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What has happened to the protection of rights in SADC?

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1. Introduction: Curbing the powers of the SADC Tribunal

For about the last year and a half a vital aspect of the Southern African Development Community (SADC) legal regime, the ability to enforce the rights and obligations in the legal instruments of this regional arrangement, has been suspended. The terms of the Judges (Members) of the Tribunal have also not been renewed. There are no indications yet as to when and how the judicial function in the organization will be restored or what new arrangement might be put in place. And there is no public debate about the issues at stake.

Since the Windhoek meeting of the SADC Summit in August 2010, the SADC Tribunal has not been allowed to hear any new cases. This is a consequence of decisions taken by the SADC Summit at is Windhoek Summit. At this meeting it discussed, amongst other matters, the recent rulings by the SADC Tribunal against Zimbabwe. Those judgments were not implemented. It was, instead, decided to commission a new study on the role, responsibilities and terms of reference of the SADC Tribunal.[1] This development was triggered by the rulings by the Tribunal that provisions in the SADC Treaty had been breached by the actions of the government of Zimbabwe. The *Campbell* case involved a national of Zimbabwe and his claim that his basic rights had been violated as a result of the expropriation, without compensation, of his private property. The SADC Tribunal became involved after all efforts at obtaining judicial protection through the courts of Zimbabwe had failed. In the later *Gondo* case the Tribunal again ruled against Zimbabwe for other violations of basic human rights and the failure to honour local judgments on compensation for the violation of private rights.

The SADC Summit decisions give rise to serious concerns about the rule of law in this organization and about the protection of rights. The decision to suspend the functioning of the Tribunal has resulted in the de facto amendment of the Treaty and Protocol on the Tribunal, but involving what is prima facie an ultra vires action on the part of the Summit. It does not have the power to suspend the judicial arm of SADC or any part of the Treaty. If changes to existing legal instruments become necessary they should be brought about by giving effect to the amendment provisions in the

[1] 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, 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.

applicable legal instruments. The SADC Tribunal is one of the main institutions of this organization and it derives its powers and legal status from the SADC Treaty, as further defined in its own Protocol.

When proposed changes go further and affect the rights of private parties, traders and investors in a rules-based trade regime there should be a proper debate about the essential issues at stake and the nature of any amendments. In many of the SADC member states national Parliaments are involved in the adoption of international agreements.[2] This is an important indication of the process involved in international law making and why the present debate about the future of SADC merits a comprehensive and open debate.

2. What does SADC provide for in terms of the Protection of Rights?

The SADC Treaty provides for an international organisation with legal personality. When the SADC Member States adopted the SADC Treaty they established a 'Community' under international law, including institutions with general and specific powers. The applicable legal instruments have the status of international law. The SADC Tribunal is responsible for a vital aspect of how this systems functions; it has to rule on all disputes regarding the application and interpretation of provisions in the legal instruments. It also enjoys jurisdiction over disputes involving certain rights of private parties.

The "General Undertakings" listed in Article 6 of the Treaty provide that member states "*shall take all steps necessary to ensure the uniform application of this Treaty*" as well as "*all necessary steps to accord this Treaty the force of national law*".[3] The literal meaning of Article 6(5) is that the Treaty needs to be given effect within the member states – which may require new legislation or other actions in order to comply with this requirement. National constitutions will indicate what will be required in particular countries. Under the type of arrangement foreseen by the SADC Treaty it should be possible for legal and natural persons to invoke the Treaty in domestic courts in appropriate instances. This is not happening because members have not respected these provisions.

[2] This is e.g. the case under Section 231 of the South African Constitution.
[3] Article 6(5). Treaty.

Part of the operational difficulty with SADC is that compliance with international obligations is not being properly monitored and there are no effective sanctions for non-compliance. SADC needs a mechanism to perform these functions. It should be recalled that members states have to respect another obligation, namely that they "*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*".[4]

The Treaty does provide, in principle, 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*".[5] 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 revisit the powers and functions of the Tribunal.

And there is an institutional weakness in the present arrangement. The Summit consists of the Heads of State or Government, and is SADC's supreme policymaking institution. Unless provided otherwise in the Treaty, Summit decisions are taken by consensus,[6] giving the member in violation of its obligations a veto over any sanctions. This is a major flaw in the system.

The SADC Tribunal plays a vital role in the functioning of SADC and this role should not be undermined. Article 16 of the Treaty 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."* The decisions of the Tribunal are final and binding.[7]

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.[8] Its jurisdiction is quite wide. Article 14 of the Protocol on the Tribunal deals with the "Basis of Jurisdiction", and provides that the –

[4] Article 17(1), Treaty. .
[5] Article 33(1), Treaty.
[6] Article 10, Treaty.
[7] Article 16(5), Treaty.
[8] Agreements to amend this Protocol were adopted in 2002, 2007 and 2008. See also Article 15(1) of this Protocol.

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.

Why has this progressive language not resulted in more impressive outcomes? 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.[9]

Why did the Tribunal never hear any trade disputes? The answer is not because no such disputes have ever arisen. 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.

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 formal disputes, whether by governments or other parties. Why is this so? There seems to be insufficient awareness about these provisions. It is almost as if the SADC 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

[9] The latter aspect is provided for by Article 19 of the Protocol on the Tribunal.

arrangements on trade remedies, for example.[10] 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 most member states, as Article 6 of the Treaty requires.[11] Another factor could be that trade disputes are perceived as inter-state disputes, although there have not yet been any efforts by private parties to test this assumption. And there is the historical reality and diplomatic tradition that African governments seldom 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. These are additional reasons why the expert report commissioned by the SADC Summit should be publicly discussed. The legal profession, the business community and academia in the member states have a direct interest in these issues and a responsibility to ensure that such a debate does take place.

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.*

[10] South Africa is an exception.

[11] 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.

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 constitutional obstacles to the domestic application of its judgments through "registration" 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.

3. Concluding Observations

The manner in which the present mater has been handled gives rise to serious concerns. There is no debate about the issues involved and no public information about the content of the expert report commissioned by the SADC Summit, which has been submitted in March 2011. Matters which ought to be discussed include the rights of private parties, traders and officials working for SADC institutions. No indications have been given as to when and how the present impasse will be resolved. Since March last year this matter is "under discussion" but only government officials are involved. What exactly they are deliberating about is not known. There are no indications that national parliaments, professional bodies or the business community are involved. No official response to the expert report has been formulated. These responses will presumably be for the eyes of the governments only.

There is an opportunity now to revisit the SADC legal instruments and to deal with a number of deficiencies which prevent this regime to function as a proper rules-based arrangement. One lesson to be learned is that effective regional 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. There should, in addition, be an independent forum to rule on the correct interpretation and application of the legal instruments at stake. The rulings of this forum should be binding on the parties involved and they should be implemented.

Some will probably argue that the issues at stake here are of a purely inter 'governmental' nature and therefore beyond public discourse. It would be very unfortunate if that approach prevails; the issues are far more complicated. The SADC regime involves many legal dimensions. The Trade Protocol is one example of a specific technical area calling for its own compliance arrangement. There are others such as investment and law enforcement where the same considerations apply. The different jurisdictional dimensions and the enforcement of SADC's legal instruments cannot be viewed as a one size fits all affair. The enforcement of a rules- based trade regime involves specific technical issues which have to be accommodated in the context of international trade regulation and the reality that governments do not trade; private parties do.

The Campbell and Gondo cases are about the protection of human rights in SADC and in Zimbabwe specifically. It may be that sui generis sensitivities arise as a result of these decisions and that certain governments are concerned about the implications of the Tribunal's judgments. The rulings against Zimbabwe concerned a country beset with its own political problems which pose another challenge to SADC. The international protection of human rights is a complicated matter in a region where the domestic protection of such rights is often lacking. However, the Tribunal cannot be blamed for having performed its judicial function. The expert report has analysed the Treaty provisions at stake and could find no fault with the Tribunal's reasoning. If states agree to clear obligations in binding international legal instruments they should respect the rules to which they have consented. And they should give effect to rulings by the judicial organ created to ensure compliance. International legal obligations should be taken seriously.

Right now the SADC member states are negotiating the establishment of the Tripartite Free Trade Area which will consist of 26 countries. In June last year these governments adopted a declaration and a set of negotiating principles indicating that they want to establish a proper legal arrangement among themselves. One of the draft legal instruments provides for dispute resolution. The present impasse in SADC demonstrates how important it is to design these legal regimes with due care and why respect for rules agreed to by the states involved is important. A rules-based system must provide for the recognition of the independence of the judicial function, for the effectiveness of judgments on the application and interpretation of legal instruments and for impartiality.

One of the institutional flaws in the SADC arrangement concerns the enforcement of decisions of the Tribunal. The governments of the member states have the final word and they take decisions on the basis of 'consensus'. If they are involved in formal disputes or are the defendants in cases before the Tribunal crises such as the present one will inevitably follow. And they will not only be about human rights issues.

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