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Another chapter in the SADC Tribunal saga: South African Court confirms the Tribunal's Costs Order

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Introduction

The South African Supreme Court of Appeal has, during the final week of September 2012,[1] handed down a judgment, giving effect to aspects of an earlier ruling by the Southern African Development Community (SADC) Tribunal against Zimbabwe for violating certain SADC Treaty obligations. The obligations in question concerned the protection of basic human and democratic rights.

This matter came before the South African Supreme Court of Appeal because Zimbabwe had appealed against an earlier judgment against it by another local court. The latter had granted a writ of execution (requested by private applicants) authorising the sheriff for the district of Cape Town to attach immovable properties belonging to Zimbabwe and to sell them in execution of the Tribunal's costs order against the government of Zimbabwe. The Zimbabwean appeal has now failed and unless it can convince the South African Constitutional Court to rule in its favour on the basis of a constitutional complaint, it will have exhausted all remedies available from the South African judiciary.

This adds another chapter to the saga around the SADC Tribunal in the aftermath of its rulings against Zimbabwe. The judgment explains a number of fundamental legal issues which are vital to the future of SADC. When the enforcement of those Tribunal decisions came before the SADC Summit,[2] Zimbabwe claimed that its sovereignty had been violated by the Tribunal's rulings. It later maintained that the Tribunal also lacked the necessary legal authority, inter alia because its Protocol had not entered into force as required. These issues have now been clarified by a senior national court and will have to be taken into account when the future of the Tribunal is discussed by the Summit. It is equally important to point out that the Summit (a political body) does not have the power to decide the future of the Tribunal. It has been established in terms of international agreements which can only be amended in terms of their own amendment clauses.

The SADC Summit (which is composed of the heads of state and government of the member states) suspended the functioning of the Tribunal in August 2010. It requested new studies on the Tribunal's "terms of reference" and its jurisdictional powers. The Summit has not accepted any of the

[1] *Government of the Republic of Zimbabwe v Fick & others* (657/11) [2012] ZASCA 122 (20 September 2012).
[2] In terms of Article 32 of the Protocol on the Tribunal failures to comply with orders of the Tribunal can be referred to the Summit for appropriate action.

subsequent reports; leaving SADC without a judicial organ and without any mechanism to settle legal disputes involving SADC community law.[3]

This decision of the South African Supreme Court of Appeal has also added an important new dimension to the development SADC community law, namely the enforcement, under certain conditions, of Tribunal decisions through the national courts of the member states. It is the first example of this kind. In terms of Article 32 of the Protocol on the Tribunal the assistance of a national court in a member state can be invoked to give effect to rulings of the Tribunal. This provision deals with the enforcement and execution of Tribunal decisions 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 State in which the judgement is to be enforced shall govern enforcement.*
>
> *2. 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 States concerned.*
>
> *4. Any failure by a 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.*

"Appropriate action" in terms of this provision can surely not include the suspension of the Tribunal!

This paper discusses this judgment of the South African Supreme Court of Appeal and some of its implications, including the reasons why Zimbabwe could not, in this instance, invoke state sovereignty as a defence against the jurisdiction of a South African court. The factual background and context are important and are mentioned in some detail (quoting directly from the judgment) in order to record important historical and legal facts.

[3] SADC "community law" refers to the legal sources mentioned in Article 14 of the Protocol on the Tribunal which grants the Tribunal jurisdiction over the interpretation and application of the SADC Treaty as well as the interpretation, application or validity of the Protocols and all subsidiary instruments adopted within the framework of the Community, and acts of the institutions of the Community.

Background

The SADC Tribunal is one of the main institutions of SADC.[4] Its role is to ensure that the Organization functions in a rules-based manner. It has the power to "*ensure adherence to and the proper interpretation of the provisions of this [SADC] Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it*.[5] It has been in operation since 2005.

The Tribunal's jurisdictional powers, matters of standing, composition and administrative issues are dealt with in a separate Protocol. It has its seat in Windhoek, where the Registrar has his office. The Tribunal has heard about 15 cases in the period up to 2010. With the exception of the two Zimbabwe cases, all of the cases dealt with individual complaints by SADC officials involving their conditions of employment.[6] There was one application by a private company involving customs procedures in the DRC but this matter could not be finalised because of the suspension of the Tribunal by the SADC Summit. No inter-state complaints have ever been lodged and disputes concerning regional integration and trade have never been ruled on.

There were two cases involving Zimbabwe. The Tribunal twice found that Zimbabwe had violated basic human rights obligations. The *Campbell* judgment (which has now come before the South African courts) involved the unlawful expropriation of private land without compensation. In another matter, the *Gondo* case, it was found that a provision of the State Liability Act of Zimbabwe was in breach of the SADC Treaty in so far as it provided that State-owned property was immune from execution, attachment or process to satisfy a judgment debt of the state.

These complaints were brought by Zimbabwean nationals. In both instances the Tribunal determined that Article 4(c) and Article 6(2) of the SADC Treaty required SADC Member States to comply with human rights, democracy and the rule of law.

The starting point of the present matter is Zimbabwe's land reform policy and especially the expropriation without compensation of private agricultural land. This policy was incorporated into Zimbabwe's Constitution in 2004, with effect from 16 September 2005. In the words of the judgment of the South African Supreme Court of Appeal (hereinafter the Court) the policy reflected in that

[4] Article 9, SADC Treaty.
[5] Article 16(1), SADC Treaty.
[6] This can be done in terms of Article 19 of the Protocol on the Tribunal.

section of the Constitution *"was elementary and to the point. In summary, agricultural land that had been, or would in the future be, identified in the Gazette was confiscated by the state, without compensation other than for improvements on the land. The section went on to oust the jurisdiction of the courts to challenge a confiscation. The respondents were amongst those whose farms were confiscated. Because the Constitution precluded challenges to the confiscation in the domestic courts the respondents, together with 76 others whose land had been confiscated, turned instead to the Tribunal for relief.''*[7]

When the lawfulness of the confiscation of private agricultural land in Zimbabwe came before the SADC Tribunal it found this policy to be in violation of the SADC Treaty.[8] The application was based on a claim that Zimbabwe had violated Article 4(c) and Article 6(2) of the SADC Treaty. These provisions provide as follows:

> *SADC and its Member States shall act in accordance with the following principles: … (c) human rights, democracy and the rule of law.*
>
> *SADC and Member States shall not discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture, ill health, disability, or such other ground as may be determined by the Summit.*

Zimbabwe was represented in the first proceedings before the SADC Tribunal by its Deputy-Attorney General and it did not object to the jurisdiction of the Tribunal at that point. *"What was said to have been a jurisdictional challenge was a dilatory objection taken to the proceedings on the grounds that they were premature, in that the applicants had not exhausted their domestic remedies. Needless to say, bearing in mind the constitutional ouster of domestic remedies in Zimbabwe, the objection was dismissed. At a stage in the proceedings an application by Zimbabwe for a postponement was refused whereupon Zimbabwe's representatives withdrew and failed to participate further."*[9]

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[7] Judgment, paras 6 and 7.
[8] Mike Campbell (Pvt) Ltd v Republic of Zimbabwe (2/2007) [2008] SADCT 2 (28 November 2008).
[9] Judgment, para 8.

On 28 November 2008 the SADC Tribunal found in favour of the applicants before it and made the following orders:

> *For the reasons given, the Tribunal holds and declares that:*
>
> *(a) by unanimity, the Tribunal has jurisdiction to entertain the application;*
>
> *(b) by unanimity, the Applicants have been denied access to the courts of Zimbabwe;*
>
> *(c) by a majority of four to one, the Applicants have been discriminated against on the grounds of race; and*
>
> *(d) by unanimity, fair compensation is payable to the Applicants for their lands compulsorily acquired by the Respondent.*

The SADC Tribunal further held and declared that:

> *(1) by unanimity, the Respondent is in breach of its obligations under Article 4(c)6 and, by a majority of four to one, the Respondent is in breach of its obligations under Article 6(2)7 of the Treaty;*
>
> *(2) by unanimity, Amendment 17 is in breach of Article 4(c) and, by a majority of four to one, Amendment 17 is in breach of Article 6(2) of the Treaty;*
>
> *(3) by unanimity, the Respondent is directed to take all necessary measures, through its agents, to protect the possession, occupation and ownership of the lands of the Applicants, except for Christopher Mellish Jarret, Tengwe Estates (Pvt) Ltd, and France Farm (Pvt) Ltd that have already been evicted from their lands, and to take all appropriate measures to ensure that no action is taken, pursuant to Amendment 17, directly or indirectly, whether by its agents or others, to evict from, or interfere with, the peaceful residence on, and of those farms by, the Applicants, and*
>
> *(4) by unanimity, the Respondent is directed to pay fair compensation, on or before 30 June 2009, to the three applicants, namely, Christopher Mellish Jarret, Tengwe Estates (Pvt) Ltd, and France Farm (Pvt) Ltd.*

Zimbabwe voiced its objection to the jurisdiction of the Tribunal on 7 August 2009 for the first time in a letter written by its Minister of Justice to the Registrar of the Tribunal.[10] This letter referred to the Protocol under which the Tribunal had been established, and amendments to the SADC Treaty. He claimed, amongst other things, that the Protocol was not binding upon Zimbabwe, in that it has not yet been ratified by the requisite two thirds of the total membership of SADC as provided for under Article 38 of the Protocol, that the amendment of the SADC Treaty had not yet entered into force (since it has not yet been ratified by two thirds of the total membership of SADC as required), and that it had not been ratified by Zimbabwe. In those circumstances, it was argued:

> *We hereby advise that, henceforth, we will not appear before the Tribunal and neither will we respond to any action or suit that may be instituted or be pending against the Republic of Zimbabwe before the Tribunal. For the same reasons, any decisions that the Tribunal may have made or may make in the future against the Republic of Zimbabwe are null and void."*[11]

The subsequent developments are summarized in the recent South African case as follows:

Consistent with its expressed intentions Zimbabwe failed to comply with the Tribunal's orders. On 7 May 2009 two of the applicants in those proceedings once again approached the Tribunal, on that occasion for a declaration that Zimbabwe was in breach and contempt of its order. Once again Zimbabwe chose not to participate in the proceedings. On 5 June 2009 the Tribunal found that Zimbabwe had indeed failed to comply with its order and ruled that it would report its findings to the Summit for "appropriate action" to be taken, as provided for by Article 32(5) of the Protocol on the Tribunal.

The Tribunal also ordered Zimbabwe to pay the applicants' costs, to be agreed between the parties or, failing agreement, to be determined by the Registrar of the Tribunal. The costs could not be agreed and they were determined by the Registrar at US$ 5 816,47 and ZAR 112 780,13.

In December 2009 the applicants applied to the North Gauteng High Court for leave to commence proceedings against Zimbabwe by edictal citation. The proceedings contemplated were an application for orders declaring the rulings made by the Tribunal to be registered in terms of Article 32 of the Protocol of the SADC Tribunal by the High Court of South Africa and for the costs as

[10] The Tribunal gave its judgment the previous November.
[11] Judgment para 10.

determined by the Registrar of the Tribunal. On 13 January 2012 that court authorized the requested proceedings.

The application was duly served and Zimbabwe entered a notice of its intention to oppose the application, but withdrew that notice on 1 February 2010. It alleges that after filing the notice of its intention to oppose it was *"advised that, as a sovereign state, it was judicious that it does not subject itself to the courts of another sovereign state, in this case the Republic of South Africa", and withdrew its notice on that advice."*[12]

The requested order was granted by default on 25 February 2010. The Government of Zimbabwe then finally decided to lodge an appeal before the South African Supreme Court of Appeal. This Court eventually dismissed the appeal application.

The Basis of the South African Court's Jurisdiction

In the matter before the South African Supreme Court of Appeal Zimbabwe relied on the South African Foreign States Immunities Act 87 of 1981. This Act provides in section 2 that *"a foreign state shall be immune from the jurisdiction of the courts of the Republic except as provided in the Act, or in any proclamation issued thereunder"*[13] and that *"a court shall give effect to the immunity conferred by this section even though the foreign state does not appear in the proceedings in question".* However, under Section 3 a foreign state forfeits that immunity in proceedings in respect of which the foreign state has expressly waived its immunity. In the case before the Supreme Court of Appeal Zimbabwe had forfeited such immunity by expressly submitting itself to the jurisdiction of the South African court in question.

It was also submitted that it was not competent for a South African court to recognise the order of the SADC Tribunal. These arguments were also dismissed. Both in England and in South Africa, it is well established that foreign judgments are recognizable and enforceable under the common law.

The Court noted, quoting the applicable authority: *"... A foreign judgment is not directly enforceable in South Africa; but if it is pronounced by a proper court of law and certain requirements are met any determination therein (for example of a party's rights or status) will be recognized and the judgment*

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[12] Judgment para 13.
[13] There are no such proclamations.

will in fact found a defence of res judicata if it would have founded such a defence had it been a South African judgment. In addition, an authenticated foreign judgment constitutes a cause of action and as such is enforceable by ordinary action in a South African court, including, where appropriate, an action for provisional sentence or for a declaratory order or for default judgment......The present position in South Africa is that a foreign judgment is not directly enforceable, but provided (i) that the court which pronounced the judgment had jurisdiction to entertain the case according to the principles recognized by our law with reference to the jurisdiction of foreign courts (sometimes referred to as „international jurisdiction or competence") (ii) that the judgment is final and conclusive in its effect and has not become superannuated; (iii) that the recognition and enforcement of the judgment by our Courts would not be contrary to public policy; (iv) that the judgment was not obtained by fraudulent means; (v) that the judgment does not involve the enforcement of a penal or revenue law of the foreign State; and (vi) that enforcement of the judgment is not precluded by the provisions of the Protection of Businesses Act 99 of 1978, as amended.[14]

The Court found no reason not to apply these same principles to an order of an international tribunal whose legitimacy had been accepted.

The Court went on to observe:

It is surprising that the jurisdiction of the Tribunal should be contested by Zimbabwe, bearing in mind that its Deputy-Attorney General raised no such objection when he appeared before the Tribunal on behalf of Zimbabwe, that Zimbabwe nominated one of its judges to membership of the body, and that its own high court has rejected the contention.[15]

The Court went on to state that it was *"..... expressly acknowledged in the affidavits filed by Zimbabwe,that Article 32(3) renders decisions of the Tribunal enforceable in the territories of all member states. By its adoption of that Article Zimbabwe clearly both waived any immunity it might otherwise have been entitled to claim from the jurisdiction of the courts of member states and agreed that orders of the Tribunal would be enforceable in those courts.* [16]

[14] Joubert (ed) *The Law of South Africa* (first reissue, 1993) vol 2, para 476; *Jones v Krok* 1995(1) SA 677(A) at 685B-E and *Purser v Sales* 2001(3) SA 445 (SCA) at 450 D-G; quoted in para 28 of the Judgment.
[15] Judgment para 31.
[16] Judgment para 44.

Another argument put forward on behalf of Zimbabwe was that the Protocol on the SADC Tribunal had not been made part of the law of South Africa in terms of Section 231 of the South African Constitution and could, therefore, not be given any effect. This point was also dismissed. *"While it was submitted that the Treaty and the Protocol has not been 'domesticated' in this country, in that it has not been ratified by Parliament, that submission misses the point. It is not that the instruments are being enforced – only that by its act Zimbabwe has submitted to the jurisdiction and enforcement. No grounds have been advanced why Zimbabwe should not be held to its express undertakings*.[17]

The applicable Provisions of SADC Community Law

One of Zimbabwe's arguments is that the Protocol on the Tribunal has never entered into force. The South African Supreme Court of Appeal has now dealt with this point and has provided a detailed exposition of the applicable SADC Law. This should settle the matter.

SADC was constituted under a Treaty signed in Windhoek in August 1992. It was subsequently ratified by the signatory states (including Zimbabwe) and came into force the following year.

Article 16 of the SADC Treaty provides for the establishment of the Tribunal, with the following powers and procedures:

> *1. The 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.*
>
> *2. The composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed in a Protocol adopted by the Summit. ….*
>
> *5. The decisions of the Tribunal shall be final and binding.*

Article 22 of the Treaty provides for the adoption of subsequent SADC Protocols. About 25 of them have been adopted, including the important Trade Protocol.[18] These Protocols are international agreements in their own right and their entry into force depends on instruments of ratification being deposited by two thirds of the SADC member states. Each Protocol shall be binding only on those

[17] Judgment para 45.
[18] See the tralac website (http://www.tralac.org/2011/03/24/sadc-legal-texts/) for a complete list of these Protocols.

states that are party to the Protocol in question.[19] This arrangement has certain unfortunate consequences. It means that different configurations of SADC member states are bound by different SADC rules. Such a fragmented approach undermines regional integration efforts. In the case of the jurisdiction of the Tribunal it became clear that a new solution had to be found. The Tribunal should be able to exercise its jurisdiction over all the SADC member states should they be involved in legal disputes involving SADC community law. The outcome was that the Tribunal Protocol was given a sui generis status. The Court's judgment explains this aspect in some detail; it has refuted Zimbabwe's argument on this point.

The Protocol on the Tribunal was signed in 2000. It provided for ratification by signatory states in accordance with their constitutional procedures. In the light of Zimbabwe's argument that this Protocol is not in force, the Court made the following findings: *"Whether the Protocol was ratified as required by Article 35 is neither here nor there. In 2002 it was amended, under the hand of the presidents or heads of government of all Member States (including Zimbabwe) by the deletion of articles 35 and 38. Whatever the position might have been before that, clearly the adoption of the amended Protocol, constituting its adoption by the Summit, made it binding upon Member States.*

After a detailed analysis of the various amendments to the SADC legal instruments the Court reaches the following conclusion:

The combined effect of these provisions is that an amendment to the Treaty is not concluded by way of ratification by Member States but is adopted by a decision of not less than three-quarters of the Summit, comprising the Heads of State or Government of all Member States. Furthermore, the decision of the Summit to adopt the amendment is binding on all Member States. The amendment becomes operative immediately thereafter and there is no need for any further ratification by Member States in order to bring the amendment into force and effect.......

The meaning and effect of the amending words are clear, to wit, the Protocol of the Tribunal forms an integral part of the Treaty without the need for its ratification by the Member States. To clarify this position and dispel any doubt on the matter, all the Member States, including Zimbabwe, concluded and signed the Agreement Amending the Protocol on the Tribunal on the 3rd October 2002. By virtue of Articles 16 and 19 of this Agreement, Articles 35 and 38 of the Protocol of the

[19] Article 22 (9) SADC Treaty.

Tribunal, which required ratification of the Protocol by two-thirds of the Member States, were repealed in toto, thereby obviating the need to ratify the Protocol........

On the 14th of August 2001, the Amendment Agreement was signed by 13 out of the 14 Heads of State or Government of the Member States, including Zimbabwe, thereby concluding the process of its adoption and entry into force. In my view, there can be no doubt whatsoever that the Agreement was duly adopted in terms of Article 36.1 of the Treaty and that it became binding upon all the Member States on the date of its adoption. It follows that as from that date, by virtue of Article 16.2 of the Treaty as amended, the Protocol of the Tribunal constituted an integral part of the Treaty and became binding on all Member States without the need for its further ratification by them. It also follows that the Republic of Zimbabwe thereupon became subject to the jurisdiction of the tribunal and that the jurisdictional competence of the Tribunal in the Campbell case, which was heard and determined in 2008, cannot now be disputed.

What will happen to the SADC Tribunal?

Zimbabwe has lost an important case before a national court of another SADC member state in an application which it brought in its own name. Unless it can have this matter reviewed by the South African Constitutional Court, the cost order against it will be executed. Zimbabwe's property in South Africa will be sold and the applicants will see some justice done.

Could Zimbabwe take this matter on "appeal" to a higher international forum? The only theoretical possibility would be to bring a case before the International Court of Justice (ICJ) in The Hague. Zimbabwe will then have to accept the jurisdiction of the ICJ and show that South Africa has violated its sovereignty in terms of the rules of Public International Law. For the sake of legal certainty that would be a positive development; it will bring clarity about the very same issues heard by the South African Supreme Court of Appeal. This possibility should actually be supported; it will enforce the rule of law. However, the prospect of a victory in The Hague is slim; the rules on sovereign immunity are clear. It is unlikely that Zimbabwe will pursue this avenue. The more likely outcome is that it will continue its campaign against the SADC Tribunal through the Summit with renewed vigour.

Such a development spells danger to the future of SADC, and not only because of the views of one particular member. Some of the other member states have shown sympathy for the argument that their sovereignty is under attack; at least as far as human rights issues are concerned. They fear that

they too may face claims before the Tribunal for human rights violations. This aspect requires careful consideration. It may be true that the SADC Tribunal was not designed as a regional human rights court and that SADC has never adopted a separate human rights protocol. This is hardly surprising. The fact of the matter is that the effective protection of human rights starts at home. A government which does not allow for the protection of human rights under its national constitution is unlikely to accept the jurisdiction of a supra-national human rights court. The answer to this particular issue would be to deal with the human rights aspect (and the effect of Articles 4 and 6 of the SADC Treaty) as a separate issue.

The remainder of the Tribunal's jurisdictional powers and the enforcement of rulings should be accepted and be improved. They are vital for the pursuit of rules-based regional integration in SADC. The power of the Summit to decide what "appropriate action" to take in instances of persistent violations of SADC law by member states should not include anything akin to what has happened thus far. The appropriate action contemplated under Article 32 of the Protocol on the Tribunal is obviously action to compel the offending state to mend its ways. Serious consideration should rather be give to adopt the "negative consensus" rule of the WTO when it comes to enforcement of judgments of the Tribunal.[20]

More serious damage might ensue if the Tribunal's future will be determined through the deliberations of the SADC Summit only. It is for all practical purpose a political forum where national interests are articulated and defended. SADC has no effective voice to speak on behalf of the collective. The additional flaw is that Summit decisions are taken on the basis of consensus.[21] The SADC rules do not contain guidelines for how consensus is to be reached; which allows individual member states to claim that they enjoy a veto right.

In light of the clear ruling of the South African Supreme Court of Appeal Zimbabwe will presumably now endeavour to have all the clarifications on SADC law and the status of the Tribunal annulled; including the power of national courts to implement aspects of the Tribunal's rulings.

Developments at the most recent Maputo SADC Summit in August 2012 give rise to further concerns. This Summit meeting refused to accept the report of the SADC Ministers of Justice and Attorneys General on the jurisdiction and terms of reference of the Tribunal which an earlier Summit meeting

[20] Rulings by WTO panels and the appellate body are adopted unless there is consensus not to adopt them.
[21] Article 10(9), SADC Treaty.

had requested. The political leaders of the member states in fact rejected the expert report of their own Ministers of Justice and Attorneys General. They referred the matter back to consider the same points raised earlier by Zimbabwe. These points are:

- That the mandate of the tribunal is too broad
- That the Tribunal' judgments would undermine the sovereignty of the member states
- That the entry into force of the Protocol on the Tribunal did not follow due process of law
- That this Protocol was not ratified by two thirds of the member states
- That there are legal implications for amending the Protocol without amending the SADC Treaty as it is currently an integral part of the Treaty; and
- That the definition and content of the SADC Law are ambiguous.[22]

What mandate this group of Attorneys General and Ministers of Justice will now execute and how they will respond to the latest Summit decision are unclear. Apparently the Summit will only accept a "report" which will confirm Zimbabwe's views. This member state (one of 15) has seemingly succeeded in convincing the other government leaders that the Tribunal constitutes a threat to their sovereignty too and that the only "expert" opinion which they should accept should be one which confirms this view.

This is a very unfortunate development and sketches a dark picture about the rule of law, the nature of rules-based regional integration and the meaning of sovereignty. It is an act of sovereignty to conclude international agreements and to accept international obligations. Once international agreements have been ratified and international adjudicating bodies have been established, the law in question should be respected. The SADC member states are also inconsistent. These very same countries have accepted the jurisdiction of e.g. the Dispute Settlement Understanding of the WTO and of other bodies with dispute settlement authority of which they are members. One presumes that this was done with the understanding that legal obligations agreed to between sovereign states are to be respected.

Sovereignty encapsulates those legal principles which confirm the formal equality of states. Respect for sovereignty means that states cannot be bound by international agreements unless they have

[22] Record of Proceedings of the Maputo Summit, p 36.

given their consent thereto. Another manifestation is that states enjoy jurisdiction over their own territory without interference by others. These basic tenets have not been violated by any Tribunal decision.

Sovereignty is a legal doctrine about respect for essential international law norms; not the protection of whatever policies governments may adopt. Wrongfulness under international law is objectively determined by measuring state behaviour against the applicable norms; whether flowing from treaties which are in force, jus cogens or applicable customary international law. And as the alleged perpetrators of a violation cannot be judges in their own case, a forum with the required mandate and independence has to rule on the application of the law. This is done by measuring state action against the applicable international legal obligations which the states in question have accepted. The judgment of the South African Supreme Court of Appeal has now confirmed this basic principle.

Concluding Observations: Why Regional Tribunals matter

Sound governance arrangements are vital for regional integration and development. Regional trade arrangements are not end in themselves; they have to facilitate commerce across borders in a manner which will advance development and improve the lives of people. This requires a particular approach and a number of elements must be in place; from appropriate policies to sound governance arrangements. A general rules-based approach is necessary in order to ensure predictability and certainty and to protect the rights of those involved in regional commerce and investment.

Governance is a collective term for those many aspects which determine how governments exercise their powers, what their laws and policies are about, how they implement these, and how they regulate, amongst other things, trade related practices. It also includes judicial review and oversight functions. When rights are violated appropriate remedies should be available. This entails, as a minimum, procedures and substantive rules on transparency, accountability, participation and the combating of corruption.

Institutions play a cardinal role in achieving good governance outcomes. The courts of law, including regional tribunals, play an essential role in this scheme of things. They should enjoy the necessary independence and have the power to rule on the application and interpretation of the applicable law.

African Regional Economic Communities (RECs) are based on detailed arrangements which include many legal instruments, as well as institutions such as secretariats and regional tribunals. This creates the impression of proper legal regimes being in place. The SADC Tribunal saga shows that reality is another matter. Since August 2010 a vital aspect of the SADC regime, the ability to enforce rights and obligations through the pronouncements of an independent tribunal, has been suspended. The present indications are that SADC might lose this Tribunal.

The legal basis for the Summit decisions has always been suspect. Changes to existing international legal instruments can only (lawfully) be effected by amending the agreements in question. This did not happen in the present instance. The Summit acted in an ultra vires manner when it adopted the decision to suspend the Tribunal. However, the effect has been clear; when the terms of the Judges (Members) of the Tribunal have not been renewed the Summit effectively destroyed the ability to enforce SADC rules.

There are no indications yet as to when and how the judicial function in the organization will be restored or what new arrangement, if any, might be established. The recent Maputo Summit of SADC (which convened in August 2012) had to discuss a report by the Ministers of Justice and Attorneys General on the jurisdiction of the Tribunal. The press report released after the Summit indicated that its jurisdiction to hear private complaints will be removed from the powers of the Tribunal.[23] Whether this is indeed the case, is not certain; the official decisions of the Summit are still to be published.

Should this become an official decision the correct procedure will have to be followed, the Treaty as well as the Protocol on the Tribunal will have to be amended. That will be a complicated process and can take a considerable period of time. But that is how changes to existing SADC law should be brought about. Such a process should be accompanied by public debate and parliamentary

[23] See the tralac discussion note on this matter published in its electronic newsletter of 22 August 2012: *What future now for the SADC Tribunal? A plea for a constructive response to regional needs*

discussion. Do the national parliaments and civil society structures in SADC have the will to demand respect for the applicable law and for democratic practices?

The failure to address these issues will be a serious blow to the rule of law in this region; and to efforts to establish rules-based governance in other arrangements now being negotiated in the format of the Tripartite FTA between the members of SADC, COMESA and the EAC.

The absence of national debates in the member states and in their parliaments, the silence of legal fraternities and civil society structures are other concerns. SADC seems to be suffering from a democratic deficit too. Clear and principled leadership as well as vigorous public debate are now required to set SADC on the right path.

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