tralac | trade law centre

tralac Policy Brief

A NEW TRIBUNAL FOR SADC, BUT WITH LIMITED JURISDICTION AND FEWER POWERS

At the recent SADC Summit for Heads of State and Government, which took place from 17 to 18 August 2013, in Lilongwe, Malawi, an important decision on the future of the SADC Tribunal was taken. The Tribunal was suspended by a Summit decision in 2010, following its rulings against Zimbabwe involving human rights violations.[1] Zimbabwe participated in the Summit deliberations and decision to suspend the Tribunal.[2]

Since that time no disputes about the application or interpretation of any SADC legal instrument could be settled in a binding and final manner. This impasse might now be resolved, albeit in a manner which will strip the Tribunal of many of its powers.

The Summit report and decision read as follows:[3]

> *Summit recalled that at its meeting held in August 2012 in Maputo Mozambique, it approved the extension of the mandate of Ministers of Justice/Attorneys-General to enable them to revise the Protocol on the Tribunal in order to address the concerns raised by the Council of Ministers. Summit noted that Council at its meeting held in August 2013 in Lilongwe, Malawi approved the Terms of Reference for the Committee's extended mandate on the Legal Framework of the SADC Tribunal, listed below:*
>
> *(a) negotiate a new Protocol on the Tribunal, the mandate of which should be confined to the interpretation of the SADC Treaty and Protocols relating to disputes between Member States;*

[1] These were the Campbell and Gondo judgments.
[2] Summit decisions are taken by consensus.
[3] SADC/SM/1/2013/1A.

(b) the Protocol should enter into force once ratified by two thirds of the Member States;

(c) while preparing the new Protocol on the Tribunal, the Committee of Ministers of Justice/Attorneys-General will review existing instruments and also identify the provisions of the Treaty, Protocols and other legal instruments that will require consequential amendments;

(d) in discharging its mandate, the Committee of Ministers of Justice/Attorneys-General should benchmark with other regional tribunals/courts, such as the East African Court of Justice, provided such benchmarking does not lead to deviation from the mandate given by the Summit, as highlighted in (a) above; and

(e) requested the Ministers of Justice/Attorneys General to fast-track the negotiation of a new Protocol as mandated by Summit.

Summit directed the Ministers of Justice/Attorneys General to fast-track the negotiation of a new Protocol on the Tribunal.

This important development ushers in a *de novo* negotiating process and will result in a very different dispute settlement dispensation in SADC. The first point to note is that the Summit has called for inter-state negotiations to adopt the text of the new Protocol for the SADC Tribunal. The negotiations will start with preparatory work that the Ministers of Justice/ Attorneys-General of the member states will undertake.

These negotiations will hopefully not be a long and drawn-out process since this matter has seen in depth discussions over the last few years. The requirement of ratification before entry into force may however cause extended delays. The Summit decision states that the new Protocol will have to be ratified by two thirds of the Member States to enter into force. Since national constitutional procedures will then enter the picture, it may be quite some time before SADC sees its new Tribunal. Ratification should therefore be prioritized and should remain on the Summit's agenda.

The Summit will presumably have a say about the content of whatever will be negotiated. In terms of Article 22(2) of the SADC Treaty each Protocol "*shall be approved by the Summit on the recommendation of the Council*". It must, however, be noted that Article 16 of the Treaty applies with respect to the adoption of the Tribunal's Protocol; which is in force once "adopted by the Summit".[4]

The manner in which this saga has been handled does not bode well for the rule of law in SADC. The existing Protocol on the Tribunal is legally still a binding instrument. Changes to an existing international agreement have to be dealt with in terms of its own amendment procedures. The state parties to such an agreement are entitled to take the necessary

[4] Article 16(2) SADC Treaty.

decisions. The Summit, despite being the highest decision making body in SADC, cannot simply *qua* Summit dispense with existing and binding Protocols on the basis of a routine decision. The Summit is a separate SADC organ and it does not enjoy that power. Article 22(10) of the Treaty reads: *Decisions concerning any Protocol that has entered into force shall be taken by the parties to the protocol in question.* An amendment to any Protocol that has entered into force shall be adopted by a decision of three quarters of the Member States that are parties to a Protocol.[5] These provisions in article 22 of the Treaty are *lex specialis*.

The process now underway will require several amendments to existing SADC instruments. The Summit report notes that "*while preparing the new Protocol on the Tribunal, the Committee of Ministers of Justice/Attorneys-General will review existing instruments and also identify the provisions of the Treaty, Protocols and other legal instruments that will require consequential amendments*…." This will include the Rules of Procedure of the Tribunal.

This exercise will require careful scrutiny of the procedure and the implications of proposed changes for all SADC legal instruments. The adoption of the original Tribunal Protocol gave rise to legal uncertainties (which later figured in the Campbell case and in disputes before the South African courts) about the question as to whether it had properly entered into force. When it was realized that the standard requirement of Article 22 of the Treaty (ratification by two thirds of the SADC members) was unsuitable for the *sui generis* Protocol of the Tribunal with the power to "*ensure adherence to and the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it*", the special procedure of the amended Article 16 was adopted. This was meant to prevent dissimilar configurations of contesting parties in disputes where some member states would be bound by a Protocol and others not. That is why Article 16(2) introduced an important amendment: "*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."* The original Tribunal Protocol came into force and applied as a result of its incorporation into the Treaty. This particular uncertainty is re-introduced where the Summit now decides that "*the* [new] *Protocol should enter into force once ratified by two thirds of the Member States".* This danger will hopefully be dealt with as the process unfolds.

Far-reaching substantive changes are contemplated. The Tribunal's jurisdiction will be drastically circumscribed and only inter-state disputes will in future be heard. It is well known that African members of Regional Economic Communities never litigate against each other. There may, as a result, never be any disputes before this new Tribunal. That would be very unfortunate for the development of rules-based governance in SADC. The region's expanding trans-boundary commerce, the nature of supply chain production involving private firms and investment demand certainty and predictability. Governments do not trade and do

[5] Article 22(11) SADC Treaty.

not enjoy the private rights (whether intellectual property or with respect to correct customs procedures) which are involved.

The right of individual standing will be abolished and unless a special arrangement is adopted, private parties will not be able to bring claims against governments which infringe their rights. The Trade Protocol and its Annexes for example deal with many individual rights; and do so without venturing into human rights disciplines. Staff disputes; of which several were heard by the Tribunal during the five years of its existence, will also become impossible.

We have a special concern about trade disputes and about the adjudication of matters pertaining to trade facilitation. No trade dispute or a case about regional integration, customs procedures or non tariff barriers has ever been brought to the SADC Tribunal. These are mostly not sensitive issues where national sovereignty is at stake. The reason why they are not decided by courts of law relate to the inadequacy of SADC legal instruments and a lack of preparedness by private parties and their lawyers to litigate in terms of the applicable disciplines.

It is well known that the bold rulings of the Tribunal on human rights violations by Zimbabwe have triggered the political process which has now resulted in the emasculation of the rule of law in SADC. Several other member states eventually supported Zimbabwe. This is unfortunate but shows that the adjudication of human rights is a matter where governments easily invoke their sovereignty. The Campbell case involved the controversial issue of land reform. That is why special and concerted efforts to protect human rights are so important. This will happen optimally when national courts enjoy the power of judicial review. When an enforceable national bill of rights is absent states are unlikely to allow human rights powers to be exercised by regional fora.

We have the distinct impression that the adjudication of trade and regional integration disputes has not been considered as part of the recent Summit exercise and decision to re-negotiate the Tribunal's Protocol. It is not too late to do so. The task of the Committee of Ministers of Justice/Attorneys-General is *inter alia* to review the existing legal instruments of SADC. They have an opportunity to ensure that these other areas of dispute settlement; which are vital for good governance and the rule of law, will be catered for. Deeper integration without respect for rights will remain a futile exercise.

Annex Six to the SADC Trade Protocol, which has never entered into force, provides for a panel procedure to settle trade disputes and grants the Tribunal an appeal jurisdiction. It still needs more work but could be a good start. A panel procedure does not normally provide for individual claims. Its adoption will, however, allow the development of jurisprudence about trade related rights and processes. Their different focus and technical nature should make it easier for government agencies to take up cases on behalf of nationals. This type of dispute settlement is in most cases no threat to national pride. It is in fact a practical solution to technical problems and allows for trans-boundary business transactions between private parties to continue, just as it happens with respect to commercial disputes before national

courts. Other SADC Protocols also invoke the dispute settlement role of the Tribunal for the specialized subjects which they deal with.[6] This is a crucial aspect of rules-based governance; which in SADC is unfortunately in its infancy. There is, ironically, an opportunity now to look at the bigger picture regarding dispute settlement in this Organization and to add vitally important building blocks to SADC's legal and institutional architecture.

Gerhard Erasmus, tralac Associate

Please send comments to: Trudi Hartzenberg (trudi@tralac.org)

[6] The Finance and Investment Protocol and its Annexes are examples.