Third parties which have notified the Registrar of a substantial interest in the matter pursuant to the Rules may make written submission to, and be given an opportunity to be heard by, the Tribunal.
3. The Tribunal may uphold, modify or reverse the legal findings and conclusions of the panel.
4. In cases of urgency, parties to a dispute and the Tribunal shall make every effort to accelerate the proceedings to the greatest extent possible.
5. An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.
6. The Tribunal may call an expert to address them during oral hearings on any matter for the Tribunal's benefit.
7. Disputes relating to the legal findings and conclusions of a panel established under the Protocol on Trade referred to the Tribunal for appellate review by a party to a dispute shall be dealt with in accordance with that Protocol.

²⁴ The text of Article 20A was introduced through Article 5 of the Agreement Amending the Protocol on the Tribunal of 17 August, 2007

ARTICLE 21
APPLICABLE LAW
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 States²⁵.

ARTICLE 22
WORKING LANGUAGES

The working languages of the Tribunal shall be English, Portuguese and French. The Council may determine that any other language be used as a working language.

PART IV
Procedure of the Tribunal

ARTICLE 23
RULES OF PROCEDURES

The rules annexed to this Protocol shall form an integral part thereof.

²⁵ Amended by Article 10 of the Agreement Amending the Protocol on the Tribunal of 3 October, 2002.

ARTICLE 24 DECISIONS

1. Decisions of the Tribunal shall be in writing and delivered in open court and shall state the reasons on which they are based.
2. Decisions of the Tribunal shall be taken by a majority.
3. Decisions and rulings of the Tribunal shall be final and binding.

ARTICLE 25 DEFAULT DECISIONS

1. The Tribunal may give a decision in default.
2. Before giving such decision the Tribunal shall satisfy itself that it has jurisdiction over the dispute and that the claim is well-founded in fact and law.
3. A party against whom a default decision is made may apply to the Tribunal for the rescission of such decision. The applicant shall set out the grounds for such application.

ARTICLE 26 APPLICATION FOR REVIEW OF A DECISION

An application for review of a decision may be made to the Tribunal if it is based upon the discovery of some fact which by its nature might have had a decisive influence on the decision if it had been known to the Tribunal at the time the decision was given, but which fact at the time was unknown to both the Tribunal and the party making the application; provided always that such ignorance was not due to negligence.

ARTICLE 27

REPRESENTATION BEFORE THE TRIBUNAL

1. The Member States²⁶ and the institutions of the Community shall be represented before the Tribunal by an agent appointed for each case. The agent may be assisted by an advisor.
2. Other parties shall be represented by an agent or other persons before a court of a Member State²⁷.
3. Such agents, advisers and representatives shall, when they appear before the Tribunal, enjoy the rights, privileges and immunities necessary for the independent exercise of their duties, under conditions laid down in the rules of procedure.
4. As regards such agents, representatives and advisers who appear before it, the Tribunal shall have the powers normally accorded to courts of law, under conditions laid down in the rules of procedure.

ARTICLE 28

INTERIM MEASURES

The Tribunal or the President may, on good cause, order the suspension of an act challenged before the Tribunal and may take other interim measures as necessary.

ARTICLE 29

LEGAL COSTS

Unless the Tribunal decides otherwise, each party to a dispute shall pay its, his, or her own legal costs.

²⁶ Amended by Article 11 of the Agreement Amending the Protocol on the Tribunal of 3 October, 2002.

²⁷ Amended by Article 11 of the Agreement Amending the Protocol on the Tribunal of 3 October, 2002.

ARTICLE 30

APPLICATION TO BE JOINED AS A PARTY

Should a Member State²⁸, natural or legal person consider that it or he or she has an interest of a legal nature that may affect or be affected by the subject matter of a dispute before the Tribunal, it or he or she may submit by way of a written application in such a form and manner as the rules of procedure may prescribe a request to be permitted to intervene.

ARTICLE 31

FEES AND LEGAL AID

Fees payable by parties other than Member States²⁹ and the granting of legal aid, within limits agreed by the budgetary authorities of the Community, may be prescribed by the rules.

ARTICLE 32

ENFORCEMENT AND EXECUTION

1. The law and rules of civil procedure for the registration and enforcement of foreign judgements in force in the territory of the Member State³⁰ in which the judgement is to be enforced shall govern enforcement.
2. Member States³¹ and institutions of the Community shall take forthwith all measures necessary to ensure execution of decisions of the Tribunal.
3. Decisions of the Tribunal shall be binding upon the parties to the dispute in respect of that particular case and enforceable within the

²⁸ Amended by Article 12 of the Agreement Amending the Protocol on the Tribunal of 3 October, 2002.

²⁹ Amended by Article 13 of the Agreement Amending the Protocol on the Tribunal of 3 October, 2002.

³⁰ Amended by Article 14 of the Agreement Amending the Protocol on the Tribunal of 3 October, 2002.

³¹ Amended by Article 14 of the Agreement Amending the Protocol on the Tribunal of 3 October, 2002.

territories of the Member States³² concerned.

4. Any failure by a Member State³³ to comply with a decision of the Tribunal may be referred to the Tribunal by any party concerned.
5. If the Tribunal establishes the existence of such failure, it shall report its finding to the Summit for the latter to take appropriate action.

ARTICLE 33

BUDGET

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.

PART V

Final Provisions

ARTICLE 34³⁴

SIGNATURE

This Protocol shall be signed by the Heads of Member State or Government, or their duly authorised representatives.

ARTICLE 35

RATIFICATION

[Repealed by Article 16 of the Agreement Amending the Protocol on the Tribunal of 3 October, 2002]

³² Amended by Article 14 of the Agreement Amending the Protocol on the Tribunal of 3 October, 2002.

³³ Amended by Article 14 of the Agreement Amending the Protocol on the Tribunal of 3 October, 2002.

³⁴ The original text of Article 34 was amended and replaced through Article 15 of Agreement Amending the Protocol on the Tribunal of 3 October, 2002.

**ARTICLE 36
ACCESSION**

[Repealed by Article 17 of the Agreement Amending the Protocol on the Tribunal of 3 October, 2002]

**ARTICLE 37³⁵
AMENDMENT**

1. Any Member State may propose an amendment to this Protocol.
2. Proposals for amendment to this Protocol may be made to the Executive Secretary who shall duly notify all Member States of the proposed amendments at least thirty (30) days in advance of consideration of the amendment by Member States but such period of notice may be waived by Member States.
3. Amendments to this Protocol shall be adopted by a decision of three quarters of all the Members of the Summit and shall become effective within thirty (30) days after such adoption.

³⁵ The original text of Article 37 was amended and replaced through Article 18 of Agreement Amending the Protocol on the Tribunal of 3 October, 2002.

ARTICLE 38: ENTRY INTO FORCE ³⁶

[Repealed by Article 19 of the Agreement Amending the Protocol on the Tribunal of 3 October, 2002]

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- 36 Note: The Protocol came into force on August 14, 2001 as a result of its incorporation into the Treaty. See the text of the Agreement Amending the Treaty of the Southern African Development Community. The operative provisions are Articles 18 and 32 which provide, respectively:

“Article 18 AMENDMENT OF ARTICLE 16 OF THE TREATY

Article 16 of the Treaty is amended, in paragraph 2, by inserting immediately after “Protocol” the words “which shall, notwithstanding the provisions of Article 22 of this Treaty, form an integral part of this Treaty” (emphasis added);

“Article 32 ENTRY INTO FORCE

This Agreement shall enter into force on the date of its adoption by three quarters of all members of the Summit.”

The Agreement was adopted and signed on August 14, 2001 by all of the SADC Member States at that time (14 in total). Consequently, the agreement came into force on that day and, as a result, the incorporation of the Protocol into the Treaty became effective on that day.

As a result the text of Article 16 paragraph 2 of the Treaty as amended reads as follows:

“Article 16 The Tribunal

2. 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 Summit.”

Article 22 of the Treaty provides for; inter alia, the ratification of protocols before they come in to force. It is this requirement that was waived by the Agreement Amending the Treaty of the Southern African Development Community for the Protocol on the SADC Tribunal.

ARTICLE 39
DEPOSITARY³⁷

1. The original texts of this Protocol and all instruments of ratification and accession shall be deposited with the Executive Secretary who shall transmit certified copies to all Member States.
2. The Executive Secretary shall register this Protocol with the Secretariat of the United Nations and the Commission of the African Union (AU).

³⁷ The original text of Article 37 was amended and replaced through Article 15 of Agreement Amending the Protocol on the Tribunal of 3 October, 2002.

IN WITNESS WHEREOF, WE, the Heads of State or Government, or duly authorised representatives, of SADC Member States have signed this Protocol.


Done at Windhoek, this 7th day of August 2000 in three original texts in the English, French and Portuguese languages, all texts being equally authentic.


REPUBLIC OF ANGOLA

REPUBLIC OF BOTSWANA


DEMOCRATIC REPUBLIC OF CONGO

KINGDOM OF LESOTHO



REPUBLIC OF MALAWI


REPUBLIC OF MAURITIUS


REPUBLIC OF MOZAMBIQUE



REPUBLIC OF NAMIBIA


REPUBLIC OF SEYCHELLES


REPUBLIC OF SOUTH AFRICA


KINGDOM OF SWAZILAND


UNITED REPUBLIC OF TANZANIA


REPUBLIC OF ZAMBIA


REPUBLIC OF ZIMBABWE

APPENDIX

Rules of Procedure

APPENDIX

These Rules are made in terms of Article 23 of the Protocol.

PART I

Preliminary

Rule 1

Title, Interpretation, Commencement

1. These Rules shall be known as the Rules of Procedure of the Southern African Development Community (SADC) Tribunal.
2. The Tribunal shall function in accordance with the provisions of the Treaty, the Protocol and these Rules.
3. These Rules shall form an integral part of the Protocol and shall come into operation when the Protocol enters into force.
4. In these Rules unless the context otherwise provides:
 - "Agent" means the person representing a party;
 - "Applicant" means a person, Member State or institution that has submitted an application to the Tribunal;
 - "Institution" means an institution of SADC established in terms of Article 9 of the Treaty;
 - "Member" means a Member of the Tribunal appointed in terms of Article 4 of the Protocol;
 - "Person" means natural or legal person;
 - "Pool of Members" means Members who are called upon to sit on the Tribunal whenever a Regular Member is unavailable in terms of Article 3 of the Protocol;
 - "President" means the President of the Tribunal elected in terms of Article 7 of the Protocol;
 - "Protocol" means the Protocol on Tribunal of SADC;
 - "Reference" means a request by a national court or tribunal to the Tribunal for a preliminary ruling on a matter;
 - "Regular Member" means a Member who sits regularly on the Tribunal in terms of Article 3 of the Protocol;
 - "Respondent" means the person, Member State or institution against whom proceedings have been brought by the applicant before the Tribunal;
 - "Special Agreement" means an agreement by parties to refer any dispute to the Tribunal;

APPENDIX

"Tribunal" means the Tribunal established in terms of Article 9 of the Treaty and constituted in terms of Article 2 of the Protocol.

Rule 2

Scope of Application

1. These Rules shall apply in all cases where the Tribunal has jurisdiction in terms of Article 16 of the Treaty and Articles 14 and 15 of the Protocol and it shall dispose of such matters in terms of these Rules.
2. Nothing 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.

PART II

Constitution and Functions of The Tribunal

A. MEMBERS OF THE TRIBUNAL

Rule 3

Solemn Declaration

1. Before taking up his or her duties, each Member shall in accordance with the provisions of Article 5 of the Protocol, in open session, make a solemn declaration to perform his or her duties impartially, independently and conscientiously and to preserve the secrecy of the Tribunal's deliberations.
2. The solemn declaration referred to in Article 5 of the Protocol shall be in accordance with the form prescribed in Annex 1.

Rule 4

Tenure of Office

1. The term of office of Members of the Tribunal shall begin to run from the date upon which he or she is appointed in accordance with Article 4 of the Protocol.
2. Apart from normal replacement or death, the duties of a Member shall terminate upon his or her resignation.
3. Where a Member resigns, the letter of resignation shall be addressed to the President of the Tribunal.

4. Upon notification of a Member's resignation a vacancy shall arise and the Member shall be replaced in accordance with Article 4 of the Protocol.

Rule 5

Precedence of Members

1. In terms of status, the President shall rank first and all the other members shall rank in precedence according to their seniority in office.
2. Where there is equal seniority in office, precedence shall be determined by age.
3. Retiring Members who are re-appointed shall retain their former precedence.

B. THE PRESIDENCY

Rule 6

Commencement of Term of Office

The term of office of the President shall begin to run from the date on which he or she is elected in accordance with Article 7 of the Protocol.

Rule 7

Election of the President

1. The regular Members of the Tribunal designated in terms of Article 3 of the Protocol shall constitute an electoral college for purposes of electing a President and shall designate one of their Members to preside over the election.
2. The election of the President in accordance with Article 7 (1) of the Protocol shall take place by secret ballot.
3. There shall be no nomination for purposes of the election. The Member of the Tribunal obtaining the votes of a majority of Members shall be declared elected, and shall enter forthwith upon his or her functions.

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Rule 8

Functions of the President

1. The President shall preside at all meetings of the Tribunal and shall direct the work and supervise the administration of the Tribunal.
2. In the event of the inability of the President to exercise his or her functions, such functions shall be exercised by a Member elected as Acting President from among the Members in accordance with the provisions of Article 7 (2) of the Protocol and the provisions of subrules 1,2, and 3 of Rule 7 shall apply mutatis mutandis.

Rule 9

Vacancy in the Presidency

If a vacancy in the Presidency occurs the electoral college referred to in subrule 1 of Rule 7 shall proceed to elect one of their Members in accordance with the provisions of Article 7 (1) of the Protocol.

C. THE REGISTRY

Rule 10

Election and Appointment of Registrar

1. Whenever there is a vacancy in the post of a Registrar, the Tribunal shall elect the Registrar by secret ballot from amongst nationals of Member States qualified to hold high judicial office in their respective States from a list referred to in Rule 11.
2. The person elected in terms of subrule 1 shall be appointed Registrar and he or she shall hold office in accordance with Article 12 of the Protocol.

Rule 11

Vacancy in the Office of Registrar

1. The President shall give notice of a vacancy or impending vacancy to Member States and shall fix a date for the closure of the list of candidates so as to enable nominations and information concerning the candidates to be received by the Tribunal in sufficient time.

2. Nominations shall indicate the relevant information concerning the candidates and in particular information as to age, sex, nationality, present occupation, academic qualifications, knowledge of languages, any previous experience in law, or work in international organisations.

Rule 12

Registrar to take Oath or Affirmation of Office

Before taking up his or her duties, the Registrar shall take an Oath or affirmation of office at a meeting of the Tribunal in accordance with the form prescribed in Annex 2.

Rule 13

Appointment of Assistant Registrar

1. The Tribunal shall appoint an Assistant Registrar and the provisions of Rule 11 shall apply to such appointment of Assistant Registrar.
2. Before taking up his duties, the Assistant Registrar shall take an oath or affirmation of office at a meeting of the Tribunal in accordance with the form prescribed in Annex 2.

Rule 14

Other Staff

The Tribunal may employ such other staff as may be required to enable it to perform its functions on proposals submitted by the Registrar. Such appointments may, however, be made by the Registrar with the approval of the President.

Rule 15

Duties of the Registrar

The Registrar, in the discharge of his duties, shall:

- (a) be the regular channel of communication to and from the Tribunal, and in particular shall effect all communications, notifications and transmission of documents required by these Rules and ensure that the date of dispatch and receipt thereof is readily available;

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- (b) keep in such form as may be laid down by the Tribunal, a General List of all cases, entered and numbered in the order in which the document instituting proceedings or requesting an advisory opinion are received in the Registry;
- (c) transmit to the parties copies of all pleadings and documents upon receipt thereof in the Registry;
- (d) communicate to the Government of the State in which the Tribunal is sitting and any other Governments which may be concerned, the necessary information as to the persons from time to time entitled to privileges, immunities or facilities;
- (e) be present in person or by his or her Assistant at meetings and sittings of the Tribunal and be responsible for the preparation of such minutes and records as necessary;
- (f) be responsible for the printing and publication of the Tribunal's advisory opinions, orders, decisions and of such other documents as the Tribunal may direct to be published;
- (g) be responsible for all administrative work and in particular for the accounts and financial administration in accordance with financial procedures prescribed by the Council;
- (h) deal with enquiries concerning the Tribunal and its work; and
- (i) have custody of the seals, stamps and archives of the Registrar.

Rule 16

Duties of Assistant Registrar

1. The Assistant Registrar shall assist the Registrar, act as Registrar in the latter's absence, and in the event of the office becoming vacant, exercise the functions of Registrar until the vacancy has been filled.
2. If both the Registrar and his or her Assistant are unable to carry out the duties of Registrar, the President shall appoint an official of the Registry to discharge those duties for such time as may be necessary.

Rule 17

Composition of The Registry

The Registry shall comprise of the Registrar, the Assistant Registrar and such other staff as are appointed in terms of Rule 14.

Rule 18

Organisation of the Registry

1. The Tribunal shall prescribe the organisation of the Registry.
2. Instructions for the running of the Registry shall be drawn by the Registrar with the approval of the President.
3. The staff of the Registry shall be subject to Staff Regulations drawn by the Tribunal and approved by the Council.

Rule 19

Removal of Registrar and Assistant Registrar

1. The Registrar may be removed from office only if, in the opinion of two-thirds of the Members of the Tribunal, 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.
2. Before a decision is taken under this Rule, the Registrar shall be informed by the President of the action contemplated, in writing, giving the ground therefore and any relevant evidence. The Registrar shall be afforded an opportunity to be heard at a meeting of the Tribunal before a decision is taken.
3. The Assistant Registrar may be removed from office only on the same grounds and by the same procedure as the Registrar.

D. SEAT, SESSIONS AND SITTINGS OF THE TRIBUNAL

Rule 20

Dates and Times of Sittings and Duration of Sessions

1. The dates and times of the sittings of the Tribunal shall be fixed by the President.
2. The duration of the sessions shall be determined by the President having due regard to the business before the Tribunal.

Rule 21

Deliberations of the Tribunal

1. All deliberations of the Tribunal shall be conducted in closed sessions and shall remain secret.
2. Only those Members who were present at the oral proceedings of the case may take part in the deliberations.
3. Every Member taking part in the deliberations shall give his or her opinion in writing and the reasons for it.
4. The conclusions reached by the majority of the Members of the Tribunal after the final deliberations shall be the decision of the Tribunal.
5. Any differences of view on the substance or wording or order of questions shall be settled by the Tribunal.

Rule 22

General List of Cases

The list of cases before the Tribunal shall be prepared by the President.

Rule 23

Vacations of the Tribunal

1. The vacations of the Tribunal shall be determined by the President who shall publish the days of vacation in each calendar year.
2. During such vacations the President shall exercise his or her functions at the Seat of the Tribunal either by himself or through any other Member designated by the President to exercise such functions.

3. In a case of urgency, the President may convene the Tribunal during the vacations.
4. The Tribunal shall observe the official public holidays of the Member State where it has its Seat and those of any Member State where it is holding its sittings during those sittings.
5. The President may in appropriate cases grant leave of absence to any Member after consultation with other Members.

PART III

Representation Before The Tribunal

Rule 24

Agents, Advisors and Other Representatives

1. Member States and Institutions shall be represented before the Tribunal by an agent appointed for each case.
2. The agent may be assisted by an advisor.
3. Other persons shall be represented by agents or other persons authorised by him or her or it.

Rule 25

Immunities and Privileges

1. Agents, advisors and other representatives shall, when they appear before the Tribunal enjoy immunity in respect of words spoken or written by them concerning the case or the Parties.
2. Agents, advisors and other representatives shall enjoy the following further privileges and facilities:
 - (a) their papers and documents relating to the proceedings shall be exempt from both search and seizure; in the event of a dispute the customs officials or police may seal the papers and documents and immediately forward them to the Tribunal for inspection in the presence of the Registrar and the parties concerned;
 - (b) they shall be entitled to:
 - (i) such allocation of foreign currency as may be necessary for the performance of their duties;
 - (ii) travel in the course of duty without hindrance.

Rule 26

Proof of Status.

In order to qualify for the privileges, immunities and facilities specified in Rule 25, agents, advisors and other representatives shall furnish proof of their status by producing:

- (a) an official document issued by the Member State or institution or party which they represent; and
- (b) a certificate signed by the Registrar whose validity shall be limited to a specified period. The period may be extended or curtailed by the Registrar according to the length of proceedings.

Rule 27

Waiver of Immunities

1. The privileges, immunities and facilities specified in Rule 25 are granted exclusively in the interest and proper conduct of proceedings.
2. The Tribunal may waive the privileges and immunities where it considers that the proper conduct of proceedings will not be hindered thereby.

Rule 28

Exclusion

1. Any agent, advisor or representative whose conduct towards the Tribunal, a Member or the Registrar is incompatible with the dignity of the Tribunal, or who uses his rights for purposes other than those for which they are granted may, at any time, be excluded from the proceedings by order of the Tribunal after having been given an opportunity to defend himself.
2. An order issued under this Rule shall have immediate effect.
3. Where an agent, advisor or representative is excluded from the proceedings, the proceedings shall be suspended for a period fixed by the President in order to allow the party concerned to appoint another agent, advisor or representative.
4. The Tribunal may rescind a decision made in terms of this Rule on application by the agent, advisor or representative on good cause shown.

PART IV

Languages

Rule 29

Working Languages

1. In terms of Article 22 of the Protocol the working languages of the Tribunal shall be English, French and Portuguese.
2. The Council may, at any time determine that any other language be used as a working language.
3. The working languages shall be used in the pleadings and oral submissions of the parties, in supporting documents and also in the record and decisions of the Tribunal.
4. Any supporting documents expressed in another language other than a working language of the Tribunal shall be accompanied by a translation into a working language. In the case of lengthy documents, translations may be confined to extracts unless otherwise ordered by the Tribunal on its own motion or at the instance of a party.
5. Where a witness or expert is unable to adequately express himself or herself in one of the working languages, the Tribunal may authorise him to give his or her evidence in another language and the Registrar shall cause any such evidence to be interpreted into a working language.

Rule 30

Translation

The Registrar shall, at the request of any Member, or of a party, arrange for anything said or written in the course of proceedings before the Tribunal to be translated into any of the working languages.

Rule 31

Authentic Text

The texts of documents drawn up in the working languages of the Tribunal shall be deemed to be authentic.

PART V
WRITTEN PROCEDURE

Rule 32

Institution of Proceedings

Proceedings before the Tribunal shall be instituted by either an application or a special agreement between the parties to the proceedings.

Rule 33

Proceedings Instituted by An Application

1. The application shall state:
 - (a) the name and address of the applicant
 - (b) the name, designation and address of the respondent
 - (c) the precise nature of the claim together with a succinct statement of the facts
 - (d) the form of relief or order sought by the applicant
2. The application shall state the name and address of the applicant's agent to whom communications on the case, including service of pleadings and other documents should be directed.
3. Any application which does not comply with the requirements of sub-rules 1 and 2 shall render the application inadmissible.
4. The original of the application shall be signed by the agent of the party submitting it.
5. The original of the application accompanied by all annexes referred to therein shall be filed with the Registrar together with five copies for the Tribunal and a copy for every other party to the proceedings. All copies shall be certified by the party filing them.
6. Where the applications seeks the annulment of a decision, it shall be accompanied by documentary evidence of the decision for which the annulment is sought.
7. An application made by a legal person shall be accompanied by:
 - (a) the instrument regulating the legal person or recent extract from the register of companies, firms or associations or any other proof of its existence in law;
 - (b) proof that the authority granted to the applicant's agent has been properly conferred on him or her by someone authorised for the purpose.

8. (a) If an application does not comply with requirements sent out in sub-rules 4 to 7; the Registrar shall prescribe a reasonable period within which the applicant is to comply with them whether by putting the application itself in order or by producing any of the documents.
- (b) If the applicant fails to put the application in order within the time prescribed, the Tribunal shall, after hearing the agents decide whether the non-compliance renders the application formally inadmissible.

Rule 34

Proceedings Instituted by Special Agreement

1. The notification may be effected by the parties jointly or by anyone or more of them. If the notification is not a joint one, a certified copy of it shall forthwith be communicated by the Registrar to the other party.
2. The notification shall be accompanied by an original or certified copy of the special agreement and shall to the extent not apparent from the agreement indicate the precise subject of the dispute and identifies the parties. It shall also be accompanied by five copies for the Tribunal.
3. The party making the notification shall state the name of its agent. Any other party to the special agreement, upon receiving from the Registrar a certified copy of such notification or as soon as possible thereafter shall inform the Tribunal of the name of its agent.

Rule 35

Service of Applications and Notifications

1. The Registrar shall transmit forthwith a certified copy of the application or notification to the respondent or other party to the proceedings.
2. All agents shall have an address for service at the Seat of the Tribunal to which all communications concerning the case are to be sent. Communications addressed to agents of the parties shall be considered as having been addressed to the parties.

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Rule 36

Defence

1. The respondent shall file a defence within thirty (30) days of service of the application or notification stating:
 - (a) the name and address of the respondent;
 - (b) the name and address of the respondent's agent;
 - (c) arguments of facts relied upon;
 - (d) the form of order sought by the respondent;
 - (e) the nature of any evidence offered by him or her or it in defence.
2. The time limit prescribed in this Rule may be extended by the President upon application by the respondent giving reasonable explanation for his or her or its inability to comply with the prescribed time limit.

Rule 37

Counter-Claim

1. A respondent may, as part of its, his or her defence make a counter-claim proven that the counter-claim is directly connected with the subject matter of the claim of the other party and that it comes within the jurisdiction of the Tribunal.
2. A counter-claim shall be made in the defence of the party presenting it and shall form part of the submissions of that party.

Rule 38

Reply and Rejoinder

1. The application initiating proceedings and the defence may be supplemented by a reply from the applicant and a rejoinder from the respondent provided that no new issues may be raised through a reply or a rejoinder.
2. The President shall determine the time-limits within which a reply and rejoinder, if any, are filed.
3. The introduction of any new facts may only be permitted by way of an amendment to the pleadings if it relates to matters that only came to the knowledge of the party seeking to introduce them in the course of the proceedings. In such a case, the Tribunal shall

allow the other party to answer to the new facts within time-limits prescribed by the President.

Rule 39

Joinder of Cases

The Tribunal may at anytime direct that the proceedings in two or more cases be joined for purposes of written or oral submissions or of the final decisions.

Rule 40

Documents

1. The Tribunal may require the parties to produce all documents and to supply additional information which the Tribunal considers desirable. Formal note shall be taken of any refusal.
2. The Tribunal may also require Member States and institutions not parties to the case to supply all information which the Tribunal considers necessary for the proceedings.

Rule 41

Closure of Pleadings

1. Pleadings shall close after the completion of written proceedings.
2. No further documents may be submitted to the Tribunal by either party after the closure of pleadings except with the consent of the other party.

PART VI

Commencement Of Oral Proceedings

Rule 42

Date of Hearing

1. Upon the closure of pleadings the case shall be ready for hearing. The President shall fix the date for the opening of oral proceedings.
2. The Tribunal may also decide, should the occasion arise, that the opening or the continuance of the oral proceedings be postponed.

Rule 43

Priority of Cases

1. When fixing the date for, or postponing the opening of the oral proceedings, the Tribunal shall have regard to the circumstances of each particular case including the urgency of a particular case.
2. Where the pleadings in several cases are completed simultaneously, the order in which they are to be dealt with shall be determined by the date of entry in the register of applications initiating them.
3. The President may in special circumstances order that a case be given priority over others.
4. The President may in special circumstances, after hearing the parties, either on his or her own initiative or at the request of one of the parties, defer a case to be dealt with at a later date.

Rule 44

Place of Hearing

The Tribunal may, if it considers it desirable, decide pursuant to Article 13 of the Protocol that all or part of the proceedings in a case shall be held at a place other than the seat of the Tribunal. Before so deciding the Tribunal shall ascertain the views of the parties.

Rule 45

Conduct of Proceedings.

1. The proceedings shall be held in public unless the Tribunal otherwise directs either on its own motion or the application of any of the parties. Such a decision may concern either the whole or part of the hearing and may be made at any time.
2. The proceedings shall be commenced and presided over by the President or an acting President who shall be responsible for the proper conduct of the hearing.
3. No reference may be made during the oral proceedings to the contents of any document which has not been produced as part of the pleadings or produced in accordance with Rule 40, unless the document is part of a publication readily available.
4. Without prejudice to the provisions of these Rules concerning the production of documents, each party shall communicate to the

Registrar, in sufficient time before the opening of the proceedings, information regarding any evidence which it intends to produce or which it intends to request the Tribunal to obtain. This communication shall contain a list of all names, nationalities, description and places of residence of the witnesses and experts whom the party intends to call.

Rule 46

Order of Proceedings

The order in which the parties will be heard, the method of handling the evidence and examining of any witnesses and experts, and the number of agents or representatives to be heard on behalf of each party, shall be settled by the Tribunal.

Rule 47

Questions by Members

The President and the other Members may in the course of the hearing put questions to the agents, representatives or advisors of the parties.

Rule 48

Calling of Witnesses

1. The parties may call any witnesses or experts appearing on the list communicated to the Tribunal pursuant to sub-rule 4, Rule 45.
2. If at anytime during the hearing a party wishes to call a witness or expert whose name was not on the list it shall so inform the Tribunal and the other party and shall supply the information required by Rule 45 sub-rule 4. A witness or expert may be called if the other party makes no objection or if the Tribunal is satisfied that his or her evidence seems likely to prove relevant.
3. Every witness called to testify shall take the oath or affirmation prescribed in terms of Annex 3.
4. Witnesses and experts shall be examined by the agents or representatives of the parties under the control of the President. Questions may be put to the witnesses and experts by the President and by other Members.

Rule 49

Summoning of Witnesses

1. (a) The Tribunal may either of its own motion or on application by a party direct that certain facts be proved by oral testimony.
(b) The order of the Tribunal shall set out the facts to be established.
2. The Tribunal may summon a witness of its own motion or on application by a party.
3. Where an application for the examination of a witness is made by a party, such application shall state precisely about what facts and for what reasons the witness should be examined.
4. (a) The witnesses shall be summoned by an order of the Tribunal stating the following information:
 - (i) the names, description and address of the witness;
 - (ii) the precise facts the witness is to be examined on;
 - (iii) in appropriate cases particulars of the arrangements by the Tribunal for the reimbursement of expenses incurred by the witness and the penalties for failure to comply with the other;
(b) The order shall be served on the parties and the witnesses.
5. (a) The Tribunal may make the summoning of the witness at the instance of a party conditional upon such party, depositing with the Registrar a sum sufficient to cover expenses of calling such a witness.
(b) The quantum of the deposit shall be determined by the Tribunal.
6. Once the witness is located the parties shall be notified of the date and time when the witness is to appear before the Tribunal.

Rule 50

Examination of Witnesses.

1. The Tribunal may impose a pecuniary penalty upon a witness who having been duly summoned fails to appear or having appeared, refuses without good reason, to give evidence or to take the oath or affirmation.
2. The imposition of the penalty shall not absolve the witness from

the obligation to give evidence. The Tribunal may order that further summons be served on the witness at such witness's own expense.

3. The Tribunal may cancel the pecuniary penalty imposed on a witness if the witness proffers a valid excuse. It may also reduce the pecuniary penalty at the request of the witness where the witness established that the penalty is disproportionate to his or her income.
4. Witnesses and experts may be heard on oath or affirmation taken in the manner laid down by the law of their country of residence.
5. (a) A Member State shall treat any violation of an oath or affirmation by a witness or expert in the same manner as if the offence had been committed before one of its courts with jurisdiction in civil proceedings.
(b) The Member State concerned shall prosecute the offender before its competent court at the instance of the Tribunal.

Rule 51

Expenses of Witnesses and Experts

1. Witnesses and experts called by the Tribunal on its motion shall be entitled to reimbursement of their travel and subsistence expenses. These payments may be made in advance by the Registrar.
2. In addition, witnesses and experts referred to in sub-rule 1 may claim compensation for actual loss of earnings or reasonable expert fees for their services.
3. The Registrar shall pay witnesses and experts their compensation or fees after they have carried out their respective duties or tasks.

Rule 52

Address by Parties

1. A party may address the Tribunal only through his or her agent, advisor or representative.
2. The oral statements made on behalf of each party shall be directed to the issues that still divide the parties, and shall not go over the whole ground covered by the pleadings, or merely repeat the facts and arguments these contain.

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Rule 53

Closure of Proceedings

After the agents or advisors or representatives have made their submissions the President shall declare the proceedings closed.

Rule 54

Expert Witness

The Tribunal may call an expert to address them during oral hearings on any technical matter for the Tribunal's benefit.

Rule 55

Resumption of Oral Proceedings

The Tribunal may after hearing the agents, order the resumption of the proceedings.

Rule 56

Record of the Proceedings

1. (a) The Registrar shall keep the record of every hearing.
(b) The record shall be signed by the President and by the Registrar and shall constitute an official record.
2. The parties may inspect the record at the Registry and obtain copies at their own expense.

PART VII

Decisions

Rule 57

Delivery of Decisions

1. When the Tribunal has completed its deliberations and adopted its decisions the parties shall be notified of the date upon which it shall be delivered.
2. The decision shall be delivered at a public sitting of the Tribunal.

Rule 58

Content of Decision.

1. The Decision shall contain, inter alia, the following information:
 - (a) the date on which and the place where it was delivered;
 - (b) the names of Members of the Tribunal who participated in the case;
 - (c) the names of the parties;
 - (d) the names of agents, advisors and representatives of the parties;
 - (e) a summary of the proceedings;
 - (f) the submissions of the parties;
 - (g) a statement of facts;
 - (h) the applicable law;
 - (i) the operative provisions of the decision;
 - (j) the decision in regard to costs; and
 - (k) the number and names of Members constituting the majority of the decision.
2. Every opinion written by any Member in any matter shall be attached to the decision of the Tribunal.
3. One copy of the decision duly signed and sealed, shall be placed in the archives of the Tribunal and other copies shall be transmitted to each of the parties.
4. The Registrar shall send copies of the decision to:
 - (a) the Council; and
 - (b) other States entitled to appear before the Tribunal.

Rule 59

Rectification of Decision

1. Without prejudice to the provisions relating to the interpretation of decisions, the Tribunal may, of its own motion or on application by a party made within two weeks after the delivery of its decision, rectify clerical mistakes, errors in calculation and other such matters.
2. Where the decision has been rectified in terms of sub-rule 1 Registrar shall duly notify the parties concerned of such rectification and they may file with the Registrar their written objections or observations within the period specified in the notice.

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3. The Tribunal shall give its decision on any objections filed under sub-rule 2.
4. The original of the rectification order shall be annexed to the original of the rectified decision and a note of the order shall be made in the margin of the original of the rectified decision.

PART VIII

Stay Of Proceedings

Rule 60

Application for Stay of Proceedings

1. At any stage of the proceedings, the Tribunal may at its own instance or on the application of a party to the proceedings or a party which not being a party to the proceedings establishes that it has substantial interest in the subject matter of the action or will be adversely affected by the decision in the matter, may order that the proceedings be stayed where:
 - (a) a national court is already seized of the matter and the same relief is sought;
 - (b) a party fails to give security for costs ordered by the Tribunal;
 - (c) a party to the proceedings dies or becomes mentally incompetent or insolvent;
 - (d) the respondent relies on a counter claim or set off which extinguishes wholly the applicant's claim;
 - (e) an agreement between the parties provides for submission of the subject matter of the action to arbitration and the other party pleads the question of going to arbitration first and applies for a stay of proceedings pending arbitration; and
 - (f) the Tribunal finds it appropriate.
2. Where the proceedings have been stayed for failure by a party to comply with an order of the Tribunal or a condition for the commencement or continuation of the action, they may be resumed once the order or condition has been satisfied.
3. The stay of proceedings shall take effect on the date on which the order or decision is taken.
4. Unless the stay of proceedings is for a specified period, no further action, including the filing of pleadings, shall be taken until an order

for the resumption has been made by the Tribunal.

5. The order for stay of proceedings for an indefinite period shall end on the date on which a decision for the resumption of proceedings is made.
6. From the date of resumption, time shall begin to run afresh for the purposes of the time limits as set out in these Rules.
7. The orders and decisions referred to in this Rule shall be served on the parties.

PART IX

Special Proceedings

Rule 61

Suspension of Operation

1. An application to suspend the operation of any measure adopted by a Member State or an institution made pursuant to the Treaty shall be admissible only if the applicant is challenging that measure in proceedings before the Tribunal.
2. An application for any other interim measure shall be admissible only if it is made by a party to a case before the Tribunal and relates to that case.
3. The application may be made at any time during the course of the proceedings in the case in connection with which the request is made.
4. The application shall state the subject-matter of the proceedings, the reasons for the application, the possible consequences if it is not granted and the interim measure requested.
5. The application for an interim measure shall take priority over all other cases.

Rule 62

Service of Application

1. The application referred in Rule 61 shall be served on the other party and the President shall prescribe shorter periods for the making of written or oral submissions by the parties.
2. (a) In urgent cases the President may grant, the application even before the submissions or observations of the other party have

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been submitted;

- (b) A decision under this sub-rule may be varied or cancelled even without any application being made by the other party.

Rule 63

President to Decide on Application

1. The President shall fix a date for the hearing of the application which will afford the parties an opportunity of being represented at the hearing.
2. The President shall either decide on the application himself or herself or refer it to the Tribunal.
3. If the President is absent or prevented from attending, the Acting President shall decide on the application in accordance with sub-rule 2.
4. Where the application is referred to the Tribunal, the Tribunal shall, in accordance with sub-rule 5 of Rule 61 postpone all other cases and shall give a decision on the application.

Rule 64

Decision on the Application

1. The decision on the application shall take the form of a reasoned order which shall be final and served on the parties forthwith.
2. The enforcement of the order may be made conditional on the lodging of security of an amount and nature to be determined in the light of the circumstances of the case.
3. Unless otherwise stated in the order, the interim measure shall lapse when final decision is delivered. The Tribunal may, however, revoke or modify any decision upon application of a party it, in its opinion, some change in the situation justifies such revocation or modification.
4. The order shall have only an interim effect without prejudice to the decision of the Tribunal on the substance of the case.

Rule 65

Rejection of Application

The rejection of an application for an interim measure shall not act as a bar to the party who made it from making a further application on the basis of new facts which were not within the knowledge of that party at the time the first application was made.

Rule 66

Suspension of Enforcement of Interim Measure

The Tribunal may suspend the enforcement of its decision on any measure adopted by a Member State or institution referred to in Rule 61 sub-rule 1 either of its own motion or upon application by a party affected by the decision for any good cause.

Rule 67

Preliminary Application

1. A party to the proceedings may apply to the Tribunal on a preliminary objection or preliminary plea not going to the substance of the case. Such application shall be made by a separate document.
2. The application shall set out the facts and law on which the objection is based, the form of order sought by the applicant and be accompanied by any supporting documents.
3. As soon as the application has been filed, the President shall prescribe the period within which the opposite party may file a written statement of its observations and submissions and any documents in support.
4. Unless otherwise decided by the Tribunal, further proceedings shall be oral.
5. (a) The Tribunal shall decide on the application.
(b) If the application is refused the President shall prescribe new time limits for further steps in the proceedings.

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PART X

Default Decisions

Rule 68

Decision by Default

1. Where a respondent on whom an application initiating proceedings has been duly served fails to file a defence to the application in the proper form within the time prescribed in the rules, the applicant may apply for decision by default.
2. The application shall be served on the respondent and the President shall fix the date for the hearing of the application.
3. (a) Before granting the application, the Tribunal must be satisfied that the application initiating the proceedings is properly before it, discloses a cause of action and that appropriate formalities have been complied with.
(b) A decision by default shall be enforceable in the same manner as any other decision or order of the Tribunal.

Rule 69

Application to Set Aside a Decision by Default

1. The respondent may apply to set aside a default decision.
2. The application setting out the grounds upon which it is made, must be made within one month from the date of service of the decision upon the respondent and must be filed in the form prescribed by Rule 38.
3. After the application has been filed, the President shall prescribe the period within which the other party may file its submissions.
4. In determining the application, the Tribunal shall consider:
 - (i) Whether the applicant had good and reasonable cause for his or her or its failure to comply or file a defence;
 - (ii) Whether the respondent has a reasonable defence on the merits of the matter;
 - (iii) Any other material fact that may affect the consequences of either setting aside the decision or confirm it.
5. The Tribunal may by way of decision set aside the default decision or dismiss the application.

PART XI

Third Party Proceedings

Rule 70

Intervention

1. A Member State, Institution, or person may apply to intervene in any proceedings.
2. An application in terms of this Rule shall be made as soon as possible and not later than the closure of the written proceedings or in exceptional cases, and upon good cause shown, not later than the date set for the oral hearing.
3. The application shall specify the following:
 - (a) the case to which it relates;
 - (b) the precise object of the intervention;
 - (c) the interest, which must be of a legal nature, which the intervener considers may be affected by the decision of the case;
 - (d) any basis for jurisdiction; and
 - (e) a list of documents in support of the application.
4. The application must be made against all parties to the proceedings.
5. The Tribunal shall decide whether or not to grant the application.
6. If the application to intervene in terms of this Rule is granted then the intervener shall be supplied with copies of the pleadings and documents produced and shall be entitled to submit a written statement within the time limit set by the Tribunal.

APPENDIX

PART XII

Application For Revision Of A Decision

Rule 71

When Application May be Made

1. Where a party discovers a fact which by its nature might have had a decisive influence on the decision of the Tribunal had it been known at the time that the decision was given, that party may make an application for revision of the decision of the Tribunal.
2. Rule 38 and Rule 41 shall apply to an application for revision of a decision.
3. The application shall also include the following:
 - (a) a copy of the decision being contested;
 - (b) the points upon which the decision is being contested;
 - (c) the facts upon which the application is based.
4. The application shall be made within 3 (three) months from the date upon which the facts on which the application is based came to the applicant's knowledge.
5. The application must be made against all parties to the case in which revision of decision is sought.

Rule 72

Powers of the Tribunal on Revision of Decision

1. The Tribunal shall, in closed session, consider the written observations of the applications and shall decide on the admissibility of the application.
2. If the Tribunal finds the application admissible, it shall consider the substance of the application and proceed to give its decision in accordance with Rules 57 and 58.
3. The original of the revised decision shall be annexed to the original of the first decision handed down by the Tribunal

PART XIII

Interpretation Of Decisions

Rule 73

Application for Interpretation

1. An application for interpretation of a decision may be made where there is a dispute as to the meaning and scope of a decision of the Tribunal.
2. The application must be made against all the parties to the case in which the decision was given.
3. The application must be in accordance with Rule 33.
4. In addition, the application shall specify:
 - (a) the decision to be interpreted; and
 - (b) the passages on which interpretation is sought.
5. The Tribunal shall give the parties an opportunity to submit their written observations and may hear oral submission from the agents, representatives or advisors.
6. The Tribunal shall give its decision in accordance with Rules 57 and 58 and the original of the interpreting decisions shall be annexed to the original of the decision interpreted.

Part XIV

Enforcement Of Decisions

Rule 74

Enforcement

A party applying for recognition or enforcement of a decision of the Tribunal in accordance with the provisions of Article 32(3) of the Protocol shall supply the following:

- (a) the duly authenticated original decision by the Tribunal; and
- (b) the original application or special agreement submitting the matter to the Tribunal.

APPENDIX

PART XV

Preliminary Rulings In National Courts Or Tribunals

Rule 75

Reference by National Court to the Tribunal

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.

Rule 76

Transmission of Decisions

The decisions of the Tribunal shall be communicated to the national court or tribunal concerned in the original version, accompanied by a translation where necessary, into one of the working languages of the Tribunal.

Rule 77

The Hearing

1. The Tribunal shall take account of the rules of procedure of the national court or tribunal which made the reference as regards representation and attendance of the parties to the main proceedings in the preliminary ruling procedure.
2. Where a question referred to the tribunal for a preliminary ruling is substantially identical to a question on which the Tribunal has already ruled, the Tribunal may after informing the court or Tribunal which referred the question to it and considering any observations submitted by the parties to it, give its reasoned order making reference to its previous decision.

3. (a) Without prejudice to sub-rule 2, the procedure before the Tribunal shall also include an oral part.
(b) The Tribunal may, however, decide otherwise, after considering the submissions referred to in sub-rule 2 of this Rule and acting on a report from a judge or judges of the court or tribunal which referred the case, provided that none of the parties has asked to present oral arguments.
4. The costs of the reference shall be determined by the national court or tribunal.
5. In special circumstances, the Tribunal may grant by way of legal aid, assistance for purpose of facilitating the representation or attendance of a party.

PART XVI

Costs

Rule 78

Party and Party Legal Costs

1. Each party to the proceedings shall pay its own legal costs.
2. The Tribunal may, in exceptional circumstances, order a party to the proceedings to pay costs incurred by the other party.

Rule 79

Costs of Proceedings

Proceedings before the Tribunal shall be free of charge, except that:

- (a) Where a party has caused the Tribunal to incur unnecessary considerable costs, the Tribunal may order that such party reimburse the expenses incurred by the Tribunal.
- (b) Where the copying or translation work is carried out at the request of a party, the costs shall, in so far as the Registrar considers excessive, be paid for by that party.

APPENDIX

Rule 80

Currency of Payment

1. Sums due to the Tribunal shall be paid in the currency of the Member State where the Tribunal has its seat.
2. Any sum due to any other person shall be paid in the currency of the Member State in which the expenses was incurred.
3. Conversion of currency shall be made at the prevailing market exchange rate ruling on the day of payment in the Member State where the Tribunal has its seat.

PART XVII

DISCONTINUANCE

Rule 81

Tribunal May Discontinue case

1. If at any time before the final decision on the merits has been delivered the parties, either jointly or separately notify the Tribunal in writing that they have agreed to discontinue the proceedings, the Tribunal shall make an order directing that the case be removed from the list.
2. If the parties have agreed to discontinue the proceedings in consequence of having reached a settlement of the dispute and if they so desire, the Tribunal shall record this fact in the order for the removal of the case from the list.
3. If the Tribunal is not sitting, any order under this Rule may be made by the President.

Rule 82

Discontinuance in Proceedings Instituted by Application

1. If in the course of proceedings instituted by means of an application, the applicant informs the Tribunal in writing that he or she or it is not continuing with the proceedings, and if, at the date on which this communication is received in the Registry the respondent has not as yet taken any step in the proceedings, the Tribunal shall make an order officially recording the discontinuance of the proceedings

- and directing the removal of the case from the list. A copy of such order shall be sent by the Registrar to the respondent.
2. If at the time when notice of discontinuance is received, the respondent has already taken some steps in the proceedings:
 - (a) the Tribunal shall fix a time-limit which the respondent may indicate whether it, he or she opposes the discontinuance;
 - (b) if no objection is made to the discontinuance before the expiration of the time-limits, acquiescence will be presumed and the Tribunal shall order the discontinuance of the proceedings and removal of the case from the list; and
 - (c) if objection is made, the proceedings shall continue.
 3. The powers of the Tribunal under this Rule may be exercised by the President when the Tribunal is not sitting.

PART XVIII

Service

Rule 83

Method of Service

1. (a) Any notice or other document which is required to be served by these Rules shall be served by registered post with a form for acknowledgement of receipt or by personal delivery of the copy against a receipt.
(b) A notice shall be deemed to have been served if there is proof of personal delivery or registered postage in terms of paragraph (a).
2. The Registrar shall certify copies to be served, save where the parties themselves supply the copies in accordance with sub-rule 5 of Rule 33.
3. All communications addressed or delivered, to the representatives of the parties or institutions shall be deemed to be addressed or delivered, as the case may be, to the parties or institutions.

APPENDIX

PART XIX

Time Limits

Rule 84

Time Limits

1. Any period of time prescribed in terms of these Rules for the taking of any procedural step shall be reckoned as follows:
 - (a) A period expressed in days, weeks or months or years shall be calculated from the moment at which an event occurs or an action takes place, provided that the day during which that event occurs or action takes place, shall not be counted as falling within the period in question;
 - (b) Where the period is expressed in months and days, it shall first be reckoned in whole months, then in days;
 - (c) Periods shall include official holidays, Saturdays and Sundays;
 - (d) Periods shall not be suspended during the judicial vacations.
2. If the period would otherwise end on a Saturday, Sunday or an official holiday, it shall be automatically extended until the end of the first following working day.

Rule 85

Extension of Time Limits

1. Any time limit prescribed under these Rules may be extended by whoever prescribed it.
2. No right shall be prejudiced in consequence of the expiry of a time limit if the party concerned proves the existence of unforeseeable circumstances.

PART XX

Advisory Opinions

Rule 86

Request for Opinion

1. (a) The Summit or the Council may request the Tribunal for an opinion in accordance with Article 16(4) of the Treaty and Article 20 of the Protocol.
2. (a) The President shall prescribe the period within which the Summit and the Council may submit their written submission.
(b) The written submissions shall be served on the Summit or the Council, as the case may be.

Rule 87

Deliberations on the Request

Deliberations on the Request shall be in closed session and shall remain secret.

Rule 88

Delivery of Opinion

When the Tribunal has completed its deliberations and adopted its advisory opinion, the opinion shall be read at a public sitting of the Tribunal.

Rule 89

Content of Opinion

1. The Advisory opinion shall contain:
 - (i) the date on which it is delivered;
 - (ii) the names of the Members participating;
 - (iii) a summary of the proceedings;
 - (iv) a statement of the facts;
 - (v) the reasons in point of law;
 - (vi) the number and names of the Members constituting the majority.

APPENDIX

2. Every advisory opinion written by any member in any matter shall be attached to the advisory opinion of the Tribunal.

Rule 90

Submission of Opinion

The opinion shall be communicated to the Summit and the Council.

PART XXI

Annexes

ANNEX 1

(In terms of Rule 3)

"I solemnly declare that I shall perform my duties and exercise my powers as Member of the Tribunal honourably, faithfully, impartially, independently and conscientiously".

SIGNATURE OF MEMBER

SIGNATURE OF PRESIDENT

SIGNATURE OF REGISTRAR

ANNEX 2

(In terms of Rule 12)

"I solemnly declare that I shall perform the duties incumbent upon me as Registrar of the Tribunal in all loyalty, discretion and good conscience and that I shall faithfully observe all the provisions of the Protocol and the Rules of the Tribunal".

SIGNATURE OF REGISTRAR

SIGNATURE OF PRESIDENT

ANNEX 3

(In terms of Rule 48)

"I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth".