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James T. Gathii

Loyola University Chicago, School of Law, jgathii@luc.edu

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The Under-Appreciated Jurisprudence of Africa's Regional Trade Judiciaries

James Thuo Gathii*

Introduction

This paper focuses on African Regional Trade Agreement, (RTA), judiciaries. African RTAs entertain a broad range of disputes from an extremely broad category of litigants. They are not simply custodians of the trading arrangements – in fact they do much less dispute settlement around trade issues compared to the broad range of cases they have assumed jurisdiction over. Many of these judiciaries as we shall see have also often entertained cases that are well beyond their treaty defined jurisdictional bases. So while it is true as William Davey has correctly argued that RTA judiciaries have rarely been used to resolve trade disputes, in Africa there has been an exponential use of these judiciaries without much acknowledgement in the academic literature.¹

As this paper also shows, another feature of African RTA judiciaries that comes out clearly is their boldness of the decisions in relation to the fact they are relatively new institutions operating in a context in which adherence to notions of national sovereignty is very strong. The East African Court of Justice has, for example, decided cases relating to human rights even though there is no explicit treaty basis for the court to assume jurisdiction over human rights cases that challenge the conduct of Member State governments. For taking such bold steps, the leaders of

*Associate Dean for Research and Scholarship and Governor George E. Pataki Professor of International Commercial Law, Albany Law School, NY. Thanks to Joseph Rogers for his invaluable assistance in writing this article.

¹ See William Davey "The Soft Drinks Case: The WTO and Regional Agreements," 8 World Trade Review 5, 15 (2009). By contrast, the African Commission on Human and Peoples Rights has received lots of attention, see for example, Obiora C. Okafor, *The African Human Rights System, Activist Forces and International Institutions*, 2007.

the East African Community amended the Treaty Establishing the East African Community as a statement of the disapproval of East African Court of Justice's decision in the *Nyong'o* case.

Another example is the ECOWAS Court of Justice whose jurisdiction was expanded in 2005 to allow cases challenging the conduct of Member States with respect to human rights, a jurisdiction it has since not spared in its use. In short, this paper shows that African RTA judiciaries are not sleeping sentinels of the treaties under which they are established. This paper is therefore, a call for more attention to be focused on these judiciaries. Of the eight RTAs that are regarded as pillars to the African Economic Community, the Arab Maghreb Union (AMU) and the Intergovernmental Organization on Development (IGAD) do not have judiciaries that so far as I could find are operational.

The COMESA Court of Justice

The Treaty Establishing the Common Market for Eastern and Southern Africa (hereinafter 'Treaty') established the COMESA Court of Justice (hereinafter 'CoJ').² The Treaty mandates that the CoJ 'shall ensure the adherence to law in the interpretation and application of this Treaty.'³ Judgments of the CoJ are 'final and conclusive and not open to appeal.'⁴ 'Any dispute concerning the interpretation or application of th[e] Treaty or any of the matters referred to the [CoJ] . . . shall not be subjected to any method of settlement other than those provided for in th[e] Treaty.'⁵

² Treaty Establishing the Common Market of Eastern and Southern Africa, (adopted Dec. 21, 1981, came into force Sept. 30, 1982), at Art. 7(1)(c).

³ Ibid. at Art. 19.

⁴ Ibid. at Art. 31(1).

⁵ Ibid. at Art. 34(1).

The CoJ is composed of seven judges, appointed by the Authority, and chosen based upon their qualifications as impartial and independent judges in their own countries.⁶ No two judges may be nationals of the same Member State.⁷ The judges on the CoJ serve a five-year term and may be re-appointed to an additional five-year term.⁸ The judges on the CoJ were first appointed by the Authority on June 30, 1998.⁹ In March 2003 the Authority decided that the seat of the CoJ would be Khartoum, Sudan.¹⁰

Decisions of the CoJ on the interpretation of the Treaty precede the decisions of the Member States' national courts.¹¹ However, '[e]xcept where the jurisdiction is conferred on the [CoJ] by or under [the] Treaty, disputes to which the Common Market is a party shall not on that ground alone, be excluded from the jurisdiction of national courts.'¹² As discussed below, Member States' national courts may request a preliminary ruling from the CoJ where a question is raised before such national court concerning the application or interpretation of the Treaty or the validity of an action by COMESA.¹³ Where any such question is raised in a Member State's national court and the laws of that Member State do not provide for a judicial remedy for such violation of the Treaty, the national court shall refer the entire matter to the CoJ.¹⁴

Jurisdiction

⁶ Treaty Establishing COMESA, *supra* note 1, at Art. 20.

⁷ *Ibid.* at Art. 20(2).

⁸ *Ibid.* at Art. 21(1).

⁹ COMESA Web Site, 'COMESA Court of Justice', *available at* <http://about.comesa.int/lang-en/institutions/court-of-justice>.

¹⁰ *Ibid.*

¹¹ Treaty Establishing COMESA, *supra* note 1, at Art. 29(2).

¹² *Ibid.* at Art. 29(1).

¹³ *Ibid.* at Art. 30(1).

¹⁴ *Ibid.* at Art. 30(2).

The Treaty provides that the CoJ has ‘jurisdiction to adjudicate upon all matters which may be referred to it pursuant to this Treaty.’¹⁵ ‘The Authority, the Council or a Member State may request the Court to give an advisory opinion regarding questions of law arising from the provisions of this Treaty affecting [COMESA].’¹⁶ Where a Member State considers that another Member State or the Council has acted or omitted to act in violation of the Treaty, such Member State may refer the matter to the CoJ.¹⁷ Member States may also refer matters involving ‘the legality of any act, regulation, directive or decision of the Council on the grounds that such act, regulation, directive or decision is ultra vires or unlawful or an infringement of the provisions of this Treaty or any rule of law relating to its application or amounts to a misuse or abuse of power.’¹⁸

Where the Secretary-General considers that a Member State has violated the Treaty, s/he submits hi/hers findings to the Member State concerned so that the Member State may submit its findings on the matter.¹⁹ Where such Member State does not submit its findings, or such findings are unsatisfactory, the Secretary-General then presents the issue to the Council for consideration.²⁰ If ‘the Council fails to resolve the matter, the Council shall direct the Secretary-General to refer the matter to the [CoJ].’²¹

¹⁵ Treaty Establishing COMESA, *supra* note 1, at Art. 23.

¹⁶ *Ibid.* at Art. 32(1).

¹⁷ *Ibid.* at Art. 24(1).

¹⁸ *Ibid.* at Art. 24(2).

¹⁹ Treaty Establishing COMESA, *supra* note 1, at Art. 25(1).

²⁰ *Ibid.* at Art. 25(2).

²¹ *Ibid.* at Art. 25(3).

Natural and legal persons may refer matters to the COJ which involve actions or omissions of the Council or a Member State which violate the Treaty.²² '[W]here the matter for determination relates to any act, regulation, directive or decision by a Member State, such person shall not refer the matter for determination under this Article unless s/he has first exhausted local remedies in the national courts or tribunals of the Member State.'²³ This grant of standing to natural and legal persons illustrates the broadness of jurisdiction of not only the COMESA COJ but indeed all other African RTA judiciaries discussed in this paper.²⁴

The CoJ also has 'jurisdiction to hear disputes between [COMESA] and its employees that arise out of the application and interpretation of the Staff Rules and Regulations of the Secretariat or the terms and conditions of employment of the employees of [COMESA].'²⁵ The CoJ may also hear claims by third parties against COMESA or any of its institutions for acts of COMESA employees in the performance of their official duties.²⁶

Where COMESA, or any of its institutions, is a party to an agreement, and such agreement allows the CoJ to arbitrate, then the CoJ has jurisdiction to hear the dispute.²⁷ Where there is a dispute between Member States and they make a special agreement to allow the CoJ to hear the case, the CoJ has jurisdiction to hear such dispute.²⁸ Member States' national courts may also request a preliminary ruling from the CoJ where a question is raised before such national court

²² Treaty Establishing COMESA, *supra* note 1, at Art. 26.

²³ *Ibid.*

²⁴ *Ibid.*; See J. Alvarez, *International Organizations as Lawmakers*, (Oxford University Press, 2005), p. 116 (arguing that 'African institutions anticipate international organizations charged with discharging the kind of plenary executive, legislative, and even judicial powers once associated exclusively with national governments.').

²⁵ Treaty Establishing COMESA, *supra* note 1, at Art. 27(1).

²⁶ *Ibid.* at Art. 27(2).

²⁷ *Ibid.* at Art. 28(a).

²⁸ *Ibid.* at Art. 28(b).

concerning the application or interpretation of the Treaty or the validity of an action by COMESA.²⁹ Where any such question is raised in a Member State's national court and the laws of that Member State do not provide for a judicial remedy for such violation of the Treaty, the national court shall refer the entire matter to the CoJ.³⁰

The COMESA Council of Ministers is explicitly given the power and responsibility to 'give directions to all other subordinate organs of the Common Market *other than the [CoJ] in the exercise of its jurisdiction.*'³¹ This clause gives the CoJ freedom from intervention by the executive and legislative institutions of COMESA. Perhaps more important is Article 34 of the Treaty, which provides: the CoJ shall be the sole interpreter of the Treaty;³² where a dispute has been referred to the CoJ, 'Member States shall refrain from any action which might be detrimental to the resolution of the dispute or might aggravate the dispute';³³ that both Member States and the Council must 'take, without delay, the measures required to implement a judgment of the [CoJ]';³⁴ and the CoJ 'may prescribe such sanctions as it shall consider necessary to be imposed against a party who defaults in implementing the decisions of the Court.'³⁵

Former Lord President of the Court of Justice of COMESA, Honorable Mr. Justice A. M.

Akiwumi, has opined that the CoJ has 'brought together persons of differing legal traditions to

²⁹ Treaty Establishing COMESA, *supra* note 1, at Art. 30(1).

³⁰ *Ibid.* at Art. 30(2).

³¹ Treaty Establishing COMESA, *supra* note 1, at Art. 9(2)(c) (emphasis added).

³² *Ibid.* at Art. 34(1).

³³ *Ibid.* at Art. 34(2).

³⁴ *Ibid.* at Art. 34(3).

³⁵ *Ibid.* at Art. 34(4).

produce a smooth-functioning and authoritative institution’, an impressive feat given the varying legal traditions of the COMESA Member States.³⁶

The East African Court of Justice

The East African Court of Justice, (hereafter ‘EACJ’), is established under the Treaty Establishing the East African Community.³⁷ The EACJ is tasked with ‘ensur[ing] the adherence to law in the interpretation and application of and compliance with [the EAC] Treaty.’³⁸ The EAC Treaty gives the EACJ ‘jurisdiction over the interpretation and application of [the EAC] Treaty . . . [as well as] such other original, appellate, human rights and other jurisdiction as . . . determined by the Council . . . [in] a protocol . . .’³⁹ Decisions of the EACJ are ‘final, binding and conclusive and not open to appeal . . .’⁴⁰ and ‘[a]ny dispute concerning the interpretation or application of [the EAC] Treaty . . . shall not be subjected to any method of settlement other than those provided for in [the EAC] Treaty.’⁴¹ The Court became operational on November 30, 2001, but has since remained in a transitional period, meaning that it only convenes when the

³⁶ A.M. Akiwumi, ‘Towards an Independent and Effective Judiciary in Africa’, Speech given at the African Development Forum Conference entitled ‘Governance for a Progressing Africa’ held in Addis Ababa, (Oct. 11-15, 2004), available at www.uneca.org/adfv/documents/speeches_and_presentations/speech_akiwumi.htm. Notably, In May 2010, the COMESA COJ announced that it had contracted with a company to develop a website which ‘will provide information on the establishment of the Court, how to access the Court, judgements [sic], advisory opinions, arbitration awards, pending cases and news updates from the Court. Once operational, the public will be able to file cases and even conduct searches on cases and rulings online, see ‘COMESA Court of Justice to Improve its Visibility’, (May 30, 2010), available at www.comesa.int/lang-en/component/content/article/34-general-news/382-comesa-court-of-justice-to-improve-its-visibility.

³⁷ Treaty Establishing the East African Community (Adopted Nov. 30, 1999, Came into Force July 7, 2000, Amended Dec. 14, 2006 and Aug. 20, 2007) (establishing a regional economic community between Kenya, Uganda, Rwanda, Burundi, and Tanzania).

³⁸ Ibid. at Art. 23(1).

³⁹ Ibid. at Art. 27.

⁴⁰ Ibid. at Art. 35(1).

⁴¹ Ibid. at Art. 38(1).

need to do so arises, because the Summit has not yet determined that there is enough business to make it fully operational.⁴²

The EAC Treaty provides that the judges on the EACJ are to be appointed to the Summit on recommendation by the Partner States.⁴³ Before the 2006 amendments, the EAC Treaty provided that the EACJ would consist of no more than six judges with no more than two from each of the original three Partner States.⁴⁴ The EAC Treaty as amended split the EAC into a First Instance Division and an Appellate Division and provides that the court shall be composed of a maximum of fifteen judges with a maximum of ten for the First Instance Division and five for the Appellate Division.⁴⁵ No more than two judges from each of the now five Partner States can be appointed to the First Instance Division and no more than one from each Partner State to the Appellate Division.⁴⁶ The seat of the EACJ is to be determined by the Summit.⁴⁷ The Summit has not yet determined the permanent seat of the Court, but the temporary seat is in Arusha, Tanzania.⁴⁸ In August, 2010, the EACJ Court of Appeals held a sitting in Nairobi, Kenya as part of its program to familiarize East African citizens of its role while announcing the appellate decision in the *Nyong'o* case.⁴⁹ It has also had similar temporary sittings in other East African cities such as Mombasa, Dar es Salaam and Kampala.

⁴² East African Community Web Site, 'East African Court of Justice – Role of the Court', Corporate Communications and Public Affairs Department, *available at* www.eac.int/organs/eacj.html?start=2.

⁴³ EAC Treaty, *supra* note 37, at Art. 24(1).

⁴⁴ *Ibid.* at Art. 24 (as adopted Nov. 30, 1999).

⁴⁵ *Ibid.* at Art. 24(2) (Adopted Nov. 30, 1999, Amended Dec. 14, 2006 and Aug. 20, 2007).

⁴⁶ *Ibid.* at Art. 24(1).

⁴⁷ *Ibid.* at Art. 47.

⁴⁸ East African Community Web Site, 'East African Court of Justice – Review of Judgments', Corporate Communications and Public Affairs Department, *available at* www.eac.int/organs/eacj.html?start=5.

⁴⁹ Press Release: 'East African Court Takes Justice Closer to the People', (Aug. 13, 2010), *available at* http://news.eac.int/index.php?option=com_content&view=article&id=276:eacj-closer-to-the-people&catid=48:eac-latest&Itemid=69.

The EAC Treaty states that the decisions of the EACJ on the interpretation and application of the EAC Treaty have precedence over the decisions of the national courts.⁵⁰ Where jurisdiction is conferred upon the EACJ the national courts have no jurisdiction.⁵¹ However, simply because the Community is a party to a dispute does not mean that the dispute is excluded from the jurisdiction of the national courts.⁵²

The EACJ expanded the scope of its jurisdiction in 2007 with its decision in *Prof. Peter Anyang' Nyong'o and Others v. Attorney General of Kenya and Others*.⁵³ The Court had been petitioned under Article 30⁵⁴ to enjoin the swearing-in of Kenya's nine members of the East African Legislative Assembly (hereafter 'EALA').⁵⁵ The claimant's contended that Kenya had violated Article 50 of the EAC Treaty when selecting its nine members and that the elections were therefore void.⁵⁶ Article 50 provides that 'the elected members shall, as much as feasible, be representative of specified groups, and sets out the qualifications for election.'⁵⁷ The Attorney General of Kenya, in a petition for the respondents, argued that Article 52(1) specifically reserved jurisdiction to the High Court of Kenya, and so the EACJ did not have jurisdiction to hear the case.⁵⁸ That article provides, in relevant part 'Any question that may arise whether any person is an elected member of the Assembly . . . shall be determined by the institution of the

⁵⁰ EAC Treaty, *supra* note 37, at Art. 33(2).

⁵¹ *Ibid.* at Art. 33(1).

⁵² *Ibid.*

⁵³ *Prof. Peter Anyang' Nyong'o and Others v. Attorney General of Kenya and Others*, East African Court of Justice, Reference No. 1 of 2006 (Mar. 30, 2007).

⁵⁴ EAC Treaty, *supra* note 37, at Art. 30.

⁵⁵ *Prof. Peter Anyang' Nyong'o and Others v. Attorney General of Kenya and Others*, *supra* note 53, at 2.

⁵⁶ *Ibid.* at 3.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.* at 13.

Partner State that determines questions of the election of members of the National Assembly.’.⁵⁹

The EACJ, however, disagreed, finding that since an Article 50 election had not taken place, application of Article 52(1) in the first instance was precluded.⁶⁰

Senior officials within the EAC Partner States and justices on the highest national courts have supported a movement that would allow appeals from the highest national courts to the EACJ.⁶¹

This would also give the Court greater authority to punish corruption, strengthen the judiciaries within the region, and harmonize the judicial branches of the Partner States and the EAC itself.⁶²

There is also a proposal to amend the EAC treaty to give the EACJ the authority to try human rights violators.⁶³ As the Honorable Justice Harold Reginald Nsekela, President of the EACJ,

has argued:

If East Africans are serious about meaningful regional integration, they must be willing and prepared to invest in it, particularly in institutions that will make people develop with dignity. A fully-fledged East African Court of Justice with all its attendant jurisdictional roles is one such institution. East African leaders cannot expect a strong East African Community unless they invest in institutions that will guarantee its existence. We should not expect to reap where we have not sown.⁶⁴

⁵⁹ EAC Treaty, *supra* note 37, at Art. 52(1).

⁶⁰ *Prof. Peter Anyang' Nyong'o and Others v. Attorney General of Kenya and Others*, *supra* note 53, at 14-22.

⁶¹ J. Karuhanga, 'EAC Judges Call for Stronger Judicial Systems', *The New Times* (Dec. 10, 2009), *available at* <http://allafrica.com/stories/200912100297.html>.

⁶² J. Oyuke, 'EAC Judges Call for a Harmonized Judiciary', *The Standard* (Jan. 3, 2010), *available at* www.standardmedia.co.ke/InsidePage.php?id=2000000137&cid=14&j=&m=&d.

⁶³ F. Oluoch, 'Bid to Let Regional Court of Justice Try Genocide and Human Rights Suspects', *East African* (Oct. 12, 2009), *available at* <http://allafrica.com/stories/200910120115.html>.

⁶⁴ President of the East African Court of Justice H.R. Nsekela, 'The Role of the East African Court of Justice in the Integration Process', Presentation During the 3rd East African Community Media Summit (Aug. 22, 2009).

The EAC National Human Rights Commission has reviewed the draft EAC Bill of Rights.⁶⁵

‘The EAC draft Bill attempts to harmonise the rights and freedoms obtaining in the Partner States. It examines the various national constitutions and other international and regional instruments with a view to standardize and adopt international best practices.’⁶⁶ The bill, which contains the right to a fair hearing⁶⁷, would require Partner States to guarantee a large number of rights or be in violation of the EAC Treaty, which in turn would grant the EACJ greater jurisdiction.

Partner States may request advisory opinions from the EACJ.⁶⁸ Additionally, Partner States can refer a matter to the EACJ for adjudication where that state ‘considers that another Partner State or an organ or institution of the Community has failed to fulfill an obligation under [the EAC] Treaty or has infringed a provision of [the EAC] Treaty.’⁶⁹ The EAC Treaty also provides:

A Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action on the ground that it is *ultra vires* or unlawful or an infringement of the provisions of this Treaty or any rule of law relating to its application or amounts to a misuse or abuse of power.⁷⁰

⁶⁵ Press Release: ‘Heads of Human Rights’ Commissions Review EAC Draft Bill of Rights’, (EAC Department of Corporate Communications and Public Affairs, June 1, 2010), *available at* www.news.eac.int/index.php?option=com_content&view=article&id=250:heads-of-human-rights-commissions-review-eac-draft-bill-of-rights&catid=48:eac-latest&Itemid=69; Press Release: ‘Heads of Human Rights Commissions Recommend Draft EAC Bill of Rights to Council of Ministers’, (EAC Department of Corporate Communications and Public Affairs, June 4, 2010), *available at* http://www.news.eac.int/index.php?option=com_content&view=article&id=253:nhracs-recommend-bill-of-rights&catid=48:eac-latest&Itemid=69 (The National Human Rights Commission has recommended the Bill of Rights to the EAC Council of Ministers and will be discussed at EAC Conference on Good Governance in August)

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ EAC Treaty, *supra* note 37, at Art. 36.

⁶⁹ *Ibid.* at Art. 28(1).

⁷⁰ *Ibid.* at Art. 28(2).

Where a question is raised before a national court regarding the validity of some act by the Community the court may request the EACJ to give a preliminary ruling.⁷¹ In such a case, the national court is merely asking the EACJ for an opinion on the matter and is still responsible for issuing the ultimate decision. The national court does not have to request such a ruling and can interpret the EAC Treaty on its own.⁷² However, this is subject to the caveat that any decisions made by the EACJ on ‘similar matter[s]’ have precedence.⁷³

Any natural or legal person who is a resident of a Partner State may refer any matter regarding ‘the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the [EAC] Treaty.’⁷⁴ In *Nyong’o* the Attorney General of Kenya argued that the claimants did not have *locus standi* and therefore no cause of action existed for the claimants.⁷⁵ The court recognized that in order for an adverse litigant to possess *locus standi* he must: (1) have sufficient interest in the subject matter of the adjudication; and (2) ‘be seeking a remedy in respect of a legal right, which has been infringed or violated.’⁷⁶ However, the Court determined that these requirements apply more to ‘actions in tort and suits for breach of statutory duty or breach of contract. . . . [A] cause of action created by statute or other legislation . . . [has i]ts parameters . . . defined by the statute or legislation which creates it.’⁷⁷ Therefore, since Article 30 imposes no *locus standi* requirement no such requirement exists

⁷¹ Ibid. at Art. 34.

⁷² Ibid. at Art. 33(1).

⁷³ Ibid. at Art. 33(2).

⁷⁴ Ibid. at Art. 30.

⁷⁵ *Prof. Peter Anyang’ Nyong’o and Others v. Attorney General of Kenya and Others*, *supra* note 53, at 12.

⁷⁶ Ibid.

⁷⁷ Ibid. at 15.

for suits brought under Article 30.⁷⁸ The same rule applies for Articles 28 (Partner States) and 29 (EAC Secretary General). As such, the EACJ like the COMESA COJ can entertain suits from an extremely broad range of litigants. This is hardly the practice in the European Court of Justice or even the International Court of Justice which only entertain suits between States only.

Where the EAC Secretary General considers that a Partner State has violated the EAC Treaty its findings are submitted to that Partner State to submit its observations on the findings.⁷⁹ Where such state fails to submit observations within four months, or where the observations are not satisfactory, the Secretary General then refers the matter to the Council who must then decide to either immediately resolve the issue or order the Secretary General to submit the matter to the EACJ.⁸⁰

The Summit, the highest organ in the community, can request advisory opinions.⁸¹ The EAC Council, the second-highest organ in the community, may also request advisory opinions.⁸²

On April 29, 2009 the EACJ released an advisory opinion on the conflicting principles of variable geometry and consensus in the EAC's decision-making process which I have discussed at length elsewhere.⁸³

⁷⁸ Ibid. at 16.

⁷⁹ EAC Treaty, *supra* note 37, at Art. 29(1).

⁸⁰ Ibid. at Art. 29(2)-(3).

⁸¹ Ibid. at Art. 36.

⁸² Ibid. at Arts. 14(4) and 36.

⁸³ *In the Matter of a Request by the Council of Ministers of the East African Community for an Advisory Opinion*, East African Court of Justice Advisory Opinion, App. No. 1 of 2008 (Apr. 2009). See James Gathii, "African Regional Trade Agreements as Flexible Legal Regimes," 35 North Carolina Journal of International Law and Commercial Regulation, 571 (2010)

The EACJ has jurisdiction to hear and determine disputes between the EAC and its employees where the dispute arises out of ‘terms and conditions of employment . . . or the application and interpretation of the staff rules and regulations and terms and conditions of service of the [EAC].’⁸⁴ The EACJ can also hear disputes arising from:

[A]n arbitration clause contained in a contract or agreement which confers such jurisdiction to which the Community or any of its institutions is a party; or a dispute between the Partner States regarding this Treaty if the dispute is submitted to it under a special agreement between the Partner States concerned; or an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the Court.⁸⁵

On November 20, 2009 the EAC Summit ratified a protocol establishing the EAC Common Market.⁸⁶ The protocol states ‘[a]ny dispute between the Partner States arising from the interpretation or application of this Protocol shall be settled in accordance with the provisions of the Treaty.’⁸⁷ Furthermore, the Partner States guaranteed:

[A]ny person whose rights and liberties as recognised by this Protocol have been infringed upon, shall have the right to redress, even where this infringement has been committed by persons acting in their official capacities; and . . . the competent judicial, administrative or legislative authority or any other competent authority, shall rule on the rights of the person who is seeking redress.⁸⁸

Judges on the EACJ may hold office for a maximum of seven years.⁸⁹ A judge is to hold office for his or her full term unless: (1) s/he resigns; (2) s/he attains the age of 70; (3) s/he dies; or (4)

⁸⁴ EAC Treaty, *supra* note 37, at Art. 31.

⁸⁵ *Ibid.* at Art. 32.

⁸⁶ Protocol on the Establishment of the East African Community Common Market, East African Community (Adopted Nov. 20, 2009).

⁸⁷ *Ibid.* at Art. 54(1).

⁸⁸ *Ibid.* at Art. 54(2).

⁸⁹ EAC Treaty, *supra* note 37, at Art. 25(1).

s/he is removed from office in accordance with the EAC Treaty.⁹⁰ Under Article 26(1), a judge may only be removed from office by the Summit:

- (a) for misconduct or for inability to perform the functions of his or her office due to infirmity of mind or body; . . .
- (b) in the case of a judge who also holds judicial office or other public office in a Partner State–
 - (i) is removed from that office for misconduct or due to inability to perform the functions of the office for any reason; or
 - (ii) resigns from that office following allegation of misconduct or of inability to perform the functions of the office for any reason;
- (c) if the Judge is adjudged bankrupt under any law in force in a Partner State; or
- (d) if the Judge is convicted of an offence involving dishonesty or fraud or moral turpitude under any law in force in a Partner State.⁹¹

The Summit may also suspend a judge when an investigation as to misconduct is pending or where the judge is charged with an offense under Article 26(1)(d).⁹²

The EACJ's Jurisprudence

Based on the EACJ's decisions in *Nyong'o*, discussed above, *East African Law Society*, discussed below, *Katabazi*, discussed below, and the events surrounding those decisions it would seem that the EACJ has a greater amount of independence than intended by the drafters of the EAC Treaty. As will be seen in the following analysis of *East African Law Society*, the Court has asserted itself as the supreme authority over the EAC Treaty.

In November 2006 the EACJ issued an interim order to prevent Kenya's appointment of representatives to the EALA and, in March 2007, the Court decided in *Nyong'o*, that citizens of

⁹⁰ Ibid. at Art 25(2).

⁹¹ Ibid. at Art 26(1).

⁹² Ibid. at Art. 26(2).

Kenya, despite having no *locus standi*, could challenge Kenya's appointments under Article 30 of the EAC Treaty.⁹³ The EAC Council criticized this exercise of jurisdiction and recommended to the Summit that certain amendments be passed to curtail the Court's power, ultimately resulting in the EAC Treaty's amendment on December 14, 2006.⁹⁴ These amendments included: (1) restructuring the Court into two divisions, a First Instance Division and an Appellate Division; (2) adding additional grounds for removing a judge from office; "to limit the Court's jurisdiction so as not to apply to 'jurisdiction conferred by the Treaty on organs of Partner States'"; (3) adding in a two-month time limit for cases brought by legal and natural persons; and (4) providing grounds for appeal to the Appellate Division of the EACJ.⁹⁵

The amendments allow the removal from office of an EACJ judge who also holds judicial office in a Partner State where that judge is removed from office for misconduct in that position.⁹⁶ At the time this amendment was passed the two Kenyan judges were in the middle of just such a suspension following allegations of corruption against them that had been made in 2003.⁹⁷ The Kenyan government attempted to get these two justices, Justices Moiwo ole Keiwua and Kasanga Mulwa, removed from the EACJ bench pursuant to the amendments, but their efforts were stopped dead in their tracks.⁹⁸

⁹³ *East African Law Society and Others v. Attorney General of the Republic of Kenya and Others*, East African Court of Justice Judgment Ref. No. 3 of 2007, (Sept. 2008), p. 2-3. For more on this see *supra* "Natural and Legal Persons".

⁹⁴ *Ibid.* at 4. While the final decision in *Nyong'o* was not released until four months after the amendments, the Court had announced that it was granting the claimants jurisdiction in November 2006. *Ibid.* at 3.

⁹⁵ *Ibid.* at 4-5; *See also* EAC Treaty, *supra* note 37, at Arts. 23(2) [Role of the Court], 26(1)-(2) [Removal from Office and Temporary Membership of the Court], 27(1) [Jurisdiction of the Court], 30 [Legal and Natural Persons] & 35(a) [Appeals].

⁹⁶ EAC Treaty, *supra* note 37, at Art. 26(1)(b).

⁹⁷ Staff Writer, 'Kibaki Rails at EAC Court as Rwanda, Burundi Join Up', *The East African* (Dec. 4, 2006), available at www.theeastafrican.co.ke/news/-/2558/252342/-/t6awg5z/-/index.html.

⁹⁸ M. Mati, 'Kenya is Guilty of Judicial Interference', *The East African* (Feb. 26, 2007), available at www.theeastafrican.co.ke/opOrEd/-/434748/253402/-/rbk891z/-/index.html.

Several East African national law societies, using Article 30, then challenged the legality under Article 150 [Amendment of the Treaty] of the EAC Treaty of the ratification procedures that were employed for these amendments.⁹⁹ The four respondents, as in *Nyong'o*, challenged the capacity of the claimant law societies to bring the issue before the Court. The Attorney General of Tanzania and the Secretary General of the EAC argued 'that under international law, the applicants were not competent to challenge the sovereign right of the Partner States to amend the Treaty to which they were parties.'¹⁰⁰ The EACJ concluded that the claimants were not challenging the Partner States' sovereign right to amend, rather they were contesting the failure to abide by the amendment procedures prescribed by the EAC Treaty.¹⁰¹

The Attorney General of Uganda argued that the claim was 'incompetent and misconceived because there was no dispute amongst the parties to the [EAC] Treaty.'¹⁰² Since Article 30 gives legal persons the right to petition the court when there is an infringement of the Treaty this argument was deemed irrelevant.¹⁰³

The Attorney General of Kenya argued that the amendments were actually decisions of the Summit and, thus, not reviewable under Article 30.¹⁰⁴ The Court decided that even though Article 30 makes no mention of an organ of the Community, restricting the Article so that it

⁹⁹ *East African Law Society and Others v. Attorney General of the Republic of Kenya and Others*, *supra* note 93, at 2.

¹⁰⁰ *Ibid.* at 9.

¹⁰¹ *Ibid.* at 13.

¹⁰² *Ibid.* at 9.

¹⁰³ *Ibid.* at 13-14.

¹⁰⁴ *Ibid.* at 9.

could not be used where an organ violated the Treaty would defeat its purpose.¹⁰⁵ Further, the court held that:

The alleged infringement is the totality of the process of the Treaty amendment, which amendment was, and can only be made by the parties to the Treaty, namely the Partner States, acting together through the organs of the Community. It follows that if in the amendment process the Treaty was infringed, it was infringed by the Partner States. The reference therefore cannot be barred on the ground that its subject matter are decisions and actions of organs of the Community.¹⁰⁶

Therefore, the Court had jurisdiction.

The EACJ went on to conclude the ratification process that was used in making the amendments constituted an infringement of Articles 150, 5(3)(g), and 7(1)(a) of the EAC Treaty because the Partner States had not allowed the participation of the private sector and civil society in the drafting of the amendments.¹⁰⁷ However, the Court decided not to invalidate the amendments because:

[T]he infringement was not a conscious one[;] . . . after this clarification of the law on the matter the infringement is not likely to recur[; and] . . . not all the resultant amendments are incompatible with Treaty objectives¹⁰⁸

In the case of *James Katabazi and 21 Others v. Secretary General of the East African Community and Another*, the EACJ was petitioned to determine the lawfulness of the detention of Ugandan prisoners.¹⁰⁹ Sixteen people had been brought before the Ugandan High Court and

¹⁰⁵ Ibid. at 15.

¹⁰⁶ Ibid. at 16.

¹⁰⁷ Ibid. at 31.

¹⁰⁸ Ibid. at 43-44.

¹⁰⁹ *James Katabazi and 21 Others v. Secretary General of the East African Community and Another*, East African Court of Justice Judgment Ref. No. 1 of 2007 (Nov. 1, 2007).

charged with treason.¹¹⁰ The Court granted bail to fourteen of them and the court was immediately surrounded by security personnel who re-arrested the men, interfered with the preparation of the bail documents, and took the men back to jail.¹¹¹ They were taken before a military General Court Martial and charged with unlawful possession of firearms and terrorism stemming from the same facts as the previous charges.¹¹² The issues of interference with court process and conducting simultaneous civil and military prosecutions was brought before the Constitutional Court of Uganda which ruled that the interference was unconstitutional and that bail had to be granted the men.¹¹³ They were not released and the issue was brought before the EACJ.¹¹⁴

The respondents, the Secretary General of the East African Community and the Attorney General of Uganda, challenged the EACJ's jurisdiction to deal with matters of human rights considering that no such jurisdiction had been granted by the EAC Treaty or by the Council under Article 27(2).¹¹⁵ The Court stated that '[t]he quick answer is: No [this court] does not have [jurisdiction].'¹¹⁶ The Court went on to say:

It very [sic] clear that jurisdiction with respect to human rights requires a determination of the Council and a conclusion of a protocol to that effect. Both of those steps have not been taken. It follows, therefore, that this Court may not adjudicate on disputes concerning violation of human rights *per se*.¹¹⁷

¹¹⁰ Ibid. at 1.

¹¹¹ Ibid. at 2.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ *James Katabazi and 21 Others v. Secretary General of the East African Community and Another*, *supra* n. 109 at 2.

¹¹⁵ Ibid. at 12

¹¹⁶ Ibid. at 14.

¹¹⁷ Ibid. at 15.

Despite this, the Court determined that ‘[w]hile the Court will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the reference includes allegation of human rights violation.’¹¹⁸ In other words, as long as a dispute gives the EACJ jurisdiction under Article 27, the fact that the dispute involves human rights is merely incidental.

The EACJ then discussed whether it had Article 27 jurisdiction. It determined that Article 23 provides that the EACJ ‘shall ensure the adherence to law’, which meant that where the law has not been adhered to the EACJ would have Article 27(1) jurisdiction to compel adherence.¹¹⁹ The Court then determined that Articles 5(1)¹²⁰, 6¹²¹, 7(2)¹²², and 8(1)(c)¹²³ require Partner States to abide by the decisions of their courts.¹²⁴ It held:

[T]he intervention by the armed security agents of Uganda to prevent the execution of a lawful Court order violated the principle of the rule of law and consequently contravened the Treaty. Abiding by the court decision is the corner stone of the independence of the judiciary which is one of the principles of the observation of the rule of law.¹²⁵

¹¹⁸ Ibid. at 16.

¹¹⁹ *James Katabazi and 21 Others v. Secretary General of the East African Community and Another*, *supra* n. 109 at 23.

¹²⁰ Ibid. at 15 (‘The objectives of the Community shall be to develop policies and programmes [sic] aimed at widening and deepening co-operation among the Partner States in political, economic, social and cultural fields, research and technology, defence [sic], security and legal and judicial affairs, for their mutual benefit.’) (quoting the EAC Treaty, *supra* note 37, at Art. 5(1), (emphasis added by the EACJ)).

¹²¹ Ibid. ‘Article 6 sets out the fundamental principles of the Community which governs the achievement of the objectives of the Community, of course as provided in Article 5 (1). Of particular interest here is paragraph (d) which talks of the rule of law and the promotion and the protection of human and peoples rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights.’

¹²² Ibid. at 16 ‘The Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.’ (quoting the EAC Treaty, *supra* note 37, at Art. 7(2), (emphasis added by the EACJ)).

¹²³ Ibid., ‘[T]he Partner States undertake, among other things: ‘Abstain from any measures likely to jeopardize the achievement of those objectives or the implementation of the provisions of this Treaty.’ (quoting the EAC Treaty, *supra* note 37, at Art. 8(1)(c)).

¹²⁴ *James Katabazi and 21 Others v. Secretary General of the East African Community and Another*, *supra* n. 109 at 15-23.

¹²⁵ Ibid.

Therefore, since the issue in the case was whether Articles 5 through 8 had been adhered to, Article 23 gave the EACJ Article 27(1) jurisdiction, making the issue of human rights incidental and giving the Court jurisdiction to hear the case.¹²⁶

The EACJ based its decision in *Katabazi* on the objectives and purposes clauses of the Treaty which are regarded as preambles that do not create binding obligations. Objectives and purposes clauses are therefore not thought of as creating independent or substantive grounds for granting relief. Rather, they are meant to give the treaty context. In 2000, the Iran-United States Claims Tribunal put it this way:

[W]hen one is dealing with the object and purpose of a treaty, which is the most important part of the treaty's context, the object and purpose does not constitute an element independent of that context. The object and purpose is not to be considered in isolation from the terms of the treaty; it is intrinsic to its text. It follows that, under Article 31 of the Vienna Convention¹²⁷, a treaty's object and purpose is to be used only to clarify the text, not to provide independent sources of meaning that contradict the clear text.¹²⁸

¹²⁶ Ibid. at 23.

¹²⁷ Vienna Convention on the Law of Treaties, (Signed May 23, 1969, Entered into Force Jan. 27, 1980), at Art. 31.

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

¹²⁸ United States v. Iran, No. 130-A28-FT, ¶ 58 (Iran-U.S. Cl. Trib. Rep. 2000).

Notwithstanding this, the EACJ determined that Article 5(1), which spells out one of the objectives of the Community, requires Partner States to abide by the decisions of their courts. The *Katabazi* decision illustrates the interpretive boldness of the EACJ not only in seizing jurisdiction over cases that raise sovereignty questions for the member states as well as in creatively using preambular provisions of the Treaty Establishing the EACJ to determine cases brought before it when such cases involve human rights which are not an enumerated base for the exercise of jurisdiction by the ground.

The ECOWAS Community Court of Justice

The Treaty of ECOWAS (hereinafter ‘Treaty’) establishes the Community Court of Justice (hereinafter ‘CCJ’).¹²⁹ The Treaty limits the CCJ’s authority to ‘perform[ing its] functions and act[ing] within the limits of the powers conferred on [it] by this Treaty and by the Protocols relating thereto.’¹³⁰ However, ‘[j]udgments of the Court of Justice [are] binding on the Member States, the institutions of the Community and on individuals and corporate bodies.’¹³¹ The CCJ’s judges were appointed on January 30, 2001.¹³²

The Community Court Protocol (hereinafter ‘Protocol’) came into force on November 5, 1996¹³³ and was amended in 2005.¹³⁴ The Protocol expanded the CCJ’s authority by mandating:

“The Court has competence to adjudicate on any dispute relating to the following:

- a) the interpretation and application of the Treaty, Conventions and Protocols of the Community;
- b) the interpretation and application of the regulations, directives, decisions and other subsidiary legal instruments adopted by ECOWAS;
- c) the legality of regulations, directives, decisions and other subsidiary legal instruments adopted by ECOWAS;
- d) the failure by Member States to honour their obligations under the Treaty, Conventions and Protocols, regulations, directives, or decisions of ECOWAS;
- e) the provisions of the Treaty, Conventions and Protocols, regulations, directives, or decisions of ECOWAS Member States;

¹²⁹ Treaty Establishing the Economic Community of West African States, ECOWAS Authority of Heads of State and Government, (Adopted and Enacted July 24, 1993) (replacing the 1975 Treaty of Lagos as the Treaty Establishing ECOWAS), at Arts. 7(1)(e), 15(1).

¹³⁰ *Ibid.* at Art. 7(2).

¹³¹ *Ibid.* at Art. 15(4).

¹³² African International Courts and Tribunals Web Site, ‘ECOWAS CCJ’, *available at* www.aict-ctia.org/courts_subreg/ecowas/ecowas_home.html.

¹³³ A.O. Enabulele, ‘Reflections on the ECOWAS Community Court Protocol and the Constitutions of the Member States’, *International Community Law Review*, 12 (Mar. 2010), p. 111, 115.

¹³⁴ *Ibid.* at 117; *see also* ‘Supplementary Protocol, A/SP.1/01/05 Amending the Preamble and Articles 1, 2, 9, 22 and 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of Said Protocol’, Twenty-Eighth Session of the Authority of Heads of State and Government (Jan. 19, 2004).

- f) the Community and its officials; and
- g) the action for damages against a Community institution or an official of the Community for any action or omission in the exercise of official functions.”¹³⁵

The Treaty also mandated the creation of an Arbitration Tribunal of the Community.¹³⁶ The Arbitration Tribunal has yet to be set up, but until then the Protocol allows the CCJ to act in that capacity.¹³⁷

The Treaty mandates that ‘[t]he status, composition, powers, procedure and other issues concerning the Court of Justice shall be as set out in a Protocol relating thereto.’¹³⁸ The Protocol mandates that the CCJ shall consist of seven judges, appointed by the Authority of Heads of States and Government from a pool of nominees, two from each state.¹³⁹ Members of the CCJ are appointed for a five-year term and may be reappointed only once.

The Treaty states ‘[t]he Court of Justice shall carry out the functions assigned to it independently of the Member States and the institutions of the Community.’¹⁴⁰ Furthermore, the Member States agreed to ‘undertake to co-operate in judicial and legal matters with a view to harmonizing their judicial and legal systems.’¹⁴¹ The Protocol allows national courts to present certified questions on issues of interpretation and application of the Treaty and other ECOWAS texts.¹⁴²

¹³⁵ ECOWAS Community Court of Justice, Protocol A/P.1/7/91, (Adopted July 6, 1991, Came into Force Nov. 5, 1996, Amended by Supplementary Protocol A/SP.1/01/05 in 2005), at Art. 9(1).

¹³⁶ Treaty of ECOWAS, *supra* note 129, at Art. 16(1).

¹³⁷ Community Court Protocol A/P.1/7/91, *supra* note 135, at Art. 9(5).

¹³⁸ Treaty of ECOWAS, *supra* note 129, at Art. 15(2).

¹³⁹ Community Court Protocol A/P.1/7/91, *supra* note 135, at Art. 2.

¹⁴⁰ Treaty of ECOWAS, *supra* note 129, at Art. 15(3).

¹⁴¹ *Ibid.* at Art. 57(1).

¹⁴² Community Court Protocol A/P.1/7/91, *supra* note 135, at Art. 10(f).

Article 10 of the Protocol allows the CCJ to give advisory opinions to any Member State, the President of the ECOWAS Commission, and any ECOWAS institution upon request.¹⁴³ The Treaty also provides that ‘[a]ny dispute regarding the interpretation or the application of the provisions of this Treaty shall be [sic] amicably settled through direct agreement without prejudice to the provisions of this Treaty and relevant Protocols.’¹⁴⁴ In the event such agreement cannot be reached, ‘either party or any other Member States or the Authority may refer the matter to the Court of the Community whose decision shall be final and shall not be subject to appeal.’¹⁴⁵ The Protocol authorizes Member States and the Executive Secretary to bring an action before the CCJ for the alleged failure of a Member State to perform an obligation.¹⁴⁶ Furthermore, Member States, the Council of Ministers, and the Executive Secretary may bring a proceeding before the CCJ to determine the legality of an action in relation to any ECOWAS text.¹⁴⁷

The Authority of Heads of States and Government also has the ‘power to grant the Court the power to adjudicate on any specific dispute that it may refer to the Court other than those specified in [the Protocol].’¹⁴⁸ Individuals and corporate bodies may also bring a proceeding before the CCJ ‘for the determination of an act or inaction of a Community official which violates the rights of the individuals or corporate bodies.’¹⁴⁹ Individuals are also explicitly granted the right to bring cases of violations of human rights before the CCJ.¹⁵⁰

¹⁴³ Ibid. at Art. 10.

¹⁴⁴ Treaty of ECOWAS, *supra* note 129, at Art. 76(1).

¹⁴⁵ Ibid. at Art. 76(2).

¹⁴⁶ Community Court Protocol A/P.1/7/91, *supra* note 135, at Art. 10(a).

¹⁴⁷ Ibid. at Art. 10(b).

¹⁴⁸ Ibid. at Art. 9(8).

¹⁴⁹ Community Court Protocol A/P.1/7/91, *supra* note 135, at Art. 10(c).

¹⁵⁰ Ibid. at Art. 10(d).

Where an agreement gives the CCJ jurisdiction over dispute settlement, the CCJ has such jurisdiction.¹⁵¹ The staff of any ECOWAS institution can also bring an action before the CCJ once it has ‘exhausted all appeal processes available . . . under the ECOWAS Staff Rules and Regulations.’¹⁵² Where an issue of interpretation as to the COMESA Treaty, COMESA protocols, or COMESA regulations arise within a Member State’s national court, such national court may, on its own or at the request of a party to the action, refer the issue to the CCJ for interpretation.¹⁵³

Prior to the 2005 amendment of the Protocol by the Supplemental Protocol¹⁵⁴, individuals were not allowed to bring suit in the CCJ.¹⁵⁵ This was a heavy restriction on the power of the CCJ to enforce the Treaty upon ECOWAS Member States and ECOWAS stood apart from other RTA judiciaries which, as we have seen so far, allow such cases.¹⁵⁶ The 2003 case of *Olajide Afolabi v. Federal Republic of Nigeria*¹⁵⁷ and the 2004 case of *Frank Ukor v. Rachard Lalaye*¹⁵⁸, discussed below, emphasized this fact.¹⁵⁹

In 2003 Nigeria closed its common border with Benin, which hurt many of the businesses along the border.¹⁶⁰ A Nigerian citizen applied to the CCJ to have his suit heard on the ground that the border closure had caused loss to his business in violation of the Treaty.¹⁶¹ Nigeria objected to

¹⁵¹ Ibid. at Art. 9(6).

¹⁵² Ibid. at Art. 10(e).

¹⁵³ Ibid. at Art. 10(f).

¹⁵⁴ Supplementary Protocol A/SP.1/01/05, *supra* note 134.

¹⁵⁵ Enabulele, *supra* note 133, at 116-19.

¹⁵⁶ Ibid.

¹⁵⁷ *Olajide Afolabi v. Federal Republic of Nigeria*, ECW/CCJ/APP/01/03, (2003).

¹⁵⁸ *Frank Ukor v. Rachard Lalaye*, ECW/CCJ/APP/01/04, (2004).

¹⁵⁹ Enabulele, *supra* note 133, at 116.

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

the CCJ's jurisdiction to hear the case under the Treaty and the Protocol.¹⁶² The CCJ agreed and dismissed the case. In 2004 Benin seized a national's truck and goods.¹⁶³ The citizen applied to the CCJ to quash the order that his truck and goods be seized as violative of the Treaty.¹⁶⁴ Benin objected to jurisdiction and, again, the CCJ dismissed the case.¹⁶⁵ These cases are, in large part, the reason why the Supplemental Protocol was established in 2005.¹⁶⁶

Since the 2005 amendments to the Protocol many citizens of Member States have brought cases before the CCJ, and many have won. In 2008, a citizen of Niger brought suit in the CCJ against Niger for failing to protect her human rights, as she had been a slave for almost her entire life.¹⁶⁷ The citizen won the case and was awarded about \$17,000.¹⁶⁸

A more controversial decision of the CCJ came in 2009 in the case of *Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria and Universal Basic Education Commission*.¹⁶⁹ In this case, SERAP, a human rights NGO, brought suit in the CCJ as a legal person against Nigeria for human rights violations on the ground that Nigeria had not adequately implemented Nigeria's Basic Education Act and Child's Rights Act of 2004, and had thus violated both the African Charter and the ECOWAS Treaty.¹⁷⁰ Nigeria alleged that the CCJ

¹⁶² Ibid.

¹⁶³ Ibid. at 117.

¹⁶⁴ Ibid.

¹⁶⁵ Enabulele, *supra* note 133 at 117

¹⁶⁶ Ibid. at 116-19.

¹⁶⁷ P. Walker, 'Niger Guilty in Landmark Slavery Case', *The Guardian* (Oct. 27, 2008), available at www.guardian.co.uk/world/2008/oct/27/niger-slave-court; see also *Hadijatou Mani Koraou v. Republic of Niger*, Judgment No. ECW/CCJ/APP/08/08, unofficial translation of Judgment No. ECW/CCJ/JUD/06/08 (Oct. 27, 2008).

¹⁶⁸ Ibid.

¹⁶⁹ Judgment No. ECW/CCJ/APP/0808, *supra* note 167.

¹⁷⁰ ESCR-Net, *Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria and Universal Basic Education Commission*, Judgment No. ECW/CCJ/APP/0808, (International Network for Economic, Social and Cultural Rights, 2009), available at www.escr-net.org/caselaw/caselaw_show.htm?doc_id=1143047.

did not have jurisdiction, notwithstanding the express provision of the Protocol.¹⁷¹ The CCJ noted that Article 9(4) of the Protocol states ‘[t]he [CCJ] has jurisdiction to determine cases of violation of human rights that occur in any Member State’; that Article 4(g) of the ECOWAS Treaty affirms that the Member States must adhere to the ‘recognition promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights’; and that Article 17 of the African Charter states that ‘[e]very individual shall have the right to education’.¹⁷² Thus, the CCJ determined that it had jurisdiction, but there is yet to be a decision on the substantive issues of the case, namely whether Nigeria had actually violated its citizens’ right to an education.¹⁷³

Some commentators believe a severe conflict between the CCJ and the Constitutions of the various Members States is inevitable, and that the only reason this conflict has yet to come to light is due to the relative youth of the CCJ.¹⁷⁴ The 2005 Protocol does not give citizens of Member States the right to have cases involving the interpretation and application of the Treaty. Instead, it authorizes citizens to bring suits before the CCJ that involve, generally, alleged violations of the human rights.¹⁷⁵ As pointed out by A.O. Enabulele:

Article 3 of the Constitution of the Republic of Benin, 1990; Article 4 of the Constitution of the Gambia, 1997; Article 1(2) of the Constitution of the Republic of Ghana, 1992; Article 2 of the Constitution of Liberia, 1984; [and] Section 1(3) of the Constitution of The Federal Republic of Nigeia, 1999; [make] the various constitutions supreme and binding on all persons and authorities within their respective spheres of influence. Any law

¹⁷¹ Ibid.

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ Enabulele, *supra* note 133, at 111.

¹⁷⁵ Community Court Protocol A/P.1/7/91, *supra* note 135, at Art. 10(d).

that is inconsistent with the provisions of any of the constitutions, within its sway is null and void to the extent of its inconsistency.¹⁷⁶

Therefore, if the CCJ were to hear a human rights case and find that some action by a Member State violates the Treaty, yet one of that Member State's national courts also determined the action was authorized under the national constitution, then there would be an irreconcilable conflict between national and international law.¹⁷⁷ However, as I have observed elsewhere, the supremacy of national Constitutions over international law particularly in commonwealth African countries is slowly ebbing away.¹⁷⁸

The SADC Tribunal

The Treaty of the Southern African Development Community (hereafter Treaty) establishes the Tribunal '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.'¹⁷⁹ Further emphasis is given to this objective in Article 32: 'Any dispute arising from the interpretation or application of this Treaty, the interpretation, application or validity of Protocols or other subsidiary instruments made under this Treaty, which cannot be settled amicably, shall be referred to the Tribunal.'¹⁸⁰ The Treaty mandates '[t]he decisions of the Tribunal shall be final and binding.'¹⁸¹ Furthermore, subsection 2 of Article 16 of the Treaty states '[t]he composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed in a Protocol, which shall, notwithstanding the provisions of Article 22 of this Treaty,

¹⁷⁶ Enabulele, *supra* note 133, at 121.

¹⁷⁷ *Ibid.* at 121-34.

¹⁷⁸ James Gathii, "Kenya's Piracy Prosecutions," 104 *American Journal of International Law* (2010)

¹⁷⁹ Treaty Establishing the Southern African Development Community, (Adopted and Came into Force on Aug. 17, 1992, Amended on Aug. 14, 2001), at Arts. 1(g) and 16(1).

¹⁸⁰ *Ibid.* at Art. 32.

¹⁸¹ *Ibid.* at Art. 16(5).

form an integral part of this Treaty, adopted by the Summit.’¹⁸² Article 22 is the article that addresses the requirements of ratification process for protocols to the treaty.¹⁸³

The Protocol on Tribunal and the Rules of Procedure Thereof was passed by the Summit in August 2000 in accordance with Article 16 of the Treaty.¹⁸⁴ While the Tribunal has begun operating, the Protocol on Tribunal has not yet been ratified by two-thirds of Member States as required by Article 22.¹⁸⁵ There is much dispute over whether this protocol in particular can be given effect without such ratification. I will return to this topic below. The Protocol on Tribunal mandated the Council to determine where the seat of the Tribunal would be located.¹⁸⁶ The Council eventually chose Windhoek, Namibia.¹⁸⁷

The Treaty for the Establishment of SADC states ‘Members of the Tribunal shall be appointed for a specified period.’¹⁸⁸ The Protocol mandates ‘The Tribunal shall consist of not less than ten (10) Members, appointed from nationals of States who possess the qualifications required for appointment to the highest judicial offices in their respective States or who are jurists of recognised [sic] competence.’¹⁸⁹ The Summit, on recommendation of the Council, is to appoint the ten members¹⁹⁰, five of which it is to designate as ‘regular Members’, those who ‘shall sit regularly on the Tribunal’.¹⁹¹ The other five ‘constitute a pool from which the President [of the

¹⁸² Ibid. at Art. 16(2).

¹⁸³ Ibid. at Art. 22.

¹⁸⁴ Protocol on Tribunal and the Rules of Procedure Thereof, South African Development Community, (Adopted Aug. 7, 2000).

¹⁸⁵ Press Release, ‘Status and Meaning of Ratification of SADC Treaty and Tribunal Protocol’, Zimbabwe Human Rights NGO Forum (Sept. 6, 2009), *available at* www.zimbabwedemocracynow.com/2009/09/06/status-and-meaning-of-ratification-of-sadc-treaty-and-tribunal-protocol/.

¹⁸⁶ SADC Protocol on Tribunal, *supra* note 183, at Art. 13.

¹⁸⁷ SADC Web Site, ‘SADC Tribunal’, *available at* www.sadc.int/tribunal/.

¹⁸⁸ SADC Treaty, *supra* note 178, at Art. 16(3).

¹⁸⁹ SADC Protocol on Tribunal, *supra* note 183, at Art. 3(1).

¹⁹⁰ Ibid. at Art. 4(4).

¹⁹¹ Ibid. at Art. 3(2).

Tribunal] may invite a Member to sit on the Tribunal whenever a regular Member is temporarily absent or is otherwise unable to carry out his or her functions.’¹⁹² The Protocol states that the Tribunal is constituted by three members, but it may decide to constitute all five for any case.¹⁹³ The Tribunal only sits when there is a case submitted to it¹⁹⁴ and the President of the Tribunal gets to decide who shall sit for any case.¹⁹⁵ The Council may increase the number of members on a proposal from the Tribunal.¹⁹⁶

At any time, none of the members may be nationals of the same state.¹⁹⁷ To this end, each Member State nominates one candidate and the Council chooses amongst these candidates, with due consideration given to gender representation.¹⁹⁸ While, the Members of the Tribunal serve a five-year term and may only be re-appointed for an additional five-year term.¹⁹⁹ The Tribunal only sits when there is a case, the Council may decide to make it a full-time position and, if it does, Members would no longer be allowed to hold any other office or employment.²⁰⁰ Regardless of this, Members are not allowed to exercise any political or administrative function or engage in any trade that would interfere with his or her duties, impartiality, or independence as a member of the Tribunal.²⁰¹ The President of the Tribunal is elected by the Members of the

¹⁹² Ibid.

¹⁹³ Ibid. at Art. 3(3).

¹⁹⁴ Ibid. at Art. 6(2).

¹⁹⁵ SADC Protocol on Tribunal, *supra* note 183, at Art. 3(4).

¹⁹⁶ Ibid. at Art. 3(5).

¹⁹⁷ Ibid. at Art. 3(6).

¹⁹⁸ Ibid. at Arts. 4(1), (2), and (3).

¹⁹⁹ Ibid. at Art. 6(1).

²⁰⁰ Ibid. at Arts. 6(2) and (3).

²⁰¹ SADC Protocol on Tribunal, *supra* note 183 at Art. 9(1).

Tribunal and holds this position for 3 years.²⁰² Members and the President may resign at any time and may only be dismissed in accordance with the Tribunal Rules.²⁰³

With regard to the relationship between the tribunal and Member States, the Treaty for the Establishment of SADC provides that ‘the members of the Tribunal . . . shall be committed to the international character of SADC, and shall not seek or receive instructions from any Member States, or from any authority external to SADC.’²⁰⁴ The Tribunal ‘may rule on a question of interpretation, application or validity of the provisions in issue if the question is referred to it by a court or tribunal of a State.’²⁰⁵

The Tribunal also has original jurisdiction over:

all disputes and all applications referred to it in accordance with the Treaty and this Protocol which relate to:

- (a) the interpretation and application of the Treaty;
- (b) the interpretation, application or validity of the Protocols, all subsidiary instruments adopted within the framework of the Community, and acts of the institutions of the Community; [and]
- (c) all matters specifically provided for in any other agreements that States may conclude among themselves or within the community and which confer jurisdiction on the Tribunal.²⁰⁶

The Tribunal is directed to develop its own case law, ‘having regard to applicable treaties, general principles and rules of public international law and any rules and principles of the law of States.’²⁰⁷ The Protocol provides ‘Where a dispute is referred to the Tribunal by any party the

²⁰² SADC Protocol on Tribunal, *supra* note 183, at Art. 7(1).

²⁰³ *Ibid.* at Art. 8.

²⁰⁴ SADC Treaty, *supra* note 178, at Art. 17(2).

²⁰⁵ SADC Protocol on Tribunal, *supra* note 183, at Art. 16.

²⁰⁶ *Ibid.* at Art. 14.

²⁰⁷ *Ibid.* at Art. 21.

consent of other parties to the dispute [is] not . . . required.’²⁰⁸ The Tribunal does not have original jurisdiction, but it may give preliminary rulings in certain cases.²⁰⁹

According to the Treaty for the Establishment of SADC, ‘The Tribunal shall give advisory opinions on such matters as the Summit or the Council may refer to it.’²¹⁰ The SADC Summit and Council are the only entities that the Treaty and the Protocol allow to request advisory opinions. The Tribunal has ‘exclusive jurisdiction over all disputes between the States and the Community. Such disputes may be referred to the Tribunal . . . by the competent institution or organ of the Community.’²¹¹ It also has ‘exclusive jurisdiction over all disputes between natural or legal persons and the Community. Such disputes may be referred to the Tribunal . . . by the competent institution or organ of the Community.’²¹²

The Tribunal has ‘jurisdiction over disputes between States.’²¹³ Where there is a dispute between the Community and a State, the State may refer the issue to the Tribunal.²¹⁴ The Tribunal ‘may [also] rule on a question of interpretation, application or validity of the provisions in issue if the question is referred to it by a court or tribunal of a State for a preliminary ruling in accordance with this Protocol.’²¹⁵ As such, the Tribunal has ‘jurisdiction to give preliminary rulings in proceedings of any kind and between any parties before the courts or tribunals of

²⁰⁸ Ibid. at Art. 15(3).

²⁰⁹ Ibid. at Art. 16. For an explanation of these instances, see the ‘Partner States’ National Courts’ subsection of this section.

²¹⁰ SADC Treaty, *supra* note 178, at Art. 16(4); SADC Protocol on Tribunal, *supra* note 183, at Art. 20 (‘The Tribunal shall have jurisdiction to give advisory opinions, which may be requested by the Summit or by the Council.’).

²¹¹ SADC Protocol on Tribunal, *supra* note 183, at Art. 17.

²¹² Ibid. at Art. 18.

²¹³ Ibid. at Art. 15(1).

²¹⁴ Ibid. at Art. 17.

²¹⁵ Ibid. at Art. 16(2).

States.’²¹⁶ In addition, as is typical of other African RTA judiciaries, the Tribunal has exclusive jurisdiction over all disputes between natural and legal persons and SADC and the person may bring the suit.²¹⁷ A natural or legal person may only bring suit against a Member State ‘unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction.’²¹⁸ Finally, the Tribunal has ‘exclusive jurisdiction over all disputes between the Community and its staff relating to their conditions of employment.’²¹⁹

The Tribunal’s legitimacy has been brought into sharp focus as a result of its decision on Zimbabwe’s land reform program. Following that decision, many officials within Zimbabwe’s government argued that the Tribunal does not currently exist for reasons we shall see below. The Tribunal has reported its findings to the Summit and is awaiting action to determine if the Tribunal’s decision should be recorded by the Member States. The next part of this paper will now examine the Tribunal’s jurisprudence.

The SADC Tribunal’s Jurisprudence

The case that started the controversy over the SADC Tribunal’s legitimacy is *Mike Campbell (Pvt) Ltd. and 78 Others v. The Republic of Zimbabwe*.²²⁰ The applicants, natural and legal persons, in that case were land-owners challenging Zimbabwe’s land reform program which essentially permitted taking the applicants’ land from them and redistributing it.²²¹ The Tribunal determined that it only had jurisdiction if: (1) the applicants had standing in that they had

²¹⁶ SADC Protocol on Tribunal, *supra* note 183, at Art. 16(1).

²¹⁷ *Ibid.* at Art. 18.

²¹⁸ *Ibid.* at Art. 15(2).

²¹⁹ *Ibid.* at Art. 19.

²²⁰ *Mike Campbell (Pvt) Ltd. and 78 Others v. The Republic of Zimbabwe*, SADC (T) Case No. 2/2007 [2008] SADCT 2 (28 Nov. 2008).

²²¹ *Ibid.* at 4-7.

‘exhaust[ed] all available remedies or . . . [were] unable to proceed under the domestic jurisdiction of [Zimbabwe]’; and (2) the dispute related to interpretation and application of the Treaty.²²²

The Tribunal first determined if the dispute was within its scope of jurisdiction.²²³ The applicants began their case at the Tribunal on October 11, 2007 with an application for an interim measure under Article 28 of the Protocol on Tribunal to restrain the government of Zimbabwe from removing the applicants from their land.²²⁴ However, the respondent argued the applicants had not exhausted all of their local remedies as they had begun a case before the Supreme Court of Zimbabwe.²²⁵ The Tribunal, however, determined:

The rationale for exhaustion of local remedies is to enable local courts to first deal with the matter because they are well placed to deal with the legal issues involving national law before them. It also ensures that the international tribunal does not deal with cases which could easily have been disposed of by national courts.²²⁶

Therefore, the Tribunal reasoned:

[W]here the municipal law does not offer any remedy or the remedy that is offered is ineffective, the individual is not required to exhaust local remedies. Further, where . . . the procedure of achieving the remedies would have been unduly prolonged, the individual is not expected to exhaust local remedies.²²⁷

²²² Ibid. at 17-18.

²²³ Ibid. at 17-23.

²²⁴ Ibid. at 4.

²²⁵ *Mike Campbell (Pvt) Ltd. and 78 Others v. The Republic of Zimbabwe*, *supra* note 219, at 19-21.

²²⁶ Ibid. at 20.

²²⁷ Ibid. at 21 (internal quotations omitted).

The Tribunal thus determined that if an applicant's local remedies suffered from *de facto* exhaustion, the Tribunal would have jurisdiction. In fact, the Supreme Court of Zimbabwe had already rendered a decision in the applicants' case,²²⁸ as discussed below.

The applicants in the Tribunal's case were challenging Section 16B of Amendment 17 of the Constitution of Zimbabwe.²²⁹ Subsection (3)(b) of that section states 'a person having any right or interest in the [reorganized] land . . . shall not apply to a court to challenge the acquisition of the land by the State, and no court shall entertain any such challenge.'²³⁰ Therefore, the Tribunal determined, the amendment had 'ousted the jurisdiction of the courts of law in Zimbabwe from any case related to acquisition of agricultural land and that, as such, the first and second Applicants were unable to institute proceedings under the domestic jurisdiction.'²³¹ The Tribunal noted that this position was confirmed by the Supreme Court of Zimbabwe on January 22, 2008 in the applicants' case.²³²

The Tribunal next had to determine if there was a proper basis of jurisdiction such that it could hear the dispute; i.e. whether the dispute related to interpretation and application of the Treaty.²³³ On this issue, the respondent argued there was no such base as the Treaty only mentions human rights as a principle of SADC and there is no protocol that governs human rights standards or agrarian reform.²³⁴ The respondent went on to argue that, in the absence of such protocols, the Tribunal cannot adopt '[human rights] standards from other Treaties as this would amount to

²²⁸ *Mike Campbell (Pty) Ltd. v. Minister of National Security Responsible for Land, Land Reform and Resettlement* (124/06) [2008] ZWSC 1 (22 Jan. 2008).

²²⁹ *Ibid.* at 8.

²³⁰ *Ibid.* at 11.

²³¹ *Ibid.* at 21.

²³² *Ibid.*

²³³ *Mike Campbell (Pvt) Ltd. and 78 Others v. The Republic of Zimbabwe*, *supra* note 219, at 23-26.

²³⁴ *Ibid.* at 23.

legislating on behalf of SADC Member States.’²³⁵ The Tribunal, however, noted that Article 21(b) of the Treaty mandates the Tribunal to develop its own jurisprudence and to do so having regard for general principles and rules of public international law.²³⁶ Article 4(c) requires Member States to act in accordance with ‘human rights, democracy and the rule of law.’²³⁷ Therefore, as long as one of these interconnected principles had been violated by Zimbabwe the Tribunal had jurisdiction to hear the dispute under Article 15(2) of the Treaty. The Tribunal noted that Amendment 17 of the Constitution of Zimbabwe denied the respondents access to the courts and the right to a fair hearing and so determined that their human rights, democracy, and the rule of law had been violated and that the Tribunal had jurisdiction.²³⁸

After granting jurisdiction the Tribunal went on to discuss the substantive questions raised in the case. In its ruling, it held that the applicants had been discriminated against on the ground of race, the respondent owed the applicants fair compensation for the lands that had been taken from them, and both the respondent and Amendment 17 itself were in breach of Articles 4(c)²³⁹ and 6(2)²⁴⁰ of the Treaty.²⁴¹

²³⁵ Ibid.

²³⁶ Ibid. at 24.

²³⁷ Ibid. at 25.

²³⁸ Ibid. at 26-41.

²³⁹ ‘SADC and its Member States shall act in accordance with the following principles: human rights, democracy and the rule of law.’ SADC Treaty, *supra* note 178, at Art. 4(c).

²⁴⁰ ‘SADC and Member States shall not discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture, ill health, disability, or such other ground as may be determined by the Summit.’ SADC Treaty, *supra* note 178, at Art. 6(2).

²⁴¹ *Mike Campbell (Pvt) Ltd. and 78 Others v. The Republic of Zimbabwe*, *supra* note 219, at 57-59.

Zimbabwe did not comply with the Tribunal's ruling.²⁴² Instead, Zimbabwe argued it had not ratified the Protocol on Tribunal and therefore it did not have to abide by the decision of the Tribunal. Second, Zimbabwe argued that as the summit had not formally made it operational, the SADC Tribunal was not yet established and as such it did not in fact exist.²⁴³ The first of these two arguments is certainly the weaker. Even though Article 22 of the Treaty states, 'Each Protocol shall be binding only on the Member States that are party to the Protocol in question', the Article which sets up the Tribunal, Article 16, states, 'The composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed in a Protocol, which shall, notwithstanding the provisions of Article 22 of this Treaty, form an integral part of this Treaty, adopted by the Summit.'²⁴⁴ In other words, once the protocol has been officially adopted it became binding on all Member States as is the Treaty itself, regardless of individual ratification.

The second argument is a bit stronger. SADC protocols only come into force once they have been approved by the Summit on recommendation by the Council²⁴⁵ and are ratified by two-thirds of the Member States.²⁴⁶ As of September 2009 only five of SADC's 15 Member States had ratified it.²⁴⁷ However, going back to Article 16, the two-thirds ratification requirement specifically does not apply to the Protocol on Tribunal. Notably, the Article 22 two-thirds ratification requirement, and the Article 16 exemption from that requirement, were added in

²⁴² N. Nkomo, 'South African High Court Approves Legal Action Against Harare in Land Case', Voice of America News (Jan. 13, 2010), *available at* www1.voanews.com/zimbabwe/news/human-rights/Zimbabwe-South-African-Group-Granted-Right-to-Sue-Zimbabwe-13Jan10-81347412.html.

²⁴³ Press Release, 'Status and Meaning of Ratification of SADC Treaty and Tribunal Protocol', *supra* note 184.

²⁴⁴ SADC Treaty, *supra* note 178, at Arts. 22(9) and 16(2).

²⁴⁵ *Ibid.* at Art. 22(2).

²⁴⁶ *Ibid.* at Art. 22(4).

²⁴⁷ Press Release, 'Status and Meaning of Ratification of SADC Treaty and Tribunal Protocol', *supra* note 184. The five Member States are Botswana, Lesotho, Malawi, Mauritius and Namibia. M. Sasa, 'SADC Tribunal Does Not Exist', The Herald—Zimbabwe (Aug. 10, 2009), *available at* <http://allafrica.com/stories/200908100127.html>.

2001 when the Treaty was amended.²⁴⁸ So even though some Zimbabwean officials have argued that the 2001 Amendment itself is invalid and therefore the exemption does not apply,²⁴⁹ this offers no support to Zimbabwe's position because, if the amendment is invalid, so is the two-thirds ratification requirement itself.

Perhaps the simplest and best argument for the enforcement of Tribunal decisions is that the ratification of the Protocol on Tribunal is irrelevant to the Tribunal's existence and authority. Article 9(1)(g) of the Treaty which establishes the Tribunal and Article 16(1) thereof spells out its jurisdiction. It is important to note that Zimbabwe nominated a current Tribunal Member, Justice Antonia Guvava, to the Tribunal in 2005,²⁵⁰ which contradicts its claim that it does not believe the Tribunal to be in existence. Justice Guvava was, in fact, appointed to the Tribunal and is one of the five alternate members of the court.²⁵¹ In September 2009, Justice Minister Patrick Chinamasa of Zimbabwe announced that they would be withdrawing Guvava from the Tribunal.²⁵² It is noteworthy that no official action was ever taken on the part of Zimbabwe's government to withdraw Guvava or to pull out from Tribunal participation.²⁵³

On July 29, 2008 the High Court of South Africa decided in *Von Abo v. Government of the Republic of South Africa and Others* that citizens of South Africa whose property had been taken by the Zimbabwean government would be owed damages from the government of South Africa

²⁴⁸ S. Jarvis, 'Chinamasa Wrong on SADC Tribunal Pull Out', *The Standard—Zimbabwe* (Oct. 3, 2009), available at www.thestandard.co.zw/opinion/21583-chinamasa-wrong-on-sadc-tribunal-pull-out.html.

²⁴⁹ Press Release, 'Status and Meaning of Ratification of SADC Treaty and Tribunal Protocol' *supra* note 184.

²⁵⁰ C. Manyukwe, 'Gov't to Withdraw Judge from Tribunal', *Financial Gazette* (Sept. 17, 2009), available at <http://allafrica.com/stories/200909220904.html>.

²⁵¹ *Ibid.*

²⁵² *Ibid.*

²⁵³ D.F. Eagle, 'SA: Zimbabwe Tribunal Court Ruling Stands', *Metro Zimbabwe* (Feb. 6, 2010), available at www.zimbabwemetro.com/current-affairs/sazimbabwe-tribunal-court-ruling-stands/?utm_medium=newzimsituation&utm_source=newzimsituation.com.

where the government had failed to protect their interests through diplomatic intervention.²⁵⁴

The court made the following orders: South African citizens have a right to ‘diplomatic protection’ from violations of their rights by the government of Zimbabwe to be given to them by the government of South Africa; the government of South Africa has a constitutional obligation to provide this protection; the government of South Africa had to remedy the violations of the applicant’s rights; and an award of damages to the applicant was postponed pending South Africa’s compliance with the order of the High Court and subsequent judicial proceedings.²⁵⁵

On 7 May 2009 William Michael Campbell, the second applicant in the Tribunal’s *Mike Campbell* case, discussed above, and Richard Thomas Etheredge petitioned the Tribunal for a declaration that Zimbabwe was in breach and contempt of the decision in *Mike Campbell*.²⁵⁶ The Tribunal made such a declaration in June 2009 and reported its finding to the Summit for appropriate action under Article 32(5)²⁵⁷ of the Protocol on Tribunal.²⁵⁸

The *Von Abo* applicant then went before the Constitutional Court of South Africa, whose decision was made on 5 June 2009.²⁵⁹ Section 172(2)(a) of the Constitution of South Africa states ‘a High Court . . . may make an order concerning the constitutional validity of . . . any conduct of the President, but an order of constitutional invalidity has no force unless it is

²⁵⁴ *Von Abo v. Government of the Republic of South Africa and Others*, (3106/07) [2008] ZAGPHC 226 (29 July 2008).

²⁵⁵ *Ibid.* at ¶ 161.

²⁵⁶ *Campbell and Another v. Republic of Zimbabwe* (SADC (T) 03/2009) [2009] SADCT 1 (5 June 2009).

²⁵⁷ SADC Protocol on Tribunal, *supra* note 183, at Art. 32(5) (‘If the Tribunal establishes the existence of [a failure to comply with a decision of the Tribunal], it shall report its finding to the Summit for the latter to take appropriate action.’).

²⁵⁸ *Campbell and Another v. Republic of Zimbabwe*, *supra* note 255.

²⁵⁹ *Von Abo v. President of the Republic of South Africa*, (CCT 67/08) [2009] ZACC 15 (June 5, 2009).

confirmed by the Constitutional Court.’ On 5 June 2009 the Constitutional Court of South Africa held that the order of the High Court did not need to be affirmed by the Constitutional Court in this instance because the High Court declared the conduct of the South African government to be invalid, rather than the conduct of the president individually within the meaning of Section 172(2)(a).²⁶⁰

South Africa-Zimbabwe BIPPA and Fick

In late November 2009 the governments of South Africa and Zimbabwe were on their way toward signing the Bilateral Investment Promotion and Protection Agreement (BIPPA).²⁶¹ The BIPPA was aimed at providing security for South African investments in Zimbabwe, but it expressly excluded past claims arising from Zimbabwe’s land reform program²⁶², the very program at issue in *Mike Campbell*. In November 2009, South African legal consultants Jeremy Gauntlett and F.B. Pelsler advised the South African government that if it were to sign BIPPA as it was South Africa would be in violation of international law as it would compromise the Tribunal’s order and unlawfully terminate all remedies for past human rights violations, the uncompensated taking of land.²⁶³

On 27 November 2009, AfriForum, a farmers’ rights organization, petitioned the High Court of South Africa to enjoin the South African government from signing BIPPA.²⁶⁴ The parties settled out of court that day in *Fick and Three Others v. Government of the Republic of South Africa and*

²⁶⁰ Ibid. at ¶ 49.

²⁶¹ Staff Writer, ‘BIPPA Goes Against SA Law—Legal Consultants’, *Zimbabwe Independent* (Nov. 26, 2009), available at www.theindependent.co.zw/local/24475-bippa-goes-against-sa-law--legal-consultants.html.

²⁶² Ibid.

²⁶³ Ibid.

²⁶⁴ V. Sifile and J. Dube, ‘Farm Invasions Illegal—SA’, *The Standard—Zimbabwe* (Nov. 28, 2009), available at www.thestandard.co.zw/local/22423-farm-invasions-illegal--sa.html.

Two Others.²⁶⁵ The South African North Gauteng High Court in Pretoria announced the agreement in its entirety as follows:

1. The proposed Bilateral Agreement for the Promotion and Reciprocal Protection of Investments (BIPPA) between the government of Zimbabwe and that of South Africa, to be concluded on 27 November 2009 in Harare, aims to create legal and other remedies for South African citizens over and above existing remedies in terms of international law.
2. The First and Second Respondent hereby give the Applicants (and other South African Citizens in the Applicants' position) the assurance that BIPPA does not affect existing rights or remedies in terms of other sources of international law, in particular those in terms of the Treaty of the Southern African Development Community (SADC).
3. Thus the efficacy of the rulings and orders by the SADC Tribunal in *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* [2008] SADC (T) 02/2007 (28 November 2008) and *William Michael Campbell and Another v The Republic of Zimbabwe* [2009] SADC (T) 03/2009 (05 June 2009) is not affected by entering into the proposed BIPPA, which rulings and orders the Government of the Republic of South Africa respects and undertakes to honour [sic] in terms of its own obligations in terms the SADC Treaty.
4. The matter is removed from the roll, with no order as to costs.²⁶⁶

That same day the governments of Zimbabwe and South Africa signed BIPPA.²⁶⁷

On 5 February 2010 the North Gauteng High Court of South Africa in Pretoria continued where it had left off in 2008.²⁶⁸ In the continued proceedings, the Court ruled the government of South

²⁶⁵ *Fick and Three Others v. Government of the Republic of South Africa and Two Others* (72068/09) [2009] ZAGPPHC (27 Nov. 2009).

²⁶⁶ *Ibid.*

²⁶⁷ Staff Writer, 'Commitment Now Needed', *The Financial Gazette* (Dec. 4, 2009), available at www.financialgazette.co.zw/index.php?option=com_content&view=article&id=2165:commitment-now-needed&catid=30:comment&Itemid=13.

²⁶⁸ *Von Abo v. Government of the Republic of South Africa and Others*, *supra* note 253.

Africa was bound by the decision of the Tribunal in *Mike Campbell*.²⁶⁹ The court decided the South African government was at fault for not protecting the applicant's property rights in Zimbabwe through the use of diplomatic intervention, that the government had not complied with the High Court's 2008 ruling, and, as such, determined that the South African government was 'liable to pay to the applicant such damages as he may prove that he has suffered as a result of the violation of his rights by the Government of Zimbabwe.'²⁷⁰ AfriForum has announced its intention to the Supreme Court of South Africa to fully enforce the Tribunal's ruling in South Africa on February 23, 2010.²⁷¹

When the *Fick* settlement above is read in conjunction with the High Court's rulings in the *Von Abo* case it seems that South Africa has found a way to successfully protect its citizens while simultaneously abiding by the Tribunal's decision in *Mike Campbell* and allowing Zimbabwe to continue seizing land. As long as South Africa is willing to pay damages to its citizens who suffered injury as a result of Zimbabwe's land reform program it is abiding by *Von Abo*, *Mike Campbell*, and the BIPPA. However, this ignores the fact that Zimbabwe continues to decline to abide by the Tribunal's ruling, discussed below. South Africa would only be made whole if Zimbabwe abides by the BIPPA.²⁷² The Commercial Farmers' Union of Zimbabwe has reported that three farmers whose land was seized in December and January were covered by the BIPPA.²⁷³

²⁶⁹ Ibid. at ¶ 59.

²⁷⁰ Ibid. at ¶¶ 65-68.

²⁷¹ Nkomo, *supra* note 241.

²⁷² Staff Writer, 'AfriForum gets Green Light to Sue Zim', *Farmers' Weekly* (Jan. 29, 2010), available at [www.farmersweekly.co.za/index.php?p\[IGcms_nodes\]\[IGcms_nodesUID\]=8e3a0284a973f3576d1560e65712a69f](http://www.farmersweekly.co.za/index.php?p[IGcms_nodes][IGcms_nodesUID]=8e3a0284a973f3576d1560e65712a69f).

²⁷³ Ibid.

On 26 January 2010, the High Court of Zimbabwe in Harare dismissed a suit by Gramara, Ltd., one of the ‘other’ applicants in *Mike Campbell*, which sought a declaration that the Tribunal’s decision in *Mike Campbell* should be enforced in Zimbabwe.²⁷⁴ The court found that Amendment 17, Section 16B(3)(b)’s domestic constitutionality was affirmed by the Supreme Court of Zimbabwe in *Mike Campbell (Pty) Ltd. v. Minister of National Security Responsible for Land, Land Reform and Resettlement*.²⁷⁵ That section states that ‘a person having any right or interest in the [reorganized] land . . . shall not apply to a court to challenge the acquisition of the land by the State, and no court shall entertain any such challenge.’²⁷⁶ The court explained that since ‘the indirect consequence of the Tribunal’s judgment is to impugn the legality of the programme sanctioned by the Supreme Court . . . [and] challenge[s] the decision of the Supreme Court within its jurisdictional domain and thereby undermine[s] the authority of th[e Supreme] Court in Zimbabwe’, the Tribunal’s decision must be ignored.²⁷⁷ Furthermore, the court maintained, Section 3 of the Constitution of Zimbabwe proclaims: ‘This Constitution is the supreme law of Zimbabwe and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.’²⁷⁸ This is in clear conflict with Article 27 of the Vienna Convention on the Law of Treaties which provides that, ‘A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.’ Since the Tribunal was ‘constituted to ensure adherence to and the proper interpretation of the provisions of [the SADC] Treaty and subsidiary instruments and to adjudicate upon such disputes as may be

²⁷⁴ *Gramara (Pvt) Ltd. and One Other v. The Government of the Republic of Zimbabwe and Two Others* (HC 33/09) [2010] ZWHHC 1 (26 January 2010); A. Bell, ‘Outrage as High Court Dismisses SADC Land Ruling’, SW Radio Africa News (Jan. 27, 2010), available at www.swradioafrica.com/news270110/outrage270110.htm.

²⁷⁵ *Mike Campbell (Pty) Ltd. v. Minister of National Security Responsible for Land, Land Reform and Resettlement*, *supra* note 227. This was the case the Tribunal cited as affirming Amendment 17 had effectively denied the applicants access to the courts, violating their human rights and giving the Tribunal jurisdiction in the first place.

²⁷⁶ *Ibid.* at 11.

²⁷⁷ *Gramara*, *supra* note 273, at 14.

²⁷⁸ *Mike Campbell (Pty) Ltd. v. Minister of National Security Responsible for Land, Land Reform and Resettlement*, *supra* note 227, at 15.

referred to it,²⁷⁹ and '[t]he decisions of the Tribunal [are] final and binding',²⁸⁰ any violation of an order of the Tribunal is a violation of the SADC Treaty itself, regardless of domestic law.

The High Court of Zimbabwe however determined that:

[E]nforcement of the [*Mike Campbell (Pvt) Ltd.*] decision . . . would ultimately necessitate the Government having to reverse all the land acquisitions that have taken place since 2000. Apart from the political enormity of any such exercise, it would entail the eviction, upheaval and eventual relocation of many if not most of the beneficiaries of the land reform programme. This programme, despite its administrative and practical shortcomings, is quintessentially a matter of public policy in Zimbabwe, conceived well before the country attained its sovereign independence.

As for the doctrine of legitimate expectation, the applicants before the Tribunal and others in their position are absolutely correct in expecting the Government of Zimbabwe to comply with its obligations under the SADC Treaty and to implement the decisions of the Tribunal. However, I take it that there is an incomparably greater number of Zimbabweans who share the legitimate expectation that the Government will effectively implement the land reform programme and fulfil [sic] their aspirations thereunder. Given these countervailing expectations, public policy as informed by basic utilitarian precept would dictate that the greater public good must prevail.²⁸¹

Therefore, the Tribunal's decision in *Mike Campbell* was found to be contrary to Zimbabwean law, both judicially and constitutionally, and Zimbabwean public policy.²⁸²

It would seem that the SADC Tribunal as well as South African and Zimbabwean quite a bit on Zimbabwe's land seizure. SADC Tribunal Registrar Mkandawire has said 'The Zimbabwe issue is no longer in the hands of the Tribunal. We have done what we are mandated to do but cannot

²⁷⁹ SADC Treaty, *supra* note 178, at Art. 16(1).

²⁸⁰ *Ibid.* at Art. 16(5).

²⁸¹ *Ibid.* at Arts. 15-16.

²⁸² *Ibid.* at Art. 16.

enforce the decisions. We have reported the farm violations to the SADC summit. It is the SADC summit which now has to enforce the decisions made by the Tribunal.’²⁸³ Therefore, the legitimacy of the Tribunal rests in the hands of the Summit.

Conclusions

This paper’s discussion of African regional trade judiciaries indicates that their relative invisibility in academic and policy discussions is unwarranted. These judiciaries have exercised their jurisdiction over a burgeoning number of cases particularly in the area of human rights and increasingly over economic and trade disputes. The EACJ as well as the SADC Tribunals have been exemplary in making bold decisions which were not well received by Member States. The ECOWAS Tribunal had its jurisdiction expanded to include human rights cases. These trends show that even while African governments are not fully committed to fully funding these regional judiciaries, these judiciaries have nevertheless begun to actively build an emerging regional jurisprudence that only a few short years ago did not exist. That these judiciaries have been able to do as much with relatively little support from respective member governments is testimony to the emerging cadre and high caliber of judges who staff these regional courts.

What is needed now is a continuing to expand the number legal practitioners who can advise their clients on how these African RTA regimes offer them opportunities to use the remedies these RTA judiciaries are empowered to give. Such remedies, of course, include the trade remedy regimes of antidumping and countervailing duty law which have been borrowed from the WTO. They, of course, also include the possibility of challenging the broad range of NTB

²⁸³ S. Chirinda, ‘Land Seizures now SADC Issue – Tribunal’, ReliefWeb (Feb. 8, 2010), *available at* <http://reliefweb.int/rw/rwb.nsf/db900SID/KHII-82G4S4?OpenDocument>.

measures that exist in trade between African countries. The potential for using these African RTA judiciaries is, therefore, quite broad and this potential awaits future exploitation to the hilt.