ANALYSIS OF THE CHALLENGES FACING THE MANDATE AND ADMINISTRATION OF THE SADC TRIBUNAL

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ABSTRACT

The creation of the Southern African Development Community Tribunal is a commendable step towards pursuing regional integration, cooperation and development under the supervision and scrutiny of a judicial organ. This was achieved under the realisation that there can be no meaningful integration if there is no respect for the rule of law and a legitimate and effective dispute resolution mechanism in the SADC region. The suspension and review of the SADC Tribunal confirms that there are significant legal challenges to effective economic integration in Southern Africa. Accordingly, while a re-configuration of the legal and institutional framework along the lines alluded to in the paper will be valuable in facilitating integration, it will not standing alone lead to the attainment of that objective. More specifically, progress towards real integration will require a tightening of the legal framework to include an element of compulsion in relation to compliance with SADC Treaty obligations as well as an effective mechanism for securing such compliance. Agreement to such significant changes in the legal and institutional framework requires greater willingness on the part of member States to relinquish some of their economic sovereignty for the greater regional good. Such agreement will in turn be impossible without a significant strengthening of the political will on the part of the present political leadership in the region to make the difficult decisions upon which real regional economic integration depends.

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DEDICATION

To Pandu

DECLARATIONS

I, Shikongeni Ntinda, declare hereby that this study is a true reflection of my own research, and that this work, or part thereof has not been submitted for a degree in any other institution of higher education.

..... Date: .....

Shikongeni Ntinda

CHAPTER ONE

1. BACKGROUND

1.1. INTRODUCTION

The creation of the Southern African Development Community Tribunal (SADC Tribunal) was welcomed with eagerness and hopes within the SADC region and beyond, and has been regarded as a laudable step by SADC states towards pursuing regional integration, cooperation and development under the supervision and scrutiny of a judicial organ - in line with other African sub-regions[1]. Established under Article 9 of the Treaty establishing the Southern African Development Community (SADC Treaty), the SADC Tribunal is vested with the mandate of ensuring adherence to, and the proper interpretation of, the provisions of the SADC Treaty and its subsidiary instruments, and of adjudicating upon disputes arising out of the implementation of those instruments and the validity of acts of the Community's organs.[2] Article 16 of the SADC Treaty provides for the mandate of the Tribunal whilst the composition, powers, procedures, functions and related issues are provided for under the SADC Protocol on Tribunal and the Rules of Procedure. Since November 2005 the Tribunal has been operational and has handled several cases, with the bulk of complaints lodged against the Government of Zimbabwe, which refused to comply with the Tribunal's judgments and threatened to withdraw from the Tribunal, raising serious objections on its jurisdiction and legality. The SADC Council of Ministers was then tasked in August 2009

[1] For example; the East African Community, was originally established in 1967. The currently existing East African Court of Justice is established by Article 9(1) (e) of the East African Community Treaty as one of the organs of the Community.

[2] Adopted in 2000. Available at http.//sadc.int/English/documents/legal/protocols/tribunal.php?media=print. Last accessed on 21 March 2011.

with responding to Zimbabwe's objections and presenting a draft answering opinion. At the Jubilee SADC Summit in Windhoek, Namibia in August 2010, the regional Ministers of Justice/Attorneys-General had not completed their study by August 2010 but nonetheless recommended to the SADC Summit that independent consultants be vested with the task to undertake and complete, within six months from the decision of the Summit, "a review of the operations of the Tribunal with a view to strengthening it and improving its terms of reference". Additionally, it was determined that the Tribunal would not receive any new cases pending the completion of the review process. Those recommendations were adopted as a binding decision by the SADC Summit, which further did not renew the tenure of office of five members whose terms had expired and failed to replace them. In May 2011 the SADC Extraordinary Summit in Windhoek received and considered a report by a committee of the regional Ministers of Justice/Attorneys-General on the review of the roles, responsibilities and terms of reference of the Tribunal. Based on the content of the report, the Summit invalidated the overall mandate of the SADC Tribunal for a further 12 months. The aim is to give time to "a process aimed at amending the relevant SADC legal instruments pertaining to the Tribunal, in line with a final report from regional Ministers of Justice/Attorneys-General to be submitted in 2012."[3]

Whilst there have been mixed views over the legality of the process and the effect that it will have on the upholding of the rule of law and the independence of the judiciary in the region, lawyers and judges in the region have seen this as an opportunity for them to contribute towards the strengthening of the Tribunal.[4] Legal professionals and scholars in the SADC region have a strong interest in the effective and efficient functioning of the Tribunal as they

[3] Sasman, C. 2011. "SADC 'sabotaged' Tribunal", *The Namibian Newspaper*, 23 May 2011, p 3.
[4] Amongst others, is the SADC Lawyer's Association and the International Commission of Jurists.

are the ones who have a direct interface with the institution on behalf of the region's citizens. It is therefore important that as the SADC review process is underway, that key rule of law actors within the region be offered an opportunity to make an input into the review process. In observation of this, the paper will provide a comprehensive discussion of the significance and effectiveness of the Tribunal in administering justice, promoting regional integration, cooperation and development within the SADC region.

1.2. PROBLEM STATEMENT

International law and institutions serve as the principal framework for international cooperation and collaboration between members of the international community, at each level the task becomes progressively more complex as new actors and interests are drawn into the legal process.[5] The rules and principles of public international law and international organisations serve similar functions: to provide a framework within which the various members of the international community may cooperate, establish norms of behaviour and resolve their differences. The adjudicative function of international law knows no system of compulsory adjudication, it only has jurisdiction where the parties to the dispute have consented to the court's jurisdiction, for example, the International Court of Justice and the SADC tribunal. The same principle applies to arbitration tribunals.[6] There are other alternative methods of dispute resolution such as mediation, conciliation and negotiation, which are more attractive to some states. This is so as many states still refuse to accept adjudication as a method for resolving disputes between states, while those that do, are

[5] Dugard, J. 2005. *International Law, A South African Perspective*. Landswone: Juta & Co. p 455.
[6] Dugard, J. 2005:455.

mostly opposed to the extension of the Court's compulsory jurisdiction.[7] In some parts of the world the view prevails that legal disputes with serious political implications affecting vital political interests of states are not appropriate for judicial resolution.[8]

However, the increased interest in the judicial settlement of disputes between states has led to the establishment of several international courts with specialised jurisdiction[9], such as the SADC Tribunal, only for SADC member states. There is no doubt that a very practical reason for the effectiveness of international law is that it is based on common self interest and necessity. A good example of this is the recent boundary dispute between Namibia and Botswana over *Kasikili/Sedudu Island*[10], the agreement was referred to the Court by special agreement and although Namibia was not happy about the adverse decision, it did not hesitate to comply with the Court's judgment. International Courts have enjoyed a high level of effectiveness and efficiency in the administration of justice, which can be partly explained by the consensual nature to such Court's jurisdiction. Generally, states only consent to the court's jurisdiction in cases in which they are prepared to accept and enforce the Court's decision. However the administration and operation of International Courts, is not smooth and effective as it may seem, and the SADC Tribunal is no exception.

The institutionalisation of the Protocols in the SADC legal framework came as a realization of the fact that effective implementation of regional policies required more than just political will, but the existence of legally binding instruments and enforcement mechanisms such as

[7] Ibid.
[8] Ntinda, S. 2010. *Public International Law Assignment* 2. UNAM: Windhoek. p 1.
[9] See e.g. the International Tribunal for the Law of the Sea, the European Court of Human Rights, the Court of Justice of the European Union, the Iran-United States Claims Tribunal etc.
[10] 1999 ICJ Reports 1045.

the SADC Tribunal and its protocol.[11] Due to the predominance of legal pluralism in Southern Africa[12], the SADC tribunal is faced with establishing a sound regional jurisprudence for it member states. Even though the SADC Tribunal was operational from 2005, little or no development has happened to its jurisprudence. The first case to the Tribunal was in 2007/8, the case of *Ernest Francis Mtingwi v the SADC Secretariat*[13] in which the Tribunal had to hear a labour dispute which arose between Ernest F. Mtingwi, a national of Malawi, and the SADC Secretariat. The significance of this case lies only in that it marks the beginning of the Tribunals decisions. The real test to the Tribunal which involved a member state was the *Campbell v The Republic of Zimbabwe*[14], which tested the members respect for the rule of law, and which subsequently led to the suspension of the Tribunal.

The paper shall address comprehensively the challenges facing the operations of the SADC Tribunal, its role, responsibilities and terms of reference, in relation to the rule of law and international principles. Prime focus will in addition be given to: 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 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.

[11] Zimbabwe Human Rights 'Status and Meaning of Ratification of SADC Treaty and Tribunal Protocols' (2009) 2

[12] Ruppel O.C, Bangamwabo F. 2008."The SADC Tribunal: a legal Analysis of its Mandate and Role in Regional Integration". In Bosl A et al (Ed) *Monitoring Regional Integration in Southern Africa Yearbook.* Volume 8. pg 25. 'Due to the broad variety of applied legal systems on the African continent, African legal systems have always been an object of fascination to comparative lawyers as well as to legal ethnologists and sociologists.'

[13] SADC (T) 1/2007.

[14] SADC (T) Case No. 02/2007.

1.3. MAIN OBJECTIVES

The aim of the paper on the SADC Tribunal is to contribute to the prospect that the SADC Tribunal does not emerge from the review process as a weak and ineffective judicial institution, but that it emerges stronger, more vibrant and better placed to interpret the laws of the region and to effectively administer justice for all. This is also an opportunity for regional lawyers to contribute and raise the concerns that have been presented at various fora concerning the relevance and effectiveness of the Tribunal in administering justice in the region.

1.4. LITERATURE REVIEW

While the main focus of this academic research paper is to support the paper's own argument, the focus of the literature review is to summarize and synthesize the arguments and ideas of others on the same topic. Further, the review will assist in delimiting the research problem, seeking new lines of inquiry, avoiding fruitless approaches, gaining methodological insights, identifying recommendations for further research, and seeking support for grounded theory.

Starke[15] writes that 'international institutions are defined by reference to their legal functions and responsibilities, each such institution having its own limited field of activity. The constitutions of these bodies usually set out their purposes, objects, and powers in special clauses.' As international institutions are defined and limited by their constitutional powers,

[15] Starke, J. G. 1989. *Introduction to International Law*, Tenth Edition. London: Butterworths. p 601.

they differ basically from states as subjects of international law. In their case, problems such as those raised by the sovereignty or jurisdiction of states cannot arise, or at least cannot arise in the same way. Almost every activity is *prima facie* within the competence of a state under international law, whereas practically the opposite principle applies to an international organ, namely, that any function, not within the express terms of its constitution, is *prima facie* outside its powers. The international Court of Justice (ICJ) shares the same view;[16] 'whereas a state possesses the totality of international rights and duties recognised by international law, the rights and duties of an entity such as the organisation must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.' Thus no international body can legally overstep its constitutional powers. It is difficult to suggest a satisfactory classification of international institutions, according to Starke,[17] classification of such bodies according to function, for example as economic, political, social, etc, or even as judicial, legislative, and administrative, leads to difficulty owing to the overlapping of their responsibilities.' A suggested distinction is that of international institutions into those which are supra-national and those which are not. A supra-national body is generally considered to be one which has power to take decisions, directly binding upon individuals, institutions, and enterprises, as well as upon governments of the states in which they are situated, and which they must carry out notwithstanding the wishes of such governments. International bodies, not of the supranational type, can only act, or execute decisions by or through member states. The defect in this classification resides in the fact that the word 'supra-national' is one which lends itself so easily to misunderstandings.

[16] ICJ 1949, 180.
[17] Ibid.

Ruppel and Bangamwambo[18], submits that 'formal supranational bodies like the SADC Tribunal alone cannot create regional integration. Intergovernmental and inter-parliamentary actions are equally important and of common concern'. The European Union experience has demonstrated how such dispute settlement bodies can promote regional integration. As a supranational institution in the region, the SADC Tribunal is a part of a complex system of multilevel governance. The effectiveness of supranational action depends crucially on the strength of interdependence between the supranational and national levels.

Most commentators on the Tribunal concur that the main purpose of the SADC Tribunal is to integrate the southern African region, into one economical, social and political entity. Integration can be accelerated by the harmonisation of international rules and the development of the SADC Tribunal's jurisprudence. This is the process by which two or more states, sometimes under the auspices of an interstate or international organization, change their legislation relevant to some area of common concern to conform to their statutes and to facilitate compliance and enforcement across borders. States have been under the fear of loss of state autonomy, loss of identity, socio-economic disparity among members of a certain region, historical disagreements, lack of vision and unwillingness to share resources. However states must willingly work towards harmony, not only economical harmony, but also jurisprudential harmony of the legal systems. The SADC region is made up of different legal systems which define its legal pluralism. This calls for a preferred method of dispute resolution between parties or states from different or same jurisdictions at international courts or tribunals. Further, the Tribunal too has to ensure that there is respect of rule of law at community level. There can be no meaningful integration if there is no rule of law in the

[18] Ruppel, Bangamwabo. (2008:5)

region. As regard the principle of promotion and protection of human rights, the Tribunal has to facilitate the integration process through the recognition of the rights of individuals.

It is not necessary here to repeat all that has been written on the nature and characteristics of international institutions, particularly on the SADC Tribunal, the paper will therefore limit itself to the above preliminary considerations in order to clarify the general principles and challenges underlying the SADC Tribunal. The paper submits that proper development of the Tribunals jurisprudence can only be realised and accelerated if there is respect for the rule of law by member states; and agrees that one of the vital components for sustainability of regional integration processes is the legitimacy and effectiveness of the dispute settlement mechanisms. However, it is emphasised that any study on the challenges facing the operations of the SADC Tribunal, its role, responsibilities and terms of reference, will be deficient if it does not take primary consideration of the economic, social, cultural and political environment in which the Tribunal is operating.

1.5. RESEARCH METHODOLOGY

The methodological tool to be used in the paper and the appropriate approach taken to achieve the objectives of this paper is qualitative desk research. This intellectual activity is done in a systematic manner, by analysing the relevant literature on the legal principles and concepts that are discussed herein. The qualitative desk research methodology serves well the objectives that are emphasised, and will effectively guarantee the value of the conclusions drawn. The paper further recognises that a study of and research in law which concentrates on the textual or formal rules of law; Treaties, legal writings and decided cases, to the exclusion

of the socio-economic context in which the institution under investigation operates, is likely to give an incomplete and distorted picture of such institution. Thus, in order to reach a sound conclusion, focus is paid to the history, politics, economics, culture, religion, beliefs, practices and philosophies under which the Tribunal operates. Great regard is paid to the dynamic rather than to the static doctrinal aspects of the Tribunal. It is important to note that the SADC Tribunal is inoperative at the moment, thus the dynamics shall be deduced from the operation, decisions and opinions of the Tribunal.

CHAPTER TWO

2. THE OPERATIONS AND JURISDICTION OF THE SADC TRIBUNAL

2.1. INTRODUCTION

It is impossible to fully comprehend and appreciate the process of metamorphosis through which the SADC and its subsequent organs have passed without critically exploring the historical context and forces that coalesced in producing the birth of SADC's predecessor, the Southern African Development Co-ordination Conference (SADCC). The SADCC was established in 1980 by the independent states of the Southern African region, namely, Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe. In the years and months immediately preceding their embarking on this initiative, these countries had been unequivocal and unambiguous in their call and support for the imposition of comprehensive sanctions on apartheid South Africa by the international community. Logically, the calls and support for those sanctions originated from consensus within the political leadership of those countries that support from the international community in the form of sanctions was indispensible to the success of the liberation struggle against independence.

Established under Article 9 of the Southern African Development Community Treaty, the Southern African Development Community Tribunal became operational in 2005. The establishment of the SADC Tribunal is a major event in the history of SADC as an organisation and in the development of SADC law and jurisprudence. The Tribunal was

established in 1992 by Article 9 of the SADC Treaty as one of the institutions of SADC. The Summit of Heads of State which is the Supreme Policy Institution of SADC pursuant to Article 4(4) of the Protocol on the Tribunal appointed the members of the Tribunal during its Summit of Heads of State and Government held in Gaborone, Botswana, on 18 August 2005. The inauguration of the Tribunal and the swearing-in of the members took place on 18 November 2005 in Windhoek, Republic of Namibia. The seat of the Tribunal was designated by the Council to be Windhoek. Article 22 of the Protocol on the Tribunal provides that the working languages of the Tribunal shall be English, Portuguese and French.[19]

The SADC Protocol on the Tribunal and Rules of Procedure thereof circumscribes the Tribunal's jurisdiction. Article 16(1) of the SADC Treaty provides that the primary mandate of the Tribunal is as follows:

> 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.

The SADC Tribunal was set up to protect the interests and rights of SADC member states and their citizens, and to develop the community jurisprudence also with regard to applicable treaties, general principles and rules of public international law.[20] Subject to the principle of exhaustion of local remedies, the Tribunal has the mandate to adjudicate disputes between states, and between natural and legal persons of the Community (Protocol Art. 15(2)). In

[19] See http://www.sadc.int/tribunal Last accessed on 06/07/2011.

[20] Chidi, A.O. 2003. "Complementarity, Competition or Contradiction: The Relationship between the African Court on Human Rights and Peoples' Rights and Regional Courts in Eastern and Southern Africa". *Paper presented at the Conference of East and Southern African States on the Protocol Establishing the African Court on Human and Peoples' Rights*, Gaborone, Botswana, 9–10 December 2003, p 5.

Campbell v The Republic of Zimbabwe[21] the Tribunal raised the issue of jurisdiction *mero metu* where it ruled that it had jurisdiction since the dispute in this case involves a member state and a natural and legal person. The Tribunal has, however, made it clear that it is not competent to adjudicate in disputes involving only natural or juristic persons.[22] Further, the Protocol states that the Tribunal shall have jurisdiction over all matters provided for in any other agreements that member states may conclude among themselves or within the community and that confer jurisdiction to the Tribunal. Finally, the Tribunal has exclusive jurisdiction in disputes between organs of the community or between community personnel and the community (Protocol Art. 18-19). It is on this ground that the Tribunal exercised its jurisdiction in the case of *Ernest Francis Mtangwi v. SADC Secretariat*[23]. The dispute in this case arose between the SADC Community Secretariat and one of its staff members. Apart from jurisdiction in contentious proceedings, the tribunal also has advisory jurisdiction at the request of the Summit or the Council of Ministers (Protocol Art. 20). At this stage, it is worth noting that Article 16 of the SADC Treaty provides that the decisions of the Tribunal are final and binding.

It is trite law that the settlement of international disputes by judicial means is the exception and not the rule, in that, international law knows no system of compulsory adjudication; international tribunals only have jurisdiction where the parties to the dispute have consented to the court's jurisdiction. Ruppel and Bangamwambo[24] caution that;

> African states have historically resisted supranational judicial supervision of their sovereignty. The belief that a state is independent and free from any other exterior influence

[21] SADC (T) Case No. 02/2007.
[22] See the ruling in the case of Albert Fungai Mutize et al. v Mike Campbell (Pvt) Ltd et al (2008:4).
[23] SADC (T) Case No. 1/2007.
[24] Ruppel, Bangamwabo (2008:2).

> has stifled growth and the realisation of the interdependence among states has been rather slow. In the early days of decolonisation, economic problems to be faced by young independent African nations were explored and discussed. Consensus gradually emerged that the smallness and fragmentation of young and underdeveloped African markets constitute an obstacle to the creation of modern and competitive enterprises in the era of globalisation. It is a pressing reality that a century of change has tied the people of the earth in unprecedented intimacy of contact, interdependence of welfare and vulnerability.

Thus, it was agreed that new African countries should promote economic cooperation through regional integration. In this regard, two options were advocated: a pan-Africanist approach, that is, a regional continental arrangement comparable to the European Union model, or, alternatively, a narrow approach that will be built on sub-regional groupings and cooperation. Most African countries favoured the narrower approach of sub-regional economic integration and cooperation. It is against this backdrop that many sub-regional arrangements were put in place.[25] Southern Africa was not immune to the above developments and consequently joined forces in creating *inter alia* the Southern African Development Community. To ensure the effectiveness of its mandate there was a need for another instrument which primary objective was to adjudicate over disputes that might arise among the member states or in relation to the provisions of the SADC Treaty – a step forward, though tentative, to the achievement of a more internationally oriented judicial system. In light of the above, the jurisdictional scope of the SADC Tribunal, applicable laws in this jurisdiction, enforcement of its decisions, its judicial independence and impartiality, its role in advancing and protecting human rights and contributing to economic regional integration will be monitored.

[25] Ibid.

2.2. JURISDICTION OF THE TRIBUNAL

Jurisdiction of an International Court in a certain matter is always covered by the enabling Protocol or treaty. Special focus should be given to the Campbell case, whether the Tribunal has jurisdiction over the state of Zimbabwe? Firstly, The SADC Treaty was entered into by Zimbabwe on 17 August 1992. The Treaty was duly ratified thereafter by the Zimbabwean legislature on 17 November 1992. Subsequently, on 30 September 1993, the Treaty entered into force. The Government of Zimbabwe has, of course, at no time challenged the legality of its membership of SADC. Further, the Protocol to the SADC Tribunal is, in terms of article 16(2) of the Treaty, binding on all SADC Members. That article provides that the Protocol constitutes an integral part of the Treaty, rendering separate ratification thereof unnecessary. Thus, Zimbabwe is bound by the protocol by being a member to the SADC Treaty. Furthermore, Zimbabwe has during numerous stages in different proceedings before the Tribunal, formally conceded the Tribunal's jurisdiction over it;[26] during the first hearing of the Campbell case and in its affidavit. The Tribunal which is a designated SADC organ conferred by the SADC Treaty with the authority to interpret the provisions of the Treaty; has after careful consideration of its own jurisdiction, that it did have the competency to adjudicate cases against the Government of Zimbabwe. Its ruling in this regard is conclusive. The jurisdiction of the Tribunal is conferred by the Treaty and does not require consensual jurisdictional base before being exercised.

[26] Zimbabwe has also illustrated its acceptance of the Protocol's provisions by seconding a Supreme Court judge, Gowora JA, to the Tribunal.

In most international law cases, even though the jurisdiction of the court in the particular matter is well established, enforcement is not guaranteed. This indicates one of the shortcomings of international law, that it lacks effective and proper enforcement and executive machinery of its judicial decisions.

2.3. EXHAUSTION OF LOCAL REMEDIES RULE

A claim will not be admissible on the international plane unless the individual concerned has exhausted the legal remedies available to him in the state which is alleged to be the author of injury. According to Brownlie, this is a rule which is justified by practical and political considerations and not by any logical necessity deriving from international law as a whole.[27] However, this rule was recognised by the International Court Justice in the Interhandel Case as 'a well established rule of customary international law'[28] and by a Chamber of the International Court in Electronica Sicula Case as 'an important principle of customary international law'.[29] The exhaustion of local remedies rule ensures that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic system.

The exhaustion of local remedies rule is used in classic international law to protect state sovereignty against excessive infringement by state to state claims on behalf of private individuals. Although its existence is not in doubt and it is commonly applied in practice, its function is procedural; it is a question of admissibility and not of substance. The

[27] Brownlie, I. 1990. *Principles of Public International Law*, Fourth Edition. Oxford: Clarendon Press, p. 495.
[28] 1959 ICJ Reports 6 at 27.
[29] 1989 ICJ Reports 15 at 42 para. 50.

incorporation of the rule into human rights instruments has greatly influenced the development of human rights jurisprudence; this condition is most frequently invoked and contested by the parties before the international Courts. The issue of non-exhaustion of local remedies was raised in the first hearing of the Campbell Case. In fact, when the applicants in this case approached the SADC Tribunal seeking an interim order in terms of Article 28 of the Protocol as read with Rule 61(2) and (5) of its Rules of Procedure, the respondent state argued that the application was not properly placed before the Tribunal in that the applicants had not exhausted local remedies in terms of Article 15(2) of the Protocol. The court dismissed this contention in that it was irrelevant at this stage of the proceeding. It can also be argued that customary law and treaty law on the local remedies rule have become so intertwined in international legal practice that one cannot tell whether the recognition of the rule in customary law was based on its widespread inclusion in international treaties or whether the contractual recognition followed an already existing rule of customary law. But what is obvious is that the development of the rule in recent years has been dependent on judicial or quasi-judicial determination by international tribunals. Although one of the reasons for insisting on exhaustion of local remedies is to avoid potential conflicts between domestic and international courts or tribunals, where a right is not well provided for in domestic law such that no case is likely to be heard, potential conflict does not arise. Similarly, if the right is not well provided for, there cannot be effective remedies or any remedies at all. For example when there is a legislation that prevents any domestic Court from hearing a matter on a certain issue; like expropriation[30]. Such a remedy must also satisfy three criteria, namely: the remedy must be available, effective and sufficient.[31]

[30] Courts and scholars have propounded the so-called *reasonable possibility test* in order to assess the existence or otherwise of local remedies in any given jurisdiction. The reasonable possibility test holds that wherever a *possible* remedy exists, recourse must be had to it, even if this is in fact highly unlikely to be successful. As a rule, it is for the applicant (claimant) to prove that there are no effective remedies to which recourse can be had;

Article 15(2) of the Protocol on the SADC Tribunal obviates the need to pursue local remedies where one "is unable to proceed under the domestic jurisdiction". Similarly, the African Charter on Human and Peoples' Rights[32] 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 of the Constitution of Zimbabwe, 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.[33]

2.4. THE INTERFACE BETWEEN SADC LAW AND DOMESTIC LAWS

Article 21 of the Protocol specifically deals with the applicable law by the SADC Tribunal. It provides that the Tribunal shall apply the SADC Treaty, its Protocols and 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. While the Tribunal has the mandate to develop its own jurisprudence, it must also give regard to applicable treaties, general principles and rules of public international law and any rules and principles of the law applicable in member states. Ruppel and Bangamwabo submit that:

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no such proof is required if legislation exists which on the face of it deprives the private claimants of a remedy (Ruppel, Bangamwabo (2008: 12)).

[31] The criteria are explained further herein at 2.6.

[32] Article 50.

[33] Ndlovu, N. P. 2011. "Campbell v Republic of Zimbabwe: A moment of truth for the SADC Tribunal". *SADC Law Journal*, Volume 1, Windhoek: SADC Law Journal Trust, p 63.

> this exhortation indicates a clear desire for the Tribunal to influence the direction and speed of the integration process for the community. It also reflects a desire to create a truly supranational law applicable to the Community Member States: law that is now a pure reflection of the political agreements and consensus at the level of the heads of states in the region.[34]

The treaty law of SADC does not contain any provisions dealing with the relationship between community law and domestic law. In addressing this issue, the SADC Tribunal could, however, resort to Article 21 of its Protocol. As mentioned earlier, this provision permits the Tribunal to apply general principles and rules of public international law and any rules and principles of the law of states. It is submitted that this would include jurisprudence of other regional or international courts or tribunals. An assumption can be made that there is a common field in which the community or international and domestic legal orders can operate simultaneously in regard to the same subject matter. However, conflicts of hierarchy arise.

Corollary to the issue of applicable law is the interrelationship between SADC community laws and municipal laws. Differently put, in the event that there is a conflict or inconsistency between community law and domestic laws of member states, which law should prevail? The answer to this question also depends on the various national constitutions and the status (legal force) of conventional law in member states, and on the relationship between domestic laws and conventional law in particular.

[34] Ruppel, Bangamwabo (2008:18).

Dualist doctrine points to the essential difference of international law and municipal law, consisting primarily in the fact that the two systems regulate different subject matter. International law is a law between sovereign states; municipal law applies within a state and regulates the relations of citizens with each other and with the executive. Brownlie submits that, when municipal law provides that international law applies in whole or in part within the jurisdiction, this is merely an exercise of the authority of municipal law, an adoption or transformation of the rules of international law.[35] In case of a conflict between international law and municipal law the dualist would assume that a municipal court would apply municipal law. Monism is represented by a number of writers whose theories diverge in significant respects.[36] Monism takes the form of an assertion of the supremacy of international law even within the municipal sphere.[37] International law is seen as the best available moderator of human affairs, and also as a logical condition of the legal existence of states and therefore of the municipal systems of law within the sphere of the legal competence of states.[38] Some authors[39] have moved away from the dichotomy of monism and dualism. They submit that international and municipal law have a common field of operation. The two systems do not conflict as systems since they work in different spheres. Each is supreme in its own field. Under this theory of coordination, there is preference for practice over theory, and it is to the practice that attention will be given. Further, on the whole question of the relation between municipal and international law, theoretical constructions have probably done much already to obscure realities.

[35] Brownlie. (1990:33).
[36] Ibid.
[37] Some international law jurists, such as Kelsen, do not support the primacy of international law over municipal law. They contend that the validity of each system rest on a relation of interdependence rather than a hierarchical relation.
[38] Ibid, see also Oppenheim. 1955. *International Law*, Volume i, Eighth Edition. p 38.
[39] For example; Sir Gerald Fitzmaurice. 1957, 92 Hague Recueil. II. p 68-94.

As discussed above, the relation between international and municipal law is a complex issue, and 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.[40] This indicates the tendency by some SADC member states to give primacy to municipal law over international law. In this regard, Article 6(5) of the Treaty clearly instructs that; member States shall take all necessary steps to accord this Treaty the force of national law.[41]

2.5. REVIEW OF THE TRIBUNAL'S JUDICIAL DECISIONS

With regard to Article 24(3) of the Protocol as to the finality of decisions, the provision implies that there is no further instance of appeal within the legal regime of SADC to review a decision or ruling issued by the Tribunal. Regarding cases brought by natural or legal persons, the rule of exhaustion of local remedies does play a significant role in the context of the lack of an appeal instance. Taking into account that, in principle, a case can only be brought before the Tribunal if all available remedies under domestic jurisdiction have been exhausted, the Tribunal itself can in these cases be regarded as an instance of appeal, since a national court has already ruled on the case.[42] The fact that there is no appellate body in the strict sense does not mean that SADC Tribunal decisions cannot be subject to review at all. Article 26 of the Tribunal's rules of procedure provides as follows:

[40] This approach contravenes Article 27 of the Vienna Convention on the Law of Treaties.
[41] As to the Namibian approach in respect of the reception of international law into the national legal system, see: Erasmus, G. 1991. "The Namibian Constitution and the Application of International Law in Namibia". In Van Wyk. D, Wiechers, M, Hill, R. *Namibia Constitutional and International Law Issues*. Pretoria: Verloren van Themaat Centre for Public Law Studies. p. 81.
[42] Ruppel, Bangamwabo (2008:18).

> 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.

2.6. THE CONCEPT OF EXPROPRIATION UNDER INTERNATIONAL LAW

In October 2007, the first case related to Zimbabwe's agrarian land reform was lodged before the Tribunal in *Campbell v Republic of Zimbabwe*. In this matter, the plaintiff 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.[43] Land acquired in this manner vested full title in the state[44] without compensation to the dispossessed party, except for improvements effected on the land before it was acquired.[45] 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.[46] The government of Zimbabwe refused to recognise and enforce the judgment of the Tribunal in this case which subsequently

[43] 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.
[44] Section 16B(2)(C).
[45] Section 16B(2)(b).
[46] Section 16B(3)(a).

led to the suspension of the tribunal. It is thus imperative here to fully discuss the concept of expropriation under international law.

Expropriation is the compulsory taking of private property by the State. Initially, the definition of property was said to include all moveable and immoveable property, whether tangible or intangible, including industrial, literary and artistic property, as well as the rights and interests in any property.[47] A nation possesses an inherent right to nationalize or expropriate property belonging to foreign nationals and local citizens. A state incurs responsibility for injury to the property of her nationals, if a state arbitrarily confiscates the property of a national without paying compensation. In *Texaco Overseas Petroleum Company v. Libyan Arabian Republic*,[48] it was held that: 'The right of a State to expropriate or nationalize is unquestionable today. It results from international customary law, established as a result of general practices considered by the international community as being the law. The exercise of national sovereignty to expropriate is regarded as an expression of the State's territorial sovereignty. Territorial sovereignty confers upon the State an exclusive competence to organize as it wished the economic structures of its territory and to introduce therein any reforms which may seem to be desirable to it. It is an essential prerogative of sovereignty for the constitutionally authorized authorities of the State to choose and build freely an economic and social system. International law recognizes that a State has this prerogative just as it has the prerogative to determine freely its political regime and its constitutional institutions. The exclusive nature of such a right is in fact confirmed by the fact that in practice a decision to expropriate very often is made by the organ which is regarded as the supreme level in the hierarchy of State institutions.' The nationalisation,

[47] 1929 draft: "Responsibility of States", 23 American Journal of International Law, Special Supplement, 1929:131; 1953 draft: G.A.O.R. (8th session) Supp (No. 17) at 52, UN Doc. A/2630.
[48] (1977) 53 ILR 389.

expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which is recognised as overriding purely individual or private interests, both domestic and foreign.[49]

Nationalization which is discriminatory against nationals or foreigners has been regarded as being contrary to international law.[50] In the *Amoco case*,[51] although discrimination was acknowledged as being prohibited, it was held that it could be permitted and tolerated in certain circumstances such as being reasonably related to public purpose. In the Chorzow Factory case,[52] the Permanent Court held that: 'When expropriation happens unlawfully, reparation in the form of compensation is the necessary corollary of the violation of the obligations resulting from an engagement between States. The essential principle contained in the actual notion of an illegal act is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability have existed if that act had not been committed.' There is a notion that if compensation is paid, it must comply with the minimum international standard and that it must be 'prompt, adequate and effective'. Also, that such compensation must be assessed in the light of the circumstances peculiar to the particular case. In *Anglo-Iranian Oil case*,[53] the International Court of Justice held that 'effective compensation' means that the recipient of the compensation must be able to make use of it to be able to, say, use it to set up a new enterprise to replace the one that has been expropriated or to use it to such other purposes as he wishes. The idea of just compensation is understood as compensation equal to the full value of the expropriated assets. On this backdrop it is submitted that Section 16B of

[49] These requirements have been recognised in The Resolution on Permanent Sovereignty over Natural Resources 1803 (XVII) of 1962
[50] Dharmendra C. 2009. *Responsibility of States for Injury to Aliens*. School of Law: Christ university at 16
[51] ibid
[52] Factory at Chorzow (Claim for Indemnity) Case (Germany v. Poland) (Merits), (1928) PCIJ Ser. A, no. 17
[53] (1951) ICJ Report 81

Amendment 17 of the Constitution of Zimbabwe, is in direct defiance of principles of international law.

CHAPTER THREE

3. THE RECOGNITION, ENFORCEMENT AND EXECUTION OF THE TRIBUNAL'S DECISIONS

3.1. INTRODUCTION

SADC have commissioned a report with regard to the functioning of the Tribunal; a draft of the report entitled "*Review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal",* written by Lorand Bartels in his role as a Consultant with WTI Advisors, seems to have been released on 14 February 2011. According to undocumented information disseminated on the internet[54], it seems to recommend, among other things, the following:

- SADC Member States should ensure that they give the force of law to SADC law by amending national law;
- Member States should consider amending the SADC Treaty to state that SADC law is supreme over national law, including constitutional law;
- the Tribunal should be given power to determine its own Rules of Procedure;
- the Tribunal's Protocol should be amended to provide that membership and rights of Member States may be suspended, with the Summit taking account of the possible consequences of suspension; and

[54] See Peterson, L. E. 2011. "Fate of International Tribunal To Be Debated by Southern African Heads of State; Jurisdiction Over Investment and Human Rights Disputes At Issue". *Investment Arbitration Reporter of 13 May 2011.* As well as: Peterson, L. E. 2011. "Analysis: Consultant's Draft Report On SADC Tribunal Contains Much of Interest for International Disputes Specialists". *Investment Arbitration Reporter of 13 May 2011.*

- the Tribunal should be able to order remedies (including fines) for non-compliance. Such recommendations remind, obviously of the factors that have made the European Court of Justice so successful in the framework of economic integration in Europe[55].

However such recommendations should not ignore the socio-political realities under which the Tribunal operate. As stated earlier, so many states still refuse to accept adjudication as a method for resolving disputes between states, while those that do, are mostly opposed to the extension of the Court's compulsory jurisdiction.[56] In many parts of the world the view prevails that legal disputes with serious political implications affecting vital interests of states are not appropriate for judicial resolution. In the same light Gutteridge[57] states that "the laws and institutions must be examined in the light of their political, social or economic purpose, and regard must be paid to their dynamic rather than to their static doctrinal aspects". This view have been endorsed and emphasised by many other jurists. Stone[58] wrote that "we must study the history, the politics, the economics, the cultural back ground in literature and the arts, the religions, beliefs and practices, the philosophies, if we are to reach sound conclusions as to what is and what is not common". Thus any recommendations, especially those that concern States sovereignty should carefully accommodate the social, political and economic realities of Southern Africa.

3.2. LACK OF ENFORCEMENT BY DOMESTIC COURTS

[55] Van der Vleuten, A. 2010. "Explaining the enforcement of democracy by regional organizations - Comparing EU, Mercosur and SADC", *Journal of common market studies*, vol. 48, no.3, pp 737-758.
[56] Ibid.
[57] Gutteridge, 1949. *Comparative Law*, Second Edition, Cambridge, p 12.
[58] Stone, F. 1951. *The End to be Served by Comparative Law*. 25 Tulane L.Rev P 325.

While the SADC Summit's inactivity regarding the enforcement of the decisions by the Tribunal led to the suspension and review of the functions of the Tribunal, domestic courts were equally unwilling to enforce the decision in the *Campbell Case* in view of the political and legal challenges. It came certainly as no surprise that the courts in Zimbabwe rejected the request to enforce the SADC Tribunal decision in the Campbell Case. As a matter of fact a decision of the High Court of Zimbabwe declined the application to register the SADC decision for purposes of enforcement.[59] Judge Patel of the High Court held in his decision that although the SADC Tribunal had been properly constituted and had jurisdiction to hear *Campbell's case*, its decision could not be registered as it was contrary to public policy (*ordre public*).[60] According to this High Court Decision, the Supreme Court of Zimbabwe had confirmed the constitutionality of the land reform program, and registering the SADC Tribunal's judgement in Zimbabwe would undermine the Supreme Court's authority. Furthermore, as the SADC Tribunal decision was in contradiction to the Constitution as in force (Section 16B of the Constitution as introduced by Amendment 17 in 2005) the Court felt bound by the Constitution as supreme law of the land.

The SADC treaty, whilst holding that the decisions of the Tribunal are final and binding, prescribes that enforcement and domestication of inter alia, judgments of the Tribunal must take place in accordance with the local laws of the relevant member states. Member states are obliged to ensure that their local laws provide for the domestication of SADC Tribunal

[59] High Court of Zimbabwe (PATEL J), Gramara (PRIVATE) Limited and Colin Bailie Cloete v. Government of the Republic of Zimbabwe and Attorney-General of Zimbabwe and Norman Kapanga (Intervener), Opposed Application, Harare, 24 November 2009 and 26 January 2010. Available at: http://www.kubatana.net/docs/landr/high_court_patel_gramara_goz_100126.pdf; last accessed on 21 September 2011.

[60] It seems that in his report, Lorand Bartels seems to suggest that one could interpret the SADC Treaty and the Protocol on Tribunals as obliging Members to comply with SADC law and SADC tribunal decisions just as it is the case under the ICSDI Convention or the Treaty on European Union; see Luke Eric Peterson, Analysis: Consultant's draft report on SADC tribunal contains much of interest for international disputes specialists, Investment Arbitration Reporter of 13 May 2011.

decisions. Further, Zimbabwean common law allows for applications for the registration of international judgments. The court dismissed the application, it held that the SADC Tribunal did have the jurisdictional competence to adjudicate over the Campbell case and that such registration would be contrary to public policy of Zimbabwe. The rationale behind dismissing the application for registration seems to be that foreign judgments could not be recognized if they were contrary to public policy and prior judicial precedent, referring specifically to a judgment by the Supreme Court in the Campbell case. Addressing the argument that the applicants had a reasonable expectation that the Zimbabwean Government would abide by its international obligations the court held that the beneficiaries of land reform had a reasonable expectation that Government would effectively implement land reform which outweighed the other conflicting expectation.

As part of our jurisprudence; a domestic court called upon to implement the decision of an international or foreign judicial organ, like any decision-maker confronted with the task of carrying out a previous decision, is in sense always exercising a function of review. It will have to examine whether the decision can or should be implemented at all and whether the factual conditions for carrying it into effect are met.[61] Thus it will have to make sure that what is presented to it is a valid decision and that the party relying on it is entitled to its benefits *vis a vis* the other party. It will have to examine whether the decision should be implemented at this time by this organ and in the way demanded. The outcome of this process or review may be a decision to implement, to refuse implementation or to implement in a modified way. A generous and unrestrained exercise of these functions of review by the national judge is liable to introduce a strong element of instability into international

[61] Schreaner C. 1974. *The Implementation of Judicial Decisions by Domestic Courts.* London: Butterworths, p 153.

transactions. A judgment or award which is subject to an examination on the merits by a domestic court provides an option for states to reject such decisions on different reasons.

3.3. THE PROTOCOL ON THE SADC TRIBUNAL AND ENFORCEMENT OF DECISIONS

It is unfortunate that the first test case for the SADC Tribunal involved a highly complicated political issue, which influenced the dismissal of the registration application to a large extent. Article 32 of the Protocol addresses enforcement of Tribunal decisions; this is where the Tribunal's potential weakness lies. Article 32(1) provides that the law for the enforcement of foreign judgments in member states shall govern enforcement of Tribunal decisions. Article 32(2) of the Protocol obliges member states to immediately take all measures to ensure enforcement of decisions of the Tribunal. Article 32(4) of the Protocol provides that any failure by a State to comply with a decision of the Tribunal may be referred to the Tribunal and in terms of articles 32(5) the Tribunal is obliged to refer such failure to the Summit of SADC for appropriate action. This arrangement is not adequate and provides no clear enforcement possibilities for the Summit.[62] Article 41 of the UN Charter provides a list of possible sanctions which *inter alia* include complete or partial interruption of economic relations, interruption of rail, sea, air, postal, telegraphic, radio, and other means of communication, as well as the severance of diplomatic relations. Further possible measures could be the freezing of those assets belonging to the defaulting state that are to be found in the territory of the state which is the successful party, as well as in that of third states, or the

[62] In contrast, primary enforcement of ICJ orders is covered by Article 94 (2), which gives the Security Council a range of options to compel or encourage compliance. These options are recommendations for specific measures that may include simple appeals for compliance and other peaceful options, like a request to the World Bank to withdraw funds from that country.

suspension of voting rights or other rights and privileges.[63] The ambiguity of the Protocol on SADC Tribunal should be addressed on the issue of possible coercive measures or sanctions. International legal arrangements can never be effective if states, party to international agreements, can escape their international obligations by invoking rulings of domestic courts in their favour. A useful example is the La Grand case[64], in which the US Supreme Court disregarded an ICJ order to stay the execution of a German national in Arizona. The Supreme Court ruled that, with regard to the action against the United States, which relies on the ex parte order of the International Court of Justice, there are imposing threshold barriers. First, it appears that the United States has not waived its sovereign immunity, and that the Vienna Convention did not grant rights to individuals, only to states; thus the convention was meant to be exercised subject to the laws of each state party. Thus it remains a point of contention whether the Security Council or the SADC Summit could act to enforce orders in such circumstances, unless it is in a position to determine the existence of a threat to international or regional peace and security. This makes the point that reaction to adverse ICJ or SADC Tribunal decisions shows that non-compliance does not always justify sanctions[65]. Albania, Argentina, Guinea-Bissau, Iran, Malaysia, Morocco, Nigeria, Romania, and Thailand have all ignored ICJ rulings without incurring Security Council sanctions[66].

[63] Ruppel, Bangamwabo (2008:22).
[64] LaGrand Case, Germany v. United States of America, June 27, 2001.
[65] However, sanctions can be imposed especially if the atrocities were committed against the 'Super powers'. In the *Lockerbie case,* the US and UK (joined by France) presented the case before the UN Security Council and the General Assembly. In January and March 1992, the Security Council adopted two resolutions on this matter: the first, Resolution 731, urged Libya to respond fully and effectively to the requests of the US, the UK and France (SC Res. 731 1992). The second, Resolution 748, imposed economic sanctions on Libya (SC Res. 748 1992). Further sanctions were imposed in the next years.
[66] Corfu Channel, United Kingdom v. Albania; Arbitral Award of 31 July 1989, Guinea-Bissau v. Senegal; Anglo-lranian Oil Co., United Kingdom v. Iran; Difference relating to immunity from legal process of a Special Rapporteur of the Commission on Human Rights (1998 - 1999); Land and Maritime Boundary between Cameroon and Nigeria, 2002; Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations (1989); Temple of Preah Vihear, Cambodia v. Thailand.

3.4. THE PRINCIPLES OF STATE SOVEREIGNTY AND EQUALITY OF STATES

International law rules recognise the principles of state sovereignty and equality of states as some of the foundations of international relations. Most African states that have evolved from the colonial experience have been particularly sensitive about their sovereignty and about the principles of non-intervention. This strong version of sovereignty is very much a part of African political development. The growth of human rights changed the concept, if not the foundations of sovereignty. Moreover, it is currently strongly asserted that States as sovereigns have no competence to commit acts of aggression or violate basic fundamental human rights. Further States and sovereigns are abstractions and can best be held responsible if it is recognized that behind the State and the sovereign are the actual, finite State of officials. Some of these officials were held to account directly under international law.[67] This type of thinking however, do not intend to limit states in their development and reform policies, but calls on the respect of human rights. Acceptance of almost any treaty or protocol involves a transfer of a certain amount of decision-making authority away from states, and towards some international institution. The idea of universal jurisdiction itself is simply incompatible with a system of international law and international relations based on sovereign States; thus providing a serious limitation on state absolutism and sovereignty. The Campbell Case posed the question of how, within SADC, can state sovereignty be reconciled with the universal recognition of inalienable human rights deriving from respect for human dignity and popular sovereignty? How far can the universal recognition of human rights change the subjects, structures, general principles, interpretative methods and actually limit sovereignty?[68] The answers to the above questions will arise as the jurisprudence of the

[67] Nagan, W. P, Hammer, C. 2003. *The Changing Character of Sovereignty in International Law and International Relations*. London. Routledge , p 45.
[68] Ruppel, Bangamwabo (2008:27).

Tribunal develops. However, the trend in modern international law has been in the direction of seeking to enhance the authority foundations of the international system and to provide normative guidance to move State practice away from State absolutism.[69]

While the general limitation on the power of an international tribunal is due primarily to the extent of its jurisdiction, there is also a practical reason for it. International tribunals do not have enforcing officers at their command, and international jurisprudence has not developed any species of writs by which they may compel action to be taken by States. The function of enforcing a decision of an international tribunal is an executive function, and such it should be confined to a body which is invested with executive powers. It becomes, in this event, a political as distinguished form a judicial matter. Judicial power essentially involves the right to enforce the results of its exertion, however such power can not be exercised considering the character of the parties involved in international disputes. It is sensible to assume that supra-national tribunals are more likely than interstate tribunals to be embedded in the domestic politics of the states subject to their jurisdiction, thus the recognition of their judgements largely depend on the political will of the recognising state or party.

3.5. THE CONCEPT OF POLITICAL WILL

The concept of political will is complex for several reasons. First, it involves intent and motivation, which are inherently intangible phenomena. They are hard to assess accurately or objectively and are prone to manipulation and misrepresentation. Second, it may exist at both individual and collective levels. For individuals, the notion of political will is understandable

[69] An example of this trend is the European Union and its institutions.

as a personal characteristic, reflecting a person's values, priorities, and desires. Aggregating beyond the individual introduces more complexity. Third, though political will may be expressed in spoken or written words (speeches, manifestos, legal documents, and so on); it is only manifested through action. A shorthand definition of political will is 'the commitment of actors to undertake actions to achieve a set of objectives',[70] in this instance, promoting the rule of law and integration in Southern Africa.

SADC member states have not been unequivocally consistent with their SADC Treaty related obligations. Some writers have suggested that this is probably due to the governments' inability to 'marshall political power and direct it forward the introduction of a more efficient system to co-ordinate the objectives of the organisation'[71] It is submitted that the inability to muster mass political support for the meaningful delivery on SADC treaty commitments may be due in part to governments' inability to persuade their peoples to buy into the largely economic, free market, capitalistic agenda of a supra-national organisation which was originally formed to accomplish the lofty, essentially political objectives of making regional economies independent of South Africa and facilitating the success of then liberation struggles. Further, closely related to the problem of lack of political will are the twin problems of political instability and uncertainty that continue to plague a number of the SADC countries.[72] It is widely believed that the political condition of any country greatly influences its respect for the rule of law and greatly shapes its public policy.

[70] Available at: http://www.cmi.no/publications/file/3699-u, last accessed on 14 July 2011.
[71] Wallace, J, Munyantwali, S. 1996. "The Need for a Southern African Development Institute in the Proposed Framework for the Economic Integration of Southern Africa". *30 Journal of World Trade*, Volume 147, p 152.
[72] Ibid.

3.6. CONSIDERING PUBLIC POLICY AND ENFORCEMENT OF THE TRIBUNALS DECISIONS

Cross-border trade and commerce will be impeded or stultified if the courts were to adopt "protectionist policies" or use "nationalistic undertones" when dealing with the issues at hand. On the other hand, if the courts were to demonstrate a willingness to accept that modern-day cross-border legal problems require the adoption of novel or innovative approaches in addressing the issues of enforcement of foreign judgments; this will go a long way in promoting global business. Domestic courts have differently defined the public policies of their states from those of other states, and have used this pronouncement to refuse enforcement of foreign judgments.

A domestic court will not apply, recognize and enforce a foreign law, judgment or order if the result of its application, recognition or enforcement would be contrary to the public policy of the country where the foreign judgment is to be enforced. What then is public policy? What is certain is that the public policy of one country, even at the same point in time, may be different to that of another country. In fact the public policy in the same country may be different at different times. Choong[73] explains that, to predict which or what type of foreign judgment may be repugnant to a distinctive public policy of the local court is a hazardous task. This is because the concept of public policy is mutable and uncertain. It covers a multitude of sins. Be that as it may, there are certain established "heads of public policy". Agreements to commit a crime or civil wrong; agreements which injure the State in its relations with other States; and agreements which tend to pervert the course of justice are just

[73] Choong Yeow-Choy. 2007. "Enforcement of Foreign Judgements: The Role of the Courts in Promoting (or Impending Global Business". *World Academy of Science, Engineering and Technology*, Volume 30. Malaysia, p 92.

a few examples of the established heads of public policy. Although public policy must fluctuate with the circumstances of the time, the courts must be slow to introduce new heads. It has long been recognised that the concept of public policy is an unruly horse and that public policy "is never argued at all but only when other points fail"[74]. Our law recognises that the enforcement of a foreign judgment can be challenged on the following grounds, namely:

- that the court or tribunal that delivered the judgment had no jurisdiction in the circumstances of the case:
- that the judgment obtained in the original court or tribunal was not a final and conclusive judgment.
- fraud;
- breach of the rule of natural justice; and
- public policy.

It is granted that the concept of public policy is and should be wider than the concept of illegality.[75] Be that as it may, public policy as a ground to challenge the enforcement of a foreign judgment should operate only in exceptional cases.

[74] Ibid.
[75] Ibid.

CHAPTER FOUR

4. THE SADC TRIBUNAL, THE RULE OF LAW AND HUMAN RIGHTS

4.1. INTRODUCTION

In pursuit of regional economic integration, supranational organs were established in the regional economic communities to enhance the smooth operation of the various groupings. One organ that commonly appears in the regional economic communities is a judicial body set up to resolve dispute within the communities. Established either as a 'Tribunal' or 'Community Court of Justice', these judicial bodies were almost always primarily set up to 'interpret and apply' the treaty of the relevant regional economic community.[76] However, with the growing importance of human rights in Africa and the consequent acknowledgement of respect for human rights contained in the African Charter as a principle in the Treaties of most of the regional economic communities, there has been a gradual movement towards clothing the judicial organs of the regional economic communities with competence to receive human rights cases.[77] In West Africa, the Economic Community of West African States (ECOWAS) in 2005 amended the Protocol establishing the ECOWAS Community Court of Justice to give the Court express competence to hear human rights cases from individuals.

[76] E.g. see art. 9(1) of the ECOWAS Protocol A/P.1/7/91 On the Community Court of Justice, (1991) Vol. 19, Official Journal of the Economic Community of West African States (ECOWAS).
[77] Ebobrah, S. 2005. *Litigating Human Rights Before Sub-Regional Courts in Africa: Prospects and Challenges.* Pretoria: Centre for Human Rights, University of Pretoria. p 79

At the first glance, the promotion and protection of human rights might not be in the focus of SADC as an organisation furthering socioeconomic cooperation and integration as well as political and security cooperation among the Southern African states. However, the community's territory is home to approximately 240 million inhabitants and many human rights related provisions can be found within the legal framework of SADC.[78] Although primarily set up to resolve disputes arising from closer economic and political union rather than human rights, the Campbell Case impressively demonstrates that the Tribunal can also be called upon to consider human rights implications of economic policies and programmes.[79] The SADC Treaty itself refers to regional integration and to human rights directly or indirectly at several stages.[80] In its preamble, the treaty *inter alia* determines to ensure, through common action, the progress and well-being of the people of Southern Africa and recognises the need to involve the people of the region centrally in the process of development and integration, particularly through the guarantee of democratic rights, observance of human rights and the rule of law.

4.2. HUMAN RIGHTS AND THE SADC TRIBUNAL

At inception, the SADC Tribunal was generally stuck with economic integration leaving the political issues to other forum. With respect to human rights, the feeling among some Southern African leaders was that the issue was too political and could be used as a 'pretext for intervening in their countries' internal affairs.

[78] Ndlovu, N. P. 2011. "Campbell v Republic of Zimbabwe: A moment of truth for the SADC Tribunal". *SADC Law Journal*, Volume 1, Windhoek: SADC Law Journal Trust, p 63.
[79] Viljoen, F. 2007. *International Human Rights Law in Africa.* Oxford: Oxford University Press. p 503.
[80] ibid

As discussed earlier, Article 14 of the SADC Tribunal Protocol lays out the Treaty as the basis of the Tribunal's jurisdiction. Thus, the Tribunal is competent to exercise jurisdiction over matters relating to the interpretation and application of the Treaty as well as interpretation, application or validity of Protocols and other legal instruments of SADC and of acts of the Community's institutions. However, it has to be emphasised that the Tribunal is authorised to 'develop its own jurisprudence', giving due consideration to 'applicable treaties, general principles and rules of public international law and any rules and principles of the law of States' The SADC Tribunal does not have a clear competence in the area of human rights. A proposal to include human rights in the mandate of the Tribunal was considered and rejected, but it was recognised that in addition to specific provisions guaranteeing a right from discrimination, SADC has a 'more general human rights mandate'.[81] In Article 4 of its Treaty, SADC binds its member states to act in accordance with certain principles including 'human rights, democracy and the rule of law'. SADC member states further undertake to refrain from measures likely to jeopardise sustenance of the principles of the Community.

The Campbell case raised the opportunity for the Tribunal to determine the extent to which it was willing to accommodate human rights litigation. The applicants, in an interlocutory application for stay of action by the respondent state pending determination of an on-going judicial dispute between the parties, invited the Tribunal to restrain the respondent from engaging in acts likely to breach its obligation under Article 4(c) of the SADC Treaty. Article 4(c) identifies human rights, democracy and the rule of law as fundamental principles of SADC. The Tribunal held that 'SADC as a collectivity and as individual member states are under a legal obligation to respect and protect human rights of SADC citizens'. The Tribunal

[81] Viljoen (2007:505)

employed a broader approach of judicial interpretation and application of treaty provisions as the basis for the exercise of human rights jurisdiction.

The competence for the SADC Tribunal to hear human rights cases is not secure. The first point to note is that the SADC Tribunal has as yet not heard a human rights case on the merit as the Campbell case is an interlocutory application. However, as far as a consideration of the Tribunal's competence to entertain human rights cases is concerned, Articles 14 and 15 of the SADC Tribunal Protocol are fundamental. These have to be read together with Article 4(c) of the SADC Treaty, which records the recognition of human rights, democracy and the rule of law as principles upon which SADC is hinged.

Generally, national and international human rights are best protected at the domestic or national level, which has been described as an 'inner layer, forming the core of protection'.[82] Where the victim of violation is unable to find protection at the national sphere, international mechanisms for the protection of rights existed at the global and regional spheres as a last resort. The emerging resort to mechanisms at sub-regional levels for the protection of rights appears to be linked to a perception that the regional mechanism has not been completely effective.

One of the limitations of international human rights law is in the area of implementation. With respect to Africa, states are known to have encouraged the view that human rights are largely 'Western values' imposed against the culture and desires of African people. Relying on this argument, states have either ignored obligations willingly undertaken or rallied the support of fellow African states to diffuse the moral and political pressure that comes with

[82] Ibid.

refusal to comply with decisions of universal human rights supervisory bodies. It is therefore not surprising that it has been argued that 'greater coherence' at regional and sub-regional levels holds promise for better realisation of rights.[83] At the regional and sub-regional levels, human rights standards collectively agreed upon cannot be qualified as 'Western impositions' as states share similar cultures and political values, thus creating an environment for better willingness to comply with set standards.

It needs to be pointed out however, that there is a possibility for closeness of states and the existence of strong political and cultural ties to have a negative effect for human rights realisation where states bond together to protect 'one of their own' in the face of international pressure.

4.3. THE RULE OF LAW

Dicey's[84] definition of the rule of law lays down the following general principles as prerequisites for the achievement of the rule of law:

• fair trial and punishment by ordinary courts of the land

• equality before the law, and

• the provision and enforcement of human rights.

[83] Ibid.

[84] Dicey, A.V. 1915. *An introduction to the study of the law of the constitution.* Oxford: Oxford University Press.

The rule of law is the notion that the powers of state and government can be exercised legitimately only in accordance with the applicable laws and according to laid down procedures. Thus, the legitimacy of all organs of state and its institutions must have roots in the law. As a principle, the rule of law is intended to be a safeguard against arbitrary and capricious governance and abuse of power, and to enforce limitations on the power of the state and all its institutions of government.

Yet again, the role of the rule of law goes beyond the narrow parameters of legality. In 1959, at an international colloquium of over 185 judges, lawyers and law academics from some 53 countries meeting, in India, as the International Commission of Jurists, made the Declaration of Delhi regarding the fundamental principle of the rule of law. At that important conference, the late Lord Denning, the eminent English jurist, observed the following:[85] The Rule of Law is not confined to the negative aspects of preventing the Executive from abusing its power. It has a positive aspect involving the duty of government, not only to respect personal rights but to act positively for the well-being of the people as a whole.

Thus, apart from its enduring relevance in the promotion of "government of laws and not of men", democracy, political and civil rights, the rule of law must also be seen as an instrument for the promotion of social and economic development and social justice[86].Respect for the rule of law ultimately requires a respect for international legal standards, especially the respect for human rights standards, as provided for by the African Charter and the SADC Treaty.

[85] For a summary of the proceedings of the conference, see the website of the International Commission of Jurists, http://www.icj.org; last accessed 18 March 2008.

[86] Horn, N, Bösl, A. (Ed). 2009. *The Rule of Law in Sub-Saharan Africa , An overview. In Human Rights and the Rule of Law in Namibia.* Windhoek: John Meinert Printing. p 213

CHAPTER FIVE

5. COMPARATIVE DISPUTE SETTLEMENT MECHANISMS OF THE NAFTA AND THE WTO

5.1. NAFTA

The dispute settlement mechanism of the North American Free Trade Agreement (NAFTA) and the World Trade Organisation (WTO) may serve as examples for SADC to follow in its endeavour to create a swift and certain procedure for the settlement of disputes within the region as well as within the international community; especially the just settlement of trade disputes will be a major factor in the economic development of the region.

According to Hurtington[87] the long term success or failure of NAFTA will in large part depend on the effectiveness of its dispute settlement system. In the highly politised world of international trade law, a system that can resolve disputes and promote compliance with legal obligations will go far in advancing NAFTA's substantive goals of economic integration. A weak or underutilised system, on the other hand, is likely to undermine NAFTA's legitimacy and inhibit further progress toward hemispheric integration.[88] NAFTA's dispute settlement system is to a great extent modelled directly upon the provisions in the Canada Free Trade Agreement (CFTA).[89] However, NAFTA provisions are more comprehensive than those of the CFTA and should operate more effectively to help NAFTA parties prevent and resolve

[87]Hurtington, D. S. 1993. "Settling Disputes under the North America Free Trade Agreement". *Harvard International Law Journal* 34(2). p 407.
[88] ibid
[89] Snyman-Van, E. 2003. "Dispute Resolution in NAFTA and the WTO: A Useful Guide for SADC?" *Journal for Juridical Science*. Volume 28. Number 3. p 113.

disputes concerning the interpretation and application of NAFTA, the specific unfair trade practices of dumping and subsidisation, and cross border investment.[90] NAFTA contains three primary mechanisms for the resolution of disputes, namely chapters 11, 19 and 20. Chapter 11 deals with the resolution of disputes between a party and an investor of another party. Chapter 19 deals with the resolution of the disputes arising under each party's antidumping or subsidy laws. Chapter 20 deals with the resolution of general disputes concerning the interpretation and application of NAFTA. NAFTA also makes provision for the specific economic or industrial sectors.

The general framework for resolving disputes under NAFTA is contained in Chapter 20. The Chapter establishes a three step method of resolving disputes with the Free Trade Commission as the central institution of this mechanism[91]. The first step is mandatory consultation between the disputing parties. If the consultation fails to resolve the matter within thirty days, the second stage to resolve the dispute is a meeting with the Free Trade Commissioner. The third stage in the dispute resolution procedure and as the last resort an arbitration panel may be convened.

5.2. WTO

Also the conflict resolution mechanism in the WTO in comparison to its predecessor GATT (General Agreement on Tariffs and Trade) has been shown to become more effective once the WTO dispute settlement system is introduced an appellate review of panel decisions. This

[90] See; Endsley, H. B. 1995. "Dispute Settlement Under the CFTA and NAFTA: From Eleventh Hour Innovation to Accepted Institution." *Hastings International and Comparative Law Review*, p 661.
[91] Ibid.

not only enhanced the enforceability of all commitments but ensured greater confidence in the quality of legal finding. The WTO Appellate Body was established in 1995 under Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes. The Appellate Body can uphold, modify or reverse the legal findings and conclusions of a panel, and Appellate Body Reports, once adopted by the Dispute Settlement Body, must be accepted by the parties to the dispute. The improved structure of this two-tier system has given WTO members an ability to defend their rights. The review mechanism presented in the appellate body allows conflicting parties to show how determined they are to fight their case.[92] The SADC system which is governed by treaties and agreements needs a similar mechanism of dispute resolution to ensure the enforcement of the principles agreed to.

[92] For the WTO dispute settlement system, see report by Sutherland et al. (2005:49).Sutherland, P. et al. 2005. *The future of the WTO. Addressing institutional challenges in the new millennium, Geneva: WTO Consultative Board*. Available at: http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.htm; last accessed on 20 September 2008.

CHAPTER SIX

6. CONCLUSION AND RECOMMENDATIONS

There is one major lesson deducible from the suspension and review of the SADC Tribunal presented in this paper. On a general level it confirms that there are significant legal challenges to effective economic integration in Southern Africa. Accordingly, while a re-configuration of the legal and institutional framework along the lines alluded to in the paper will be valuable in facilitating integration, it will not standing alone lead to the attainment of that objective. More specifically, progress towards real integration will require a tightening of the legal framework to include an element of compulsion in relation to compliance with SADC Treaty obligations as well as an effective mechanism for securing such compliance. Agreement to such significant changes in the legal and institutional framework requires greater willingness on the part of member States to relinquish some of their economic sovereignty for the greater regional good. Such agreement will in turn be impossible without a significant strengthening of the political will on the part of the present political leadership in the region to make the difficult decisions upon which real regional economic integration depends.

In an effort to make input into the SADC Tribunal review process and to ensure that the SADC Tribunal emerges from the review process as a stronger and more effective judicial institution, better placed to interpret SADC laws and to effectively administer justice for SADC citizens and residents, the paper adopts the following recommendations:

- The existing normative and institutional framework for human rights in the SADC legal structure should be strengthened further by expanding the human rights provisions to include clear references and links to relevant international instruments such as the Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights, which the SADC Tribunal may apply in its interpretation and application of the SADC Treaty and subsidiary instruments;

- The competence of the SADC Tribunal to receive and determine human rights cases emerging from SADC member states should also be expressly reaffirmed in the relevant treaties;

- The application and interpretation of the SADC Treaty and Protocols, including the Protocol on the SADC Tribunal is a judicial, not an executive function; and should be solely the power of the SADC Tribunal. The dependency of the judiciary on the executive to implement international law is not only outdated but also lacks any real justification;

- As provided for in the Protocol on the SADC Tribunal, the principle of exhaustion of local remedies should be applied in light of contemporary international treaty, customary and case law;

- All domestic processes and mechanisms should be initiated to ensure that SADC law is incorporated into domestic law of SADC member states;

- Decisions of the SADC Tribunal should remain enforceable in all and every SADC member state;

- All SADC countries should confer to those decisions the force of law and empower their judicial organs to implement them;

- The procedures for the enforcement of decisions from the SADC Tribunal should be harmonised, either through a Protocol (that would still need to be incorporated in the laws of the member states) or a Model Harmonised Legislation, with the focus being on ensuring enforcement as of right throughout the region and not as foreign judgments;

- The SADC Tribunal should be empowered to impose remedies for non-compliance with its judgments and other decisions.

- The principle of human rights and the rule of law, and the human rights obligations thereto related should be expanded in the SADC legal instruments and respected by all SADC organs and member states;

- The regime of sanctions under the SADC instruments should provide for sanctions in case of violations by SADC states of their obligations under SADC law;

- Sanctions should include coercive measures such as complete or partial interruption of economic relations, the interruption of communication means, the severance of

diplomatic relations, the freezing of assets belonging to the defaulting state, and the suspension of voting rights or other rights and privileges. In the application of the principle of consensus, a member state with a direct interest in a matter should not take part in the process;

- The review process should be extended to the entire SADC legal and institutional framework to ensure that the entire SADC normative and institutional framework is stronger and more effective.

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