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### **Southern African Development Community Tribunal**

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## A. Introduction

**1** The Southern African Development Community Tribunal ('SADC Tribunal' or 'Tribunal') is one of the major sub-regional courts established by African countries over the past few decades. It was established pursuant to Article 9 (1) Treaty of the Southern African Development Community ('SADC Treaty') together with five other original institutions of the → *Southern African Development Community* ('SADC') to spearhead regional cooperation and integration in Southern Africa. As set out in Article 16 (1) SADC Treaty, the main purpose of the SADC Tribunal is 'to ensure adherence to and proper interpretation of the provisions of the SADC Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it'. As such, the SADC Tribunal is the judicial arm of the SADC.

**2** The Tribunal has been suspended since 2010 following its landmark ruling against the Republic of Zimbabwe in SADC Tribunal, *Mike Campbell (PVT) Ltd and 78 others v Republic of Zimbabwe* ('*Campbell*'). A new Protocol ('2014 Protocol') was adopted to reconstitute the Tribunal with limited jurisdiction at the 34th Summit of SADC Heads of State or Government ('Summit') held in Victoria Falls, Zimbabwe, from 17 to 18 August 2014, but has not yet entered into force (Communiqué of the 34th SADC Summit, para 18). The suspension of the Tribunal has been plagued by continued reluctance of SADC Member States to sanction Zimbabwe for its blatant noncompliance with the decisions of the Tribunal, and complex legal arguments that have their roots in the poor drafting of the SADC legal instruments.

## B. Establishment of the Tribunal

**3** The SADC Tribunal was formally established when the SADC Treaty came into force on 30 September 1993. However, it took another 12 years before it became operational. This was due to delays in adopting the protocol that stipulates the composition, powers, functions, procedures and other matters governing the activities of the Tribunal, as envisaged in Article 16 (2) SADC Treaty. At the heart of the delay in adopting the Protocol was the reluctance of the SADC Member States to set up a supranational court that would compromise their national sovereignty. Several Member States were rather keen on less formal means such as arbitration and mediation. Yet they went on to establish a tribunal with comprehensive jurisdiction over the adjudication of virtually all disputes arising from SADC legal instruments in an attempt to gain credibility in the eyes of foreign investors and in particular of European donors who insisted on the importance of a strong dispute settlement mechanism in creating a rules-based integration process.

**4** The Tribunal Protocol was finally adopted together with the Rules of Procedure Thereof ('2000 Protocol') on 7 August 2000 by the 20th SADC Summit held in Windhoek, Namibia, from 6 to 7 August 2000. Under the original provisions of Articles 35 and 38 2000 Protocol, the entry into force of the Protocol was made contingent upon ratification by two-thirds of signatory States. While Lesotho, Mauritius, and Namibia subsequently ratified the 2000 Protocol, the two-thirds ratification requirement has never been met. Nevertheless, the 2000 Protocol came into force through an amendment to the SADC Treaty adopted by the 21st SADC Summit held in Blantyre, Malawi in August 2001. As will be discussed further below, the entry into force of both the 2000 Protocol and the 2001 Agreement Amending the SADC Treaty (and thereby the legality of the Tribunal's very existence) was later questioned by Zimbabwe in the wake of the *Campbell* case.

5 The Tribunal was officially inaugurated on 18 November 2005 at its seat in Windhoek, Namibia, following the appointment of the first ten judges in accordance with Article 4 (4) 2000 Protocol by the 25th SADC Summit held in Gaborone, Botswana, in August 2005. The Registry of the Tribunal was opened a year later in November 2006 and received an application instituting its first case, *Mtingwi v SADC Secretariat*, on 27 September 2007.

## **C. Composition of the Tribunal and Appointment of Judges**

### **1. Composition of the Tribunal**

6 The Tribunal is composed of at least ten judges, referred to as Members of the Tribunal. Five of these judges are appointed as regular Members who shall sit regularly on the Tribunal, while the other five constitute a reserve pool, from which the President may invite to sit on the Tribunal should anyone of the five regular Members be temporarily absent or otherwise unable to carry out his or her functions (Art 3 (2) 2000 Protocol). Unless the Tribunal decides to constitute a full bench composed of five judges, the Tribunal is normally constituted by three judges selected by the President (Art 3 (3) and (4) 2000 Protocol). In practice, the Tribunal tends to sit as a full bench where the case deals with matters of fundamental rights or issues of substantive law, or where a Member State is party to the case. The provisions governing the composition of the Tribunal remain largely unchanged under the 2014 Protocol (Art 3).

### **2. Appointment of Judges**

7 Members of the Tribunal are appointed through a three-stage process consisting of nomination by Member States, selection by the Council of Ministers ('Council'), and appointment by the Summit. As set out in Article 3 (1) 2000 Protocol, to be eligible for appointment, individuals shall 'possess the qualifications required for appointment to the highest judicial offices in their respective States' or [be] 'jurists of recognised competence'. This qualification requirement has been broadened under Article 3 (1) 2014 Protocol to include 'expertise in international law'.

8 The appointment process starts with the nomination of candidates with the necessary qualifications by Member States (Art 4 (1) 2000 Protocol). Whilst each Member State may nominate one candidate of any nationality, Article 3 (6) 2000 Protocol provides that no more than one national of the same Member State shall be appointed at any time. The 2014 Protocol has slightly changed this nomination procedure. According to Article 4 (1) 2014 Protocol, Member States may nominate up to two candidates, but only of their own nationals. Although there is no official explanation for this change, one may assume that it is caused in part by the need to ensure fair representation of the different legal traditions of the SADC region and to suppress the possibility to appoint non-SADC nationals.

9 The selection of the Tribunal Members from the list of candidates nominated by the Member States is the responsibility of the Council, which is established pursuant to Articles 9 (2) and 11 SADC Treaty and composed of one minister from each Member State. Upon completion of the selection process, the Council forwards its recommendation to the Summit, which is the highest decision-making body of the SADC, for an appointment (Arts 4 (3) and (4) 2000 Protocol). Article 4 (2) 2000 Protocol provides that due consideration shall be given to fair gender representation in the nomination and appointment process. The corresponding Article in the 2014 Protocol requires that due consideration shall also be given to the fair representation of the different SADC Member State legal systems (Art 4 (2)).

**10** Members of the Tribunal are appointed for a term of five years and may only be reappointed for an additional five-year term (Art 6 (1) 2000 Protocol). Since the Tribunal sits only when required to consider a matter submitted to it, all Members of the Tribunal are appointed on a part-time basis (Art 6 (2)). However, the Council ‘may [upon the recommendation of the President] decide that the workload of the Tribunal requires that the Members should serve on a full-time basis’ (Art 6 (3)). Before embarking on their duties, Tribunal Members shall make a solemn declaration to perform their duties independently, impartially, and conscientiously (Art 5). It is worthwhile to note that the corresponding article under the 2014 Protocol further stipulates that the solemn declaration shall be taken before the SADC Chairperson and include a declaration to ‘preserve the confidentiality of the Tribunal’s deliberations’ (Art 6).

### **3. The Presidency**

**11** The President of the Tribunal is elected from the five regular judges of the Tribunal for a term of three years (Art 7 (1) 2000 Protocol). The first two Presidents, Justice Mondlane (2005–2008) and Justice Pillay (2008–2011), were elected by a majority vote of the regular judges of the Tribunal in accordance with Rule 7 (1) 2000 Rules of Procedure. The power to elect the President of the Tribunal has now been taken from the Tribunal and given to the Summit. As per Article 5 (1) 2014 Protocol, the President of the Tribunal shall be appointed by the Summit. The responsibilities of the President have also been expanded from directing the work and supervising the administration of the Tribunal (Rule 8) to: overseeing the administration and supervision of the Tribunal; representing the Tribunal; regulating the disposition of the matters brought before the Tribunal; appointing the Registrar of the Tribunal; and performing any other acts and duties incidental to these matters (Art 15).

**12** An Acting President may be elected by the regular judges from among themselves if the President is temporarily absent or otherwise unable to carry out her or his functions (Art 7 (2) 2000 Protocol). Under the 2014 Protocol, an Acting President may also be elected if a President is not appointed by the Summit (Art 5 (2)).

### **4. The Registry**

**13** The Registry of the SADC Tribunal is composed of the Registrar, the Assistant Registrar, and other staff (Rule 17 2000 Rules of Procedure). The detailed rules regarding the Registry were embodied in the 2000 Rules of Procedure (Rules 10–19). However, perhaps in recognition of their substantive nature, they have now been reallocated to the 2014 Protocol (Arts 16–27). As provided in Article 12 2000 Protocol, the Registrar is appointed by the Tribunal from candidates nominated by SADC Member States (Art 19 2014 Protocol). While there was no provision in the 2000 Protocol and the Rules of Procedure thereof regarding the tenure of office of the Registrar, Article 20 2014 Protocol provides that the Registrar is appointed for a term of five years and is eligible for reappointment for one further term. The Registrar is subject to the overall supervision of the President and is responsible for the day-to-day administration of the Tribunal. The specific duties of the Registrar were exhaustively listed in Rule 15 2000 Rules of Procedure, but they have now been made non-exhaustive pursuant to Article 18 2014 Protocol.

## **D. Jurisdiction of the Tribunal**

**14** The SADC Tribunal has a wide jurisdiction over disputes arising out of the interpretation or application of the SADC Treaty and subsidiary instruments. Moreover, as one of the several tribunals modelled on the Court of Justice of the European Union (‘CJEU’), the Tribunal enjoys the power to issue preliminary rulings and advisory opinions

and to conduct appellate review. The rules governing the jurisdiction of the Tribunal are contained in the SADC Treaty and the 2000 Protocol.

## 1. Material Jurisdiction

**15** The main provisions that establish the material jurisdiction of the SADC Tribunal are contained in Articles 16 (1) and 32 of the SADC Treaty and Article 14 2000 Protocol. When read together, these three articles enable the Tribunal to adjudicate a wide range of disputes. Article 16 (1) of the SADC Treaty entrusts the Tribunal with the duty to ‘ensure adherence to and proper interpretation of [the SADC] Treaty and subsidiary instruments, and to adjudicate upon such disputes as may be referred to it’, whereas Article 32 of the SADC Treaty expands the jurisdiction of the Tribunal to ‘any dispute arising from ... the interpretation, application or validity of Protocols or other subsidiary instruments made under [the SADC] Treaty’. Article 14 2000 Protocol largely reiterates the above two provisions and further stipulates that the Tribunal shall have jurisdiction over all disputes and all applications referred to it in accordance with the SADC Treaty and the 2000 Protocol, which relates to ‘the interpretation, application or validity of ... acts of the institutions of the [SADC]’ and ‘all matters specifically provided for in any other agreement that Member States may conclude among themselves or within the [SADC] and which confer jurisdiction on the Tribunal’.

**16** Under the 2014 Protocol, the material jurisdiction of the Tribunal has been confined to the ‘interpretation of the SADC Treaty and Protocol’ (Art 33). This in particular means that the yet to be reconstituted Tribunal will not have jurisdiction over disputes that arise from acts of the SADC institutions.

## 2. Personal Jurisdiction

**17** The SADC Tribunal has a broad personal jurisdiction. The provisions governing the Tribunal’s personal jurisdiction are set forth in Articles 15, 17, 18, and 19 2000 Protocol. According to these articles, the Tribunal has jurisdiction over disputes between: (i) Member States (Art 15 (1)); (ii) natural or legal persons and Member States (Art 15 (1)); (iii) Member States and the SADC (Art 17); (iv) natural or legal persons and the SADC (Art 18); and (v) SADC employees and the SADC (Art 19). The jurisdiction of the Tribunal over the last three types of disputes is exclusive. However, as unequivocally confirmed by the Tribunal in *Mutize et al v Mike Campbell (Pvt) Limited and Others*, the Tribunal does not have jurisdiction over disputes between natural or legal persons.

**18** One glaring feature of the Tribunal’s jurisdiction over disputes involving natural or legal persons is the absence of nationality- or residency-related requirements. The comprehensive individual access to the Tribunal means that even natural or legal persons that are neither nationals nor residents of SADC Member States may bring a case before the Tribunal. This is quite different from other sub-regional courts such as the → *Court of Justice of the Common Market for Eastern and Southern Africa (COMESA Court of Justice)* and the → *East African Court of Justice (EACJ)*, where individual access to the Courts is limited to residents of their respective territories, and the → *Caribbean Court of Justice (CCJ)*, where individual access to the Court is limited to nationals of the Caribbean Community (‘CARICOM’). Whilst no such limitations apply to the CJEU, individuals can (only) bring a direct action before the Court against the European Union (‘EU’) (but not against the EU Member States).

**19** Moreover, it is worth noting that there is no requirement for natural or legal persons to have a legal interest in the subject matter of the dispute as a prerequisite for initiating a dispute before the Tribunal against the Member States or the SADC. As far as individual access to the Tribunal is concerned, the only requirement is related to the exhaustion of local remedies. In this regard, Article 15 (2) 2000 Protocol provides that '[n]o natural or legal person shall bring an action against a State unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction'. This provision has been invoked by Member States notably in the *Campbell* case, where the Tribunal rejected Zimbabwe's objection of failure to exhaust local remedies, and in *Republic of Tanzania v Cimexpan (Mauritius) LTD and Others* (where the Tribunal denied jurisdiction due to failure to exhaust local remedies). It should be noted further that the exhaustion of local remedies is required only in relation to cases against the Member States.

**20** However, the personal jurisdiction of the Tribunal has significantly been restricted under the 2014 Protocol. Article 33 2014 Protocol, which is the only jurisdiction-related article of the Protocol, limits the jurisdiction of the Tribunal to disputes between Member States, thereby banning individuals' access to the Tribunal. This is likely to have significant adverse effects for enforcement of SADC law and access to justice in the region. The nature of cases brought before the Tribunal prior to its suspension indicates that individual access to the Tribunal allows SADC nationals to hold their governments accountable and, in so doing, ensure the enforcement of SADC law. It is worth noting that no inter-State complaint has been filed before the Tribunal.

### **3. Appellate Jurisdiction**

**21** The SADC Tribunal was originally established without an appellate jurisdiction. It was through the 2007 Agreement Amending the 2000 Protocol that an appellate jurisdiction was conferred on the Tribunal. The amended Article 20A (1) 2000 Protocol provides that 'the Tribunal shall have appellate jurisdiction in any dispute relating to the legal findings and conclusions of a panel established under a protocol referred to it by a party to a dispute'. One such panel is the panel of trade experts established pursuant to the 1996 SADC Protocol on Trade ('Trade Protocol'). Article 32 Trade Protocol states that: 'in case of disagreement [over the interpretation and application of the Protocol] the Member States may take recourse to a panel of trade experts'. However, given the Tribunal's original jurisdiction over disputes arising out of the interpretation or application of all protocols, there appears to be an overlap in the primary jurisdiction of the Tribunal and that of the panel. This overlap remains unresolved under the 2014 Protocol, but the appellate jurisdiction of the Tribunal is entirely removed.

### **4. Preliminary Jurisdiction**

**22** Under the 2000 Protocol, the Tribunal has jurisdiction to issue preliminary rulings in proceedings of any kind and between any parties before the courts or tribunals of Member States. Article 16 (2) 2000 Protocol ambiguously provides that the Tribunal may give preliminary ruling on questions of interpretation, application, or validity of the 'provisions in issue' if requested to do so by a court or tribunal of a Member State. The literal interpretation of this provision appears to suggest that the Tribunal has jurisdiction to make rulings on the national law of Member States. But, this is clarified by Rule 75 of the Rules of Procedure, which defines the nature of questions that may be referred to the Tribunal for a preliminary ruling. According to Rule 75, the highest courts of Member States shall refer questions concerning the interpretation or application of the SADC Treaty, protocols, or other subsidiary instruments to the Tribunal for preliminary rulings, if they consider that a ruling on the question is necessary to enable them to give judgment. The 2000 Protocol and the Rules of Procedure thereof are silent on the question whether preliminary rulings issued by the Tribunal are binding or advisory. However, the legal effect of preliminary

rulings should be seen in light of Article 16 (5) SADC Treaty, which states that ‘the *decisions* of the Tribunal shall be final and binding’ (emphasis in original). There is no reason to exclude preliminary rulings from the scope of this provision. Moreover, giving advisory effect to preliminary rulings runs counter to the SADC Treaty, which requires SADC Member States to take all necessary steps to ensure the uniform application of the SADC Treaty (see Art 6 (4) SADC Treaty).

**23** No preliminary ruling jurisdiction is given to the Tribunal under the 2014 Protocol.

## **5. Advisory Opinions**

**24** Article 16 (4) SADC Treaty and Article 20 2000 Protocol confer jurisdiction on the Tribunal to give advisory opinions on such matters as the Summit or the Council may refer to it. However, neither of these articles clarifies whether the Tribunal’s jurisdiction to give advisory opinions is limited by its subject matter jurisdiction under Article 14 2000 Protocol. Since the Tribunal was not called upon to give an advisory opinion during its short lifespan, there is no indication in the case law either. The advisory opinion jurisdiction of the Tribunal is retained under the 2014 Protocol, but, yet again, without any clarification as to the law applicable in such cases (Art 34).

## **E. Applicable Law**

**25** The substantive law applicable to disputes brought before the Tribunal mainly consists of SADC legal instruments, including the SADC Treaty, protocols, and other subsidiary instruments adopted by SADC instructions. Article 21 (b) 2000 Protocol further enjoins the Tribunal to ‘develop its own community jurisprudence having regard to the applicable treaties, general principles and rules of public international law and any rules and principles of the law of Member States’. The Tribunal invoked this provision in the *Campbell* case to claim that ‘applicable treaties, general principles and rules of public international law’ are ‘sources of law for the Tribunal’. However, the corresponding article in the 2014 Protocol limits the law to be applied by the Tribunal to the SADC Treaty and protocols only (Art 35).

## **F. Rules of Procedure**

**26** Unlike most other international courts, which are masters of their own procedure, no mandate was given to the SADC Tribunal to adopt or amend its rules of procedure under the 2000 Protocol. The rules governing proceedings before the Tribunal were adopted by the Summit as an annex to the 2000 Protocol and made an integral part of the Protocol by virtue of Article 23 2000 Protocol. Since the Protocol itself is an integral part of the SADC Treaty (Art 16 (2)), the Tribunal’s Rules of Procedure are an integral part of the SADC Treaty, and hence can only be amended by the Summit (Art 36 SADC Treaty). Perhaps in recognition of this, Article 29 2014 Protocol authorizes the Tribunal to adopt its own rules by a two-thirds majority. As an integral part of the 2000 Protocol, the 2000 Rules of Procedure will be repealed when the 2014 Protocol enters into force (Art 48 2014 Protocol). This presents the Tribunal (when reconstituted) with an option either to resurrect the 2000 Rules of Procedure or adopt new rules of procedure. However, given the significant changes introduced to the jurisdiction of the Tribunal by the 2014 Protocol, it is highly likely that the Tribunal will need new rules of procedure.

## **1. Organization of Proceedings**

**27** Proceedings before the SADC Tribunal are divided into two phases: written proceedings and oral proceedings. The detailed rules governing the various aspects of these two phases are contained in the 2000 Rules of Procedure (Parts V and VI).

**(a) Written Pleadings**

**28** The proceedings before the Tribunal are instituted by the submission of an application or by notification of a special agreement between the parties to the proceedings (Rule 32). The original application and the annexes referred therein must be filed with the Registrar together with five certified copies for the Tribunal and a copy for every other party to the proceedings. When proceedings are instituted by a special agreement, notification can be made by the parties jointly or by any one of them (Rule 34). If the notification is made by one of the parties, an original or certified copy of the special agreement needs to accompany the notification (Rule 34 (1)).

**29** Upon receipt of an application or notification of a special agreement by one of the parties, the Registrar shall communicate a certified copy of the application or notification to the respondent (Rule 35). The respondent must file a defence within 30 days of service of the application or notification. The President of the Tribunal may extend the time limit upon the request of the respondent with a reasonable explanation for the inability to comply with the 30-day limit (Rule 36). The respondent may make a counterclaim as part of his or her defence provided that it is directly connected with the subject matter of the claim and falls within the jurisdiction of the Tribunal (Rule 37). The application and defence may be supplemented by a reply and rejoinder provided that no new issues are introduced (Rule 38). The time limit for the submission of a reply and rejoinder is left to be determined by the President. Pursuant to Rule 39, the Tribunal may at any time determine that the proceedings in two or more cases be joined for the purpose of written or oral submissions or final decision.

**30** Before the closure of proceedings, the Tribunal may require the parties to produce all documents and to supply additional information which the Tribunal considers desirable (Rule 40). The Tribunal may also require Member States and institutions not party to the case to supply all information which the Tribunal considers necessary for the proceedings (Rule 40 (2)). Pleadings shall close after the completion of the written proceedings. No documents may be submitted after the closure of the pleadings except with the consent of the other party (Rule 41).

**(b) Oral Pleadings**

**31** Oral pleadings commence following the closure of written proceedings, after which no documents may be submitted except with the consent of the other party (Rules 41 and 42). It is up to the President of the Tribunal to fix the date for the opening of oral pleadings taking into account the circumstances of each particular case including its urgency (Rule 42 (1)). Under certain circumstances, the President may order that the case is given priority over others or defer a case to be dealt with at a later date (Rule 43).

**32** Oral proceedings shall be held at the seat of the Tribunal in Windhoek, Namibia, but the Tribunal may decide (if it considers it desirable) that all or part of proceedings in a case shall be held at a place other than the seat of the Tribunal (Rule 44). Proceedings before the SADC Tribunal shall be held in public unless the Tribunal otherwise directs either on its own motion or by the application of any of the parties to conduct the whole or part of the hearing in camera (Rule 45). The President of the Tribunal shall declare the proceedings

closed after both parties have completed their submissions (Rule 53). The Tribunal may however order the resumption of the oral proceedings after hearing the parties (Rule 55).

## **2. Deliberations and Decisions of the Tribunal**

**33** The deliberations of the Tribunal are conducted in closed sessions and remain confidential (Rule 21 2000 Rules of Procedure (now reallocated to Article 37 of the 2014 Protocol)). As stated in Rule 21 (2) 2000 Rules of Procedure, only judges that were present at oral proceedings of the case can take part in the deliberations. Moreover, every judge taking part in the deliberations is required to give her or his opinion in writing (Rule 21 (3)). The conclusion reached by the majority of the judges after the final deliberation constitutes the decision of the Tribunal (Rule 21 (4)). The decision should be in writing and delivered at a public session of the Tribunal (Art 24 2000 Protocol and Rule 57 Rules of Procedure thereof, now reallocated to Article 38 2014 Protocol).

**34** The majority system and the fact that each judge has to give her/his decision in writing implies that dissenting opinions are possible. However, the publication of such opinions is neither explicitly permitted nor prohibited under the rules of procedure. In practice, for example, the dissenting opinion of Justice Tshosa in the *Campbell* case is widely circulated on the internet. However, his opinion was not issued as part of the majority decision. Nor were there any indications that his opinion was published by the Tribunal.

## **3. Languages of the Tribunal**

**35** English, French, and Portuguese are the three working languages of the Tribunal (Art 22 2000 Protocol and Article 31 2014 Protocol). According to Rule 29 (3) 2000 Rules of Procedure, '[t]he working languages shall be used in the pleadings and oral submissions of the parties, in supporting documents and also in the record and decisions of the Tribunal'. The literal reading of this provision gives an impression that the decisions of the Tribunal and submissions by the parties must be filed in each of the three working languages, but it is clear from the subsequent provisions that any of the three languages can be used. Given that the Tribunal does not have an 'official language' per se, the Tribunal is free to use any of the three working languages in conducting its activities (including its decisions). In practice, however, the work of the Tribunal has been predominantly carried out in English. Perhaps this is due in part to the fact that English is an official language in 11 of the 15 SADC Member States. It is also worth noting that the Tribunal is located in an English-speaking Member State (Namibia) and the majority of the cases brought before the Tribunal have concerned English-speaking Member States.

## **G. Compliance and Enforcement**

**36** The decisions of the SADC Tribunal are final and binding (Art 16 (5) SADC Treaty). Article 32 (2) 2000 Protocol obliges Member States and SADC institutions to take 'forthwith all measures necessary to ensure execution of decisions of the Tribunal'. The enforcement procedure is governed by the laws and rules of civil procedure for the registration and enforcement of foreign judgments applicable in the Member State in which the judgment is to be enforced (Art 16 (1)). Any failure by a Member State to comply with the decisions of the Tribunal may be referred to the Tribunal by any party concerned (Art 32 (4)). As provided for in Article 32 (5), '[i]f the Tribunal establishes the existence of such failure, it shall report its finding to the Summit for the latter to take appropriate action'. As will be discussed further below, the Tribunal repeatedly referred Zimbabwe's failure to comply

with its decisions in the *Campbell* case to the Summit, but no action was taken by the latter against Zimbabwe.

**37** The enforcement of the decisions of the Tribunal within SADC Member States was also brought under the spotlight in the *Campbell* case, when some of the applicants in the case brought the Tribunal's final decision for registration before the High Courts of Zimbabwe and South Africa. As discussed further below, in *Gramara (Pvt) Limited and Another v Republic of Zimbabwe* ('*Gramara*'), the High Court of Zimbabwe found that the SADC Tribunal was legally established and its decisions are binding and enforceable within the territories of Member States, but it declined to register or enforce the Tribunal's decision on public policy grounds. In *Fick and Others v Government of Republic of Zimbabwe*, Mike Campbell and two other applicants in the *Campbell* case applied before the North Gauteng High Court of South Africa for the registration and enforcement of the Tribunal's decision (regarding legal costs). The High Court ruled in favour of the applicants and registered the Tribunal's decision. It also issued a writ of execution authorizing the attachment and sale of properties belonging to the Government of Zimbabwe and located in South Africa. The Government of Zimbabwe challenged the attachment order on the basis that the properties were diplomatic properties, and hence should be immune from attachment. After hearing Zimbabwe's argument, the Court limited the scope of its writ of execution to a property owned by the Reserve Bank of Zimbabwe. Since the property was being used for commercial purposes, the Court found that it was not immune from attachment. The Government of Zimbabwe appealed the decision of the High Court before the South African Supreme Court of Appeal and then to the Constitutional Court, but the appeal was dismissed by both Courts and the property was eventually auctioned on 21 September 2015 in execution of the Tribunal's costs order.

## **H. Suspension of the Tribunal**

### **1. The Case that Led to the Suspension of the Tribunal**

**38** The suspension of the Tribunal was brought about by a series of decisions taken by the Summit following the Tribunal's politically controversial rulings against the Republic of Zimbabwe. The *Campbell* case that led to the suspension of the Tribunal was filed on 11 October 2007 by Mike Campbell (Pvt) Limited and William Michael Campbell challenging Zimbabwe's compulsory acquisition of their agricultural land carried out under the land reform program implemented through the Constitutional Amendment Act No 17/2005. The applicants approached the Tribunal seeking (i) an interim measure restraining Zimbabwe from removing them, or allowing their removal, from their agricultural land, and (ii) a declaration to the effect that Zimbabwe was in breach of its obligations under the SADC Treaty and that the compulsory acquisition of their land was illegal. Having established the existence of a prima facie right that is sought to be protected, and anticipated or threatened interference with that right and the absence of any alternative remedy, which in turn tilted the balance of convenience in favour of the applicants, the Tribunal issued an interim measure in December 2007 enjoining Zimbabwe from evicting the applicants or interfering with their peaceful residence on their agricultural land, pending the final determination of the matter.

**39** The Tribunal subsequently accepted the application by 77 other similarly-situated commercial farmers to intervene in the proceedings pursuant to Article 30 2000 Protocol and granted the interim measure sought by some of these new applicants in accordance with Article 28 2000 Protocol on 28 March 2008. Meanwhile, Zimbabwe refused to comply with the interim reliefs issued by the Tribunal and continued with its compulsory acquisition of agricultural lands. Consequently, some of the applicants made an urgent application to the Tribunal seeking a declaration to the effect that Zimbabwe was in breach and contempt of the Tribunal's interim orders pursuant to Article 32 (4) 2000 Protocol.

Having established Zimbabwe's failure to comply with its orders, the Tribunal reported its findings to the Summit for the latter to take appropriate action in accordance with Article 32 (5) 2000 Protocol.

**40** In the course of the proceedings, Zimbabwe contested the jurisdiction of the Tribunal to hear the matter on two grounds. First, considering that the first and second applicants had already filed a case on the same matter before the Supreme Court of Zimbabwe and since the latter was yet to deliver its judgment by the time the applicants brought their case before the Tribunal, Zimbabwe argued that the applicants had not exhausted local remedies in Zimbabwe in terms of Article 15 (2) 2000 Protocol. In response, referring to Article 50 → *African Charter of Human and Peoples' Rights (1981)* and Article 26 European Convention on Human Rights, the Tribunal first pointed out that the principle of exhaustion of local remedies is well established in international law and not unique to the 2000 Protocol. However, it noted that the concept of exhaustion of local remedies does not apply where the municipal law does not offer any remedy or the available remedies are ineffective. Having found that the Constitutional Amendment Act No 17/2005 had ousted the jurisdiction of Zimbabwean courts, the Tribunal unanimously decided that the exhaustion of domestic remedies was not required in the particular case. It is worth noting here that in the case mentioned by Zimbabwe (ie *Mike Campbell (Pvt) Ltd and Another v Minister of National Security Responsible for Land, Land Reform and Resettlement*), the Zimbabwean Supreme Court subsequently ruled that the compulsory acquisition of agricultural land carried out pursuant to Act No 17/2005 was constitutional.

**41** The second jurisdictional objection raised by Zimbabwe concerned the claim that the Tribunal did not have human rights jurisdiction. Zimbabwe argued that the SADC Treaty simply outlined the principles and objectives of the SADC, without providing the standards against which Member States' actions could be measured. In the absence of such standards or specific protocols on human rights or agrarian reform that give effect to the objectives and principles contained in Articles 4 (c) and 6 (2) SADC Treaty, Zimbabwe argued the Tribunal lacked jurisdiction to determine the validity or otherwise of its land reform program. It further maintained that the Tribunal could not rely on standards derived from other treaties as that would be tantamount to legislating on behalf of SADC Member States. In rejecting Zimbabwe's argument by a unanimous decision, the Tribunal found that the principles contained in Article 4 (c) SADC Treaty impose binding and enforceable obligations upon the Member States and thereby provide the Tribunal with the requisite jurisdiction to adjudicate alleged human rights violations. The Tribunal further held that it is not necessary for a protocol on human rights and agrarian reform to be adopted in order to give effect to the objectives and principles contained in the SADC Treaty. Referring to Article 21 (b) 2000 Protocol, which enjoins the Tribunal to 'develop its own Community jurisprudence having regard to applicable treaties, general principles and rules of public international law and any rules and principles of the law of States', the Tribunal held that it has recourse to other sources of law where the SADC Treaty is silent.

**42** In its final decision, delivered on 28 November 2008, the Tribunal found that Zimbabwe was in breach of its obligations under Article 4 (c) and 6 (2) SADC Treaty, which oblige the SADC Member States to act in accordance with the principles of 'human rights democracy and the rule of law' and not to discriminate against any person on grounds such as gender, race, and religion, respectively, by denying access to justice, failing to pay fair compensation, and discriminating on the basis of race. It then went on to order Zimbabwe to compensate the three farmers who had already been evicted from their lands and to take all the necessary measures to ensure that no action was taken to oust the remaining 75 farmers from their lands. However, Zimbabwe refused to recognize the judgment, claiming that the Tribunal's exercise of human rights jurisdiction was *ultra vires*. Zimbabwe's president Robert Mugabe described the Tribunal's judgment as 'nonsense' and 'of no

consequence'. Subsequently, on 7 May 2009, two of the applicants in the *Campbell* case filed another urgent application before the Tribunal seeking, in substance, a declaration to the effect that Zimbabwe was in breach and contempt of the Tribunal's final decision (see *Campbell and Another v Republic of Zimbabwe*). In a ruling delivered by the President of the Tribunal, Justice Pillay, on 5 June 2009, the Tribunal established Zimbabwe's failure to comply with the judgment and once again reported its finding to the Summit pursuant to Article 32 (5) 2000 Protocol.

## **2. Zimbabwe's Challenge to Legality of the Tribunal's Existence**

**43** By the time two of the applicants in the *Campbell* case, ie Gramara (Pvt) Limited and Colin Balie Clote, filed an application before the High Court of Zimbabwe on 6 July 2009, seeking the registration of the Tribunal's final decision for the purpose of its enforcement in Zimbabwe, the Government of Zimbabwe had moved from challenging the jurisdiction of the Tribunal in the *Campbell* case to challenging the legality of the Tribunal's very existence. Shortly after the application was filed before the High Court and ahead of the 29th SADC Summit held in Kinshasa, Democratic Republic of Congo, from 7 to 8 September 2009, the Zimbabwean Government through its Minister of Justice and Legal Affairs, Patrick Chinamasa, issued a legal opinion challenging the legality of the Tribunal and impugning its jurisdiction, mandate, and powers to enforce decisions. In the main, the 42-page memorandum contended that the Tribunal had never been properly constituted and thus Zimbabwe would neither appear before nor respond to any suit instituted in the Tribunal, and that any prior or future decisions (of the Tribunal) against Zimbabwe would be null and void. This argument was reiterated in the *Gramara* case.

**44** Zimbabwe's argument was based entirely on the claim that neither the 2000 Protocol nor the 2001 Agreement Amending the SADC Treaty was ratified by Zimbabwe and the other SADC Member States, and hence did not enter into force. As noted by the High Court of Zimbabwe in the *Gramara* case, among the changes brought about by the 2001 amendment, those that are of particular relevance to the Tribunal are related to Articles 16 (2) and 22 SADC Treaty. On the one hand, Article 21 2001 Amendment Agreement deleted part of Article 22 SADC Treaty, which renders all protocols adopted by the Summit an integral part of the SADC Treaty and added a two-thirds ratification requirement for all protocols. The effect of this amendment is that protocols adopted by the Summit are no longer an integral part of the SADC Treaty and shall be ratified by two-thirds of SADC Member States in order to enter into force. On the other hand, Article 18 2001 Amendment Agreement amended Article 16 (2) SADC Treaty to the effect that 'notwithstanding the provisions of Article 22', the 2000 Protocol forms an integral part of the SADC Treaty as far as it is adopted by the Summit. Since the 2000 Protocol was adopted by the 20th Summit in 2000, this amendment automatically makes the 2000 Protocol an integral part of the SADC Treaty without a need for ratification.

**45** However, Zimbabwe argued that becoming an integral part of the SADC Treaty should not exonerate the 2000 Protocol from meeting the ratification requirement set out in its Articles 35 and 38 or the one applicable to all protocols (set out in the amended Article 22 SADC Treaty). According to Zimbabwe, the effect of the amendment to Article 16 (2) SADC Treaty is simply to elevate the status 2000 Protocol (unlike other SADC protocols), but not to make it enforceable. However, this argument was found to be untenable for two reasons. First, given that the amended Article 22 SADC Treaty does not have an express provision precluding protocols from becoming an integral part of the SADC Treaty, the expression 'notwithstanding the provisions of Article 22' in the amended Article 16 (2) SADC Treaty can only refer to the ratification requirement thereof. That is, the 2000 Protocol forms an integral part of the SADC Treaty without the need for its ratification by the Member States. Second, the ratification requirement provided for in Articles 35 and 38 2000 Protocol was

subsequently deleted by virtue of Article 16 and 19 2002 Agreement Amending the 2000 Protocol. The Preamble to this Agreement states that the amendment was necessitated because of the 2001 amendment to the SADC Treaty. However, it is silent as to which particular part of the 2001 amendment necessitated the amendment of the 2000 Protocol.

**46** This would have clarified whether the ratification requirement of Articles 35 and 38 2000 Protocol was deleted because of the changes introduced to Article 16 (2) or Article 22 SADC Treaty. If the amendment was necessitated by the former, it means that the ratification requirement was deleted because it was no longer necessary. However, if it was necessitated by the latter, it could mean that the ratification requirement was deleted simply because it was redundant in light of the general ratification requirement of the amended Article 22. These ambiguities were, however, resolved by another preambular paragraph of the 2002 Amendment Agreement, which in the relevant part provides: '[r]ecognizing that the protocol on Tribunal [ie the 2000 Protocol] was adopted by the Summit at Windhoek on 7th August 2000 and that the Protocol entered into force upon the adoption of the Agreement Amending the [SADC Treaty] at Blantyre on 14th August 2001'. This clarified any doubt that the 2000 Protocol (as far as the Summit is concerned) entered into force through the 2001 Amendment Agreement.

**47** Zimbabwe further claimed that the 2001 Amendment Agreement itself never entered into force because it was not ratified by Zimbabwe or the prescribed number of SADC Member States. Quoting Article 40 (4) Vienna Convention on the Law of Treaties ('VCLT'), which provides that '[t]he amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement', Zimbabwe argued that since it has not ratified the 2001 Amendment Agreement, it is not bound by it and it is not subject to the jurisdiction of the Tribunal. In rejecting this argument in the *Gramara* case, Justice Patel of the Zimbabwean High Court first referred to Articles 39 and 11 VCLT to illustrate 'the flexibility inherent in the conclusion and entry into force of treaties as well as amendments thereto'. He then went on to the preamble of the 2001 Amendment Agreement, which provides that '[we] the Heads of State or Government of [all the Member States] have agreed, pursuant to Article 36 SADC Treaty to amend the Treaty as follows ...'. Article 36 (1) SADC Treaty states that '[a]n amendment of this Treaty shall be adopted by a decision of three-quarters of all the Members of the Summit'. In this respect, the 2001 Amendment Agreement was signed by 13 out of the 14 Heads of State or Government of the Member States, including Zimbabwe, thereby concluding the process of its adoption and entry into force. However, Zimbabwe alleged that the amendment was not carried out in accordance with Article 36 (2) SADC Treaty, which provides that

[a] proposal for the amendment of this Treaty may be made to the Executive Secretary by any Member State for preliminary consideration by the Council, provided, however that the proposed amendment shall not be submitted to the Council for Preliminary consideration until all Member States have been duly notified of it, and a period of three months has elapsed after such notification.

As pointed out by Zimbabwe, the adoption of the 2001 Amendment Agreement did not fully comply with this provision to the extent that the amendment proposal was initiated by the Secretariat but not by a SADC Member State. The question was, therefore, whether the failure to comply with the prescribed formality requirement has any bearing on the legitimacy of the decision to adopt the 2001 Amendment Agreement. In other words, the question was whether the breach of the formality requirement under Article 36 (2) SADC Treaty renders the 2001 Amendment Agreement void or voidable. As pointed out by the independent consultant hired by the SADC Secretariat to review the role and responsibilities of the Tribunal (see below para 52), a similar issue was raised before the → *International Court of Justice (ICJ)* in *Legal Consequences for States of the Continued*

*Presence of South Africa in Namibia ('South West Africa') notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 ('Namibia').* In the particular case, 'South Africa argued that a UN Security Council resolution was invalid because it had not been adopted by a concurring vote of the five permanent members, as required by Article 27 (3) United Nations Charter, two having abstained'. In rejecting this argument, the ICJ referred to the subsequent practice of the Security Council members, and the acquiescence in this practice of all UN members, including South Africa (*Namibia*, para 22). Similarly, in the context of the SADC Summit, the procedure pursued in adopting the 2001 Amendment Agreement was the consistent practice of SADC Member States, including that of Zimbabwe. Accordingly, Justice Patel of the High Court of Zimbabwe in the *Gramara* case concluded that Zimbabwe's position, which was 'premised on the *ex post facto* official pronouncements repudiating the Tribunal's jurisdiction', was 'essentially erroneous and misconceived'. This was subsequently confirmed by the independent consultant who carried out the review of the role, responsibilities, and terms of reference of the SADC Tribunal (see below para 52).

**48** Both Justice Patel and the independent consultant further emphasized that Zimbabwe's argument against the legality of the Tribunal's existence was rendered even more unattainable by the conduct of SADC Member States, including the Republic of Zimbabwe, subsequent to the adoption of the 2001 Amendment Agreement. The subsequent practice of Zimbabwe and other SADC Member State taken into consideration includes the fact that SADC Member States, including Zimbabwe: (i) funded the Tribunal, (ii) participated in the appointment of judges of the Tribunal by nominating candidates in accordance with Article 4 (1) 2000 Protocol, (iii) treated the Tribunal as fully being effective, including by appearing before the Tribunal (before its decision to no longer appear before the Tribunal in August 2009, Zimbabwe appeared before the Tribunal), and (iv) fully participated in the Troika system and Organ on Politics, Defence and Security Cooperation established by the same 2001 Amendment Agreement. Reflecting on the last point, Justice Patel of the Zimbabwean High Court opined that '[i]t seems to me legally unsustainable to espouse a major facet of the amended SADC regime and to simultaneously eschew those features of the same regime that are deemed to be politically inexpedient and unpalatable' (the *Gramara* case, at 13). It was further recalled that in the preamble of the 2002 Amendment Agreement all SADC Member States 'recognized' that 'the 2000 Protocol entered into force upon the adoption of the 2001 Amendment Agreement on 14 August 2001'.

### **3. The Failure of the Summit to Take Action Against Zimbabwe**

**49** On three occasions between 2007 and 2009, the Tribunal referred Zimbabwe's refusal to comply with its decisions in the *Campbell* case to the Summit for the latter to take appropriate action in accordance with Article 32 (5) 2000 Protocol. However, there were uncertainties as to the nature of the 'appropriate action' that the Summit might take against Zimbabwe as well as the decision-making procedure by which the Summit takes the appropriate action. After overlooking the issue during its 28th Session held in Johannesburg, South Africa, in August 2008, the 29th SADC Summit referred these legal questions to the SADC Ministers of Justice and Attorneys-General. The findings of the Ministers of Justice and Attorneys-General have never been made public, but it is unlikely that it was these uncertainties that prevented the Summit from taking action against Zimbabwe. Whilst neither the 2000 Protocol nor any other SADC legal instrument expressly provides what constitutes an 'appropriate action', Article 33 (1) SADC Treaty, inter alia, provides that '[s]anctions may be imposed against any Member State that ... persistently fails, without good reason, to fulfill obligations assumed under this Treaty'. The Tribunal in the *Campbell* case found that Zimbabwe was in breach of its obligations under Articles 4 (c) and 6 (2) SADC Treaty, and hence its blatant and persistent refusal to comply with the decision of the Tribunal did directly amount to persistent failure to fulfill obligations

assumed under the SADC Treaty. Therefore, one may assume that, when read in conjugation with Article 33 SADC Treaty, the 'appropriate action' envisaged under Article 32 (5) 2000 Protocol authorized the Summit to impose sanctions against Zimbabwe for non-compliance.

**50** The problem was, however, that Article 10 (8) SADC Treaty requires that, 'unless otherwise provided', Summit decisions 'shall be taken by consensus'. In the absence of any express provision precluding a non-complying SADC Member State from taking part in a Summit decision to impose sanctions for the non-compliance, the literal interpretation of Article 10 (9) would mean that Zimbabwe is able to veto any summit decision to impose sanctions against it. The literal interpretation of Article 10 (9), however, appears to run against the prevailing practice in international organizations. For example, Article 254 Treaty on the Functioning of the European Union and Article 148 East African Community Treaty provide express exceptions to the rule of consensus when the issue involves suspension or expulsion of a Member State or suspension of certain rights resulting from membership, respectively. To be sure, a similar rule of positive consensus was applied under the General Agreement on Tariffs and Trade (→ *General Agreement on Tariffs and Trade [1947 and 1994]*), in which the losing party was able to block or veto the adoption of a panel report. This practice was, however, replaced by the so-called 'negative consensus' whereby a Panel or Appellate Body report is automatically adopted unless there is a consensus against its adoption (Art 16 (4) and 17 (14) Dispute Settlement Understanding ('DSU')). It is also worth noting that the 2009 SADC Summit decision to suspend Madagascar was made without the participation of Madagascar. More importantly, enabling a non-complying Member State to block or veto a Summit decision to take action against itself would make Article 32 (5) 2000 Protocol and Article 33 SADC Treaty ineffective.

#### **4. The Decision of the Summit to Suspend the Tribunal**

**51** The first and decisive step towards suspending the Tribunal was taken by the 30th SADC Jubilee Summit held in Windhoek, Namibia, from 16 to 17 August 2010. Among the issues placed on the agenda of the Summit were: (i) the reappointment of three regular judges and one non-regular judge of the Tribunal, whose terms of office were set to expire on 31 August 2010 and (ii) action against Zimbabwe for non-compliance. The Summit deferred action against Zimbabwe and ordered a review of the role, functions, and terms of reference of the Tribunal to be carried out within six months. It also decided not to reappoint the four judges, but allowed them to stay in office, pending the review. Moreover, the Summit ordered the Tribunal not to hear any new cases until the review process was completed. No official explanation was given by the Summit why the review was needed, but one may assume that the decision to review the role, responsibilities, and terms of reference of the Tribunal was made in response to Zimbabwe's challenge to the legality of the Tribunal's existence and the scope of its jurisdiction.

**52** In accordance with the decision of the Summit, the SADC Secretariat commissioned an independent review of the role, functions, and terms of reference of the Tribunal in November 2010. The review was carried out by Cambridge Professor Lorand Bartels on behalf of the World Trade Institute Advisors ('WTI Advisors') (Bartels, 2011). The review report was presented first to SADC Senior Officials at a meeting held in Swakopmund, Namibia, in February 2011, and then to the SADC Member States' Ministers of Justice and Attorneys-General at their meeting held in Swakopmund in April 2011. The independent review found that the Tribunal was properly constituted under international law and had acted within its mandate and jurisdiction. It nevertheless suggested several

recommendations for strengthening the Tribunal, largely drawing on the experience of the CJEU, upon which the Tribunal was originally modelled.

**53** After examining the review report, the SADC Ministers of Justice and Attorneys-General reported to the Summit asking for authorization to undertake their own review. An Extraordinary Summit of SADC Heads of State or Government was accordingly convened on 20 May 2011 in Windhoek solely to discuss this issue. In Windhoek, the Summit: (i) mandated the Ministers of Justice and Attorneys-General to initiate the process aimed at amending the relevant SADC legal instruments and submit a progress report at the 31st Summit in August 2011 and the final report to the Summit in August 2012, (ii) decided not to reappoint Members of the Tribunal whose term of office expired on 31 August 2010, (iii) decided not to replace Members of the Tribunal whose term of office was set to expire on 31 October 2011 and (iv) reiterated the moratorium on receiving any new cases or hearings in any cases by the Tribunal until the SADC Protocol on the Tribunal had been reviewed and approved (paras 7 and 8 Communiqué of the Summit). These decisions unequivocally and effectively suspended the Tribunal and rendered it defunct.

**54** The Committee of SADC Ministers of Justice and Attorneys-General started its own review of the role and responsibility of the Tribunal in September 2011 and reported its progress to the 31st SADC Summit held in Luanda, Angola in August 2011. The Summit directed the Committee to 'remain seized with the task and to report to the next ordinary Summit'. At the 32nd Summit held in Maputo, Mozambique, from 17 to 18 August 2012, the Committee reported its findings to the Summit. Upon the recommendation of the Committee, the Summit resolved that 'a new Protocol on the Tribunal should be negotiated and that its mandate should be confined to interpretation of the SADC Treaty and Protocols relating to disputes between the Member States' (para 24 Communiqué of the 32nd SADC Summit). By virtue of this decision, the Summit abolished the Tribunal's jurisdiction over disputes between legal and natural persons and the Member States, and between SADC employees and the SADC Secretariat.

**55** In the absence of an express provision in the SADC legal instruments authorizing the Summit to suspend the Tribunal, questions were subsequently raised as to the legality of the Summit's decision to suspend the Tribunal and abolish its human rights jurisdiction. The question was initially raised by non-governmental organizations in the SADC Member States. It was then taken to the African Commission on Human and Peoples' Rights by two of the applicants in the *Campbell* case, ie Luke Tembani and Benjamin Freeth (*Tembani and Freeth (represented by Tjombe) v Angola and Thirteen Others*). By invoking Articles 7 and 26 African Charter on Human and Peoples' Rights ('African Charter'), they challenged the legality of the Summit's decision to suspend the Tribunal as a violation of the right of access to court. In their complaint dated 27 July 2011, Tembani and Freeth requested the Commission: (i) to refer the case to the African Court on Human and Peoples' Right, and (ii) to declare that: (a) the decisions taken by the Summit to suspend the functions of the Tribunal had infringed the SADC Treaty, the African Charter, and principles of international law, (b) the Summit should lift the purported suspension of the Tribunal's functions, and (c) the SADC Member States should give effect to the decision handed down by the Tribunal. In response, the Commission rejected the first request on the ground that the case did not meet the requirements for referral provided for in the Commission's rules of procedure. The Commission gave further consideration to the second request, but it rejected this request as well on the basis that the African Charter articles invoked by the applicants (ie Arts 7 and 26) do not guarantee access to regional courts such as the SADC Tribunal, but only apply to national courts.

## I. Reinstatement of the Tribunal

**56** Following the 2012 Summit decision, the SADC Ministers of Justice and Attorneys-General started preparing the draft new Protocol on the Tribunal. As directed by the Summit, the preparation of the draft was largely focused on confining the jurisdiction of the Tribunal to the interpretation of the SADC Treaty and Protocols with respect to inter-State disputes. Accordingly, the drafters of the new protocol simply deleted the provisions of the 2000 Protocol that appeared to authorize the Tribunal to adjudicate disputes between natural and legal persons and States. The new Protocol on the SADC Tribunal was subsequently adopted by the 34th SADC Summit held in Victoria Falls, Zimbabwe from 17 to 18 August 2014. The new Protocol was signed by nine of the fifteen SADC Member States on the last day of the Summit, but is yet to be ratified by any of the Member States. As set out in Article 53, the 'Protocol shall enter into force thirty days after the deposit of instruments of ratification by two-thirds of the Member States'.

**57** No subsequent effort has been made by the SADC Member States to ratify the 2014 Protocol following its adoption by the 34th Summit. There were expectations that the reconstituted Tribunal would have its first case in the form of the lake border dispute between Malawi and Tanzania. But this could also be the reason behind the delay to reconstitute the Tribunal. The SADC Member States were keen to resolve this conflict not through judicial but rather through diplomatic channels, involving the Africa Forum of Former Heads of State and Government.

**58** The latest development in this regard is the decision taken by the 35th Summit held in Gaborone, Botswana, from 17 to 18 August 2015, to establish the SADC Administrative Tribunal ('SADCAT') (see para 27 Communique of the 35th SADC Summit). This decision seems to have been elicited by a case brought by a disgruntled SADC employee against the SADC Secretariat before the High Court of Botswana, where the SADC Secretariat is located (see *Swart v Southern African Development Community*, 2011). By suspending the Tribunal, the Summit left the SADC without an administrative dispute settlement mechanism. Partly in an effort to rectify its mistake, the Summit decided to establish an administrative tribunal. This latest move, however, has created confusion regarding its implication for the SADC Tribunal. This confusion manifested in some media reports in the SADC Member States, which portrayed the SADCAT as a replacement and the final nail in the coffin for the SADC Tribunal. Once again, there has been no attempt from the Summit or the Secretariat to address this confusion. Only time will tell whether the SADCAT is an unfortunate reincarnation of the SADC Tribunal or an institutional duplication that will further stretch the region's limited financial and institutional resources.

## J. Concluding Remarks

**59** The SADC Tribunal saga represents the latest chapter in sub-regional courts' struggle for legitimacy in Africa. The EACJ in 2006 and the → *Court of Justice of the Economic Community of West African States (ECOWAS)* in 2008 faced similar backlashes following their rulings against Kenya and the Gambia, respectively. However, the EAC and the ECOWAS Member States managed to subdue or fend off the threats posed by Kenya and the Gambia against their respective courts. In the case of the EACJ, the backlash was prompted by its 2006 interim ruling against Kenya in *Anyang' Nyong'o and Others v Attorney General of Kenya and Others*, in which the Court granted an interim injunction restraining the EAC from recognizing the nominees chosen by Kenya to represent the country in the East African Legislative Assembly ('EALA'). The Kenyan government reacted to the ruling by threatening to remove the two Kenyan EACJ judges and to preclude the Court from rendering its final judgment. However, while it eventually managed to convince its fellow Member States to amend the EAC Treaty in 2009, Kenya was not able to prevent the Court from issuing its final decision on 30 March 2007, in which the Court found that the process

of electing the Kenyan members of the EALA was not conducted in accordance with the procedure set forth under Article 50 EAC Treaty.

**60** The Gambia has also failed to curb the jurisdiction of the ECOWAS Court of Justice following the latter's ruling in *Manneh v The Gambia*. In the case brought by the Media Foundation for West Africa on behalf of a Gambian journalist, the Court found the Gambia to be responsible for torture and other human rights abuses and ordered it to release Mr Manneh from detention and pay him US\$100,000. In the aftermath of this ruling and in the face of a second suit brought against it by an exiled journalist for torture and other human rights abuses (ie *Saidykhan v The Gambia*), the Gambia tried to limit the Court's human rights jurisdiction by officially requesting for an amendment to the 2005 Supplementary Protocol, which entrusted the Court with human rights jurisdiction. However, the ECOWAS Council of Justice Ministers unequivocally rejected its request.

**61** In contrast to Kenya and the Gambia, Zimbabwe was able to successfully cripple the SADC Tribunal, if not destroy it altogether. This is due in part to the combination of the following two factors, which appears to be at the heart of the SADC Tribunal's (ongoing) saga: tensions between politics and the rule of law, and ambiguities and vagueness in SADC legal instruments.

**62** To a large extent, the fate of the SADC Tribunal was determined by the primacy of politics over the rule of law in the SADC. The tension between politics and the rule of law manifested itself on two levels: first, when Zimbabwe refused to comply with the rulings of the Tribunal; and second, when the Summit decided to suspend the Tribunal instead of sanctioning Zimbabwe for non-compliance.

**63** As noted by the Tribunal in the *Campbell* case, SADC is an international organization. The rules set out in the SADC Treaty and other subsidiary legal instruments adopted by the SADC Member States have the status of international law. Despite the legal complications, the SADC Tribunal was legally constituted in accordance with these rules. Even a Zimbabwean court has confirmed this. It follows that Zimbabwe's refusal to comply with the decisions of the SADC Tribunal is a plain breach of international law. For Zimbabwe and President Mugabe, in particular, however, the costs of violating international law were outweighed by the political benefits of maintaining his signature land redistribution program.

**64** The rest of the SADC Membership had the chance to tilt the balance in favour of the rule of law. However, in failing to take action against Zimbabwe, SADC Member States chose to close ranks with Mugabe at the expense of the regional rule of law. At least two political considerations explain their decision to stand in solidarity with Mugabe instead of standing up for the rules and procedures they set out to govern their conduct. The first one is well-captured in a remark made by the former Tanzanian president, Jakaya Kikwete, who lamented to his fellow SADC Heads of State that, in creating the SADC Tribunal, 'we have created a monster that will devour us all' (Christie, 2011). His remark clearly shows that in creating the SADC Tribunal with such a broad jurisdiction, SADC Member States did not think through the repercussions of their action. For SADC Members with poor human right records, the *Campbell* case was a wake-up call to realize the dangers of the 'monster'. Therefore, it is no surprise that Mugabe faced little resistance from such countries in his mission to dismantle the Tribunal. However, given their relatively better human rights record and political capital within the SADC, one would have expected the likes of Botswana, Namibia, and South Africa to stop Mugabe from dismantling the Tribunal.

**65** The second political consideration is that at the early stage of the SADC Tribunal saga, SADC Member States were busy trying to broker a power-sharing agreement in Zimbabwe following the disputed outcome of the 2008 election. It seems that the SADC Member States were reluctant to sanction Zimbabwe in order not to undermine the chance of Mugabe agreeing to the power-sharing deal. A typical example of how political solidarity with Mugabe took priority over the regional rule of law is the 30th SADC Summit, which was supposed to sanction Zimbabwe for being defiant but concluded by issuing a call for the lifting of international sanctions on Zimbabwe. Unfortunately, the suspension of the SADC Tribunal is a symbol of the triumph of politics over the rule of law in the SADC.

**66** Another equally significant element to the SADC Tribunal saga is the inconsistencies and ambiguities in the SADC legal instruments. As indicated in the preceding sections, the SADC legal instruments are awash with ambiguities and evasiveness. This is largely caused by inept legal drafting. Zimbabwe used this lack of clarity in SADC legal instruments to the fullest in diverting attention from its blatant non-compliance to questions over the legal existence of the Tribunal. Zimbabwe would not have been able to cast doubt and create confusion over the legal existence of the Tribunal if the legal instruments were clear. Unfortunately, these problems seem to haunt the Tribunal to this day. As an integral part of the SADC Treaty, the 2000 Protocol can only be amended or repealed through the amendment procedure set forth in Article 36 SADC Treaty. As already noted, Article 36 requires only a signature by two-thirds of the SADC Member States. This means that as an amendment to the SADC Treaty, the 2014 Protocol shall enter into force when it is signed by ten of the fifteen SADC Member States. So far, the 2014 Protocol has been signed by nine of the fifteen Member States. Strictly speaking, the 2014 Protocol requires a signature of one more SADC Member State to enter into force. But, absurdly enough, the 2014 Protocol contains a ratification requirement, which is confusing at best and contradictory at worst.

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