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The COMESA Court of Justice: Regional agreements do protect private parties

by Gerhard Erasmus

Introduction

States are the parties to international agreements; only they derive rights from such agreements and only they can litigate before international courts when violations occur. Natural or legal persons do not enjoy rights under international agreements and they cannot bring claims to international courts. Their states of nationality have to act on their behalf but this does not amount to a legal entitlement.¹

This is the traditional approach. However, in the context of Regional Economic Communities (RECs) it is ineffectual and has to be modified. Regional integration arrangements are about more than inter-state obligations; they establish a *sui generis* legal regime which has to provide for the protection of private parties too. Regional integration promotes and extends trade and commerce (involving mostly private entities) across borders and into other national jurisdictions. These activities need the protection of appropriate legal instruments and procedures and should accommodate the reality of an enlarged market arrangement. Matters such as tariffs, standards, NTBs, services and other trade related disciplines are governed by specific international agreements, which have replaced or have been added to the regulations formerly under the exclusive jurisdiction of national governments.

Effective regional integration has to accommodate private parties in order to achieve the very objective behind the exercise and to prevent the uncertainty and costs which will result from fragmented and ad hoc national actions. This requires the enforcement of rights where needed; which happens typically via the establishment of regional courts and the uniform domestic application of regional legal instruments.

How are these benefits secured? African governments do not litigate against each other in trade matters; there are no examples of inter-state disputes about violations of regional obligations.² The REC agreements typically contain provisions on compliance but the response when member states

¹ Governments may extend “diplomatic protection” to nationals and, as part hereof, declare disputes against states which have violated the international minimum standard of protection required by international law.

² While the SADC Tribunal was operational not a single inter-state dispute was heard. The same is true of the ECOWAS court, which came into existence 12 years ago.

violate tariff or other obligations is to deal with them through political discussions and in meetings of regional bodies consisting of representatives of member states. This prevents the development of appropriate “community law”.

The European Union provides a well-known example of where this type of development has occurred. Compliance with EU community law does not depend on the willingness of the member states to lodge complaints against each other. The European Commission litigate on behalf of the collective and community law is often directly enforceable.³ In particular instances natural and legal persons involved in intra- EU trade also enjoy standing before the European Court of Justice (and before national courts in certain matters) and can enforce their substantive and procedural rights. This is a logical development in the life of deeper regional integration arrangements. It also confirms the special nature of “community law”; which differs from classical public international law with its state centred emphasis.

African RECs generally lack these features. In SADC for example private firms cannot invoke the protection of a regional court. The SADC Tribunal has been suspended but even before that it would have been practically impossible to protect private rights in the context of tariff preferences and the prohibition of non-tariff barriers. An Annex has been added to the SADC Protocol on Trade to provide for a panel procedure along WTO lines but remains dormant. Should it become operational private entities will still not enjoy standing; their governments of nationality will have to declare a dispute against the offending state and act on their behalf.

The more immediate concern involves national practices which infringe REC obligations. It often happens that member states impose trade restrictions such as import bans or quotas, new tariffs or “sur-taxes”⁴ in violation of their obligations under regional tariff schedules. Trade agreements do permit national defence measures but they must be justified in terms of safeguard measures or as remedies against unfair trade practices. Specific legal requirements then apply. In anti-dumping proceedings this will e.g. include the right of affected private parties to take such measures on judicial review.⁵ If national agencies ignore these standards the rights of private parties as well as the bigger enterprise will suffer.

³ The landmark decision of the European Court of Justice is *Van Gend en Loos vs Nederlandse Administratie Der Belastingen* 26/62, 1963.

⁴ As Zimbabwe has been doing recently.

⁵ As per the applicable GATT rules. The recent South African measures affecting imported chickens demonstrate how national and international legal disciplines apply when a WTO member state imposes such import restrictions. Brazil objected to the lawfulness of the anti dumping tariffs contemplated by ITAC and they were withdrawn. Instead, tariff

Private parties may also face another impediment; the failure to make the applicable international agreements part of the law of the land. National courts will usually refuse to give effect to unincorporated trade agreements.⁶ The end result is legal uncertainty, the enemy of the predictability which inspires long-term investment and commerce across borders.

In a recent case before the Common Market for Eastern and Southern Africa (COMESA) Court of Justice, First Instance Division, these basic principles were considered and explained in the context of the COMESA legal order. It came up with a clear and comprehensive judgment.⁷ In the process the Court found that certain duties on imported goods violated the COMESA Treaty and that a private party (a national of Mauritius) has an enforceable right under Article 26 of the COMESA Treaty. It granted relief to the applicant which, in this instance, amounted to the refund of tariff duties paid in breach of the Treaty.

The Dispute

In February 2012 Polytol Paints, a private company incorporated in Mauritius, filed an application with the COMESA Court of Justice against the Republic of Mauritius. It requested a court order instructing Mauritius to give effect to the obligations on tariff liberalization in force in COMESA; of which Mauritius is a member. The main arguments revolved around the fact that under Article 46 of the Treaty, by the year 2000, Member States of COMESA were required to eliminate customs duties and other charges of equivalent effect imposed on goods eligible for Common Market treatment.

Mauritius initially complied with this obligation but in 2001 re-introduced a 40% customs duty on specific products imported from Egypt (another COMESA member), which included the products imported by the Applicant. Only Egyptian products were targeted.

The Applicant challenged the validity of this measure. It first requested the Ministry of Finance of Mauritius to remove the duty but received no response. In April 2008 it sought relief from the local courts but failed again. The Supreme Court of Mauritius found that it could only take cognizance of the provisions of the COMESA Treaty to the extent that they had been incorporated into the national law. This Court observed that it could “*only consider the validity of the regulations against the*

increases (possible under the SACU tariff schedule) were then introduced. They are lawful as long as they do not exceed the bound rates.

⁶ This happens in countries which follow the dualist approach to the domestic application of international agreements. These agreements are not self-executing; they have to be “domesticated” in order to be enforceable as part of national law.

⁷ *Polytol Paints & Adhesives Manufacturers Co. Ltd vs The Republic of Mauritius*, 31 August 2013.

backdrop of the Customs Tariff Act and our Constitution. In the absence of any such legislation to that effect, non-fulfilment by Mauritius of its obligations, if any, under the COMESA Treaty is not enforceable by the national courts.”

Standing of Private Parties and Jurisdiction

As could be expected Mauritius opposed the Polytol application by arguing, amongst other things, that it lacked *locus standi* to bring this claim; it had not established a valid basis for invoking the jurisdiction of the COMESA Court of Justice.

The Court rejected this preliminary argument, finding that the Applicant had *locus standi* and that the Court had jurisdiction to hear the matter in terms of Articles 23 and 26 of the Treaty. The latter provides: *Any person who is resident in a Member State may refer for determination by the Court the legality of any act, regulation, directive or decision of the Council or of a Member State on the grounds that such act, directive, decision or regulation is unlawful or an infringement of the provisions of this Treaty...*

The Court draws an interesting distinction between infringement of the Treaty and non-fulfilment of a Treaty obligation. *“Thus, a legal or natural person is only permitted to bring to Court matters relating to conduct or measures that are unlawful or an infringement of the Treaty but not the non-fulfilment of a Treaty obligation by a Member State. The responsibility of bringing a matter relating to non-fulfilment of obligations under the Treaty is reserved for Member States and the Secretary General.”*⁸

The Court mentions the basic elements underpinning this separate legal order; the “community law” of COMESA. *“A proper functioning of the Common Market is, therefore, not only a concern of the Member States but also that of the residents. The Treaty is more than an agreement which merely creates obligations between the Members States. It also gives enforceable rights to citizens residing in the Member States.”*⁹

The fact that the COMESA Treaty is not directly enforceable in some jurisdictions, including Mauritius, does not alter the basic picture. Notwithstanding the differences in domestic legal systems (in some member states international agreements become directly applicable; in others they require incorporation) the Treaty objectives can only be achieved when all members fulfil their obligations: *“Any Member State that acts contrary to the Treaty cannot, therefore, plead the nature of its legal*

⁸ At p 9.

⁹ At p 17.

system as a defence when citizens or residents of that State are prejudiced by its acts. This is clearly stipulated in Article 27 of the Vienna Convention on the Law of Treaties, 1969 which provides that '[a] party may not invoke the provision of its internal law as justification for its failure to perform a treaty'."¹⁰

Breaches of the Treaty

Mauritius admitted that it had re-introduced the higher duties about which the Applicant has complained. This was done upon an import surge from Egypt between 1997 and 2000. It also mentioned negotiations with Egypt; which the Court found could not result in a unilateral suspension of a multilateral agreement. The Court notes that Mauritius was aware of the possibility to take safeguard measures¹¹ but chose not to take that route. In the view of the Court, Mauritius infringed Article 46 by reintroducing duties on Egyptian products; even if it was for the protection of its industries. This point is noteworthy. Lawful trade defence measures are available (provided the applicable requirements are met) but they were ignored. The approach adopted by Mauritius was illegal.

The main defence of Mauritius concerned the nature of the obligations in question. It argued that the provisions of the Treaty regarding tariff reductions and the eventual establishment of the COMESA Customs Union are flexible, intended to facilitate a process rather than rigid rules "cast in stone". The Court rejects this interpretation: "*Member States must comply with the deadline in order to benefit from FTA otherwise they will be left out. This is not flexibility for Member States to join whenever they choose to. The same can be inferred from the Council statements urging Member States to comply with the deadline.....Mauritius had taken steps to join the FTA in November 2000, it could not selectively apply the obligations under Article 46 by imposing duties for products from some Member States in the FTA and not others.*"¹²

The court invokes Article 31 of the Vienna Convention on the law of Treaties: when interpreting a treaty, an attempt should be made to keep the ordinary meaning of the text of the Treaty where it is not vague or ambiguous. Article 46 of the COMESA Treaty is found to be clear and unambiguous and its terms must be interpreted with their ordinary meaning in the context of the purpose and objective of the treaty to achieve free trade within the COMESA area.

¹⁰ At p 18.

¹¹ Under Article 61 of the COMESA Treaty.

¹² At pp 12 and 13.

Concluding observations

Mauritius has two months to lodge an appeal; which will be heard by the Appellate Division of this Court. If the ruling stands this watershed judgement will clarify fundamental aspects of regional integration arrangements in our part of the world. The judgment explains the nature of the international obligations which underpin the RECs, deals with their implementation by the member states and notes that these legal regimes are more than an agreement which merely creates obligations between the member states. They also give enforceable rights to citizens residing in these states. Hopefully this judgment will set the benchmark for all RECs.

Several challenges await the states in COMESA and in SADC if this judgment prevails. The first concerns the consequences of overlapping membership; which causes legal uncertainties and unnecessary costs. Mauritius is also a member of SADC. If it imposes (or has imposed) the same type of restrictions on imported goods originating in SADC countries the affected national parties will not enjoy the protection offered by a court of law; the SADC Tribunal has been suspended. That amounts to discrimination between private parties engaged in like activities – one of the consequences of uncoordinated and overlapping regional obligations.

Other COMESA members may face court applications against them. To take one example: Zimbabwe is a member of both COMESA and SADC. It has imposed surtaxes on goods imported from other COMESA and SADC countries. This amounts to violations of treaty obligations. Private parties would be entitled to bring applications to the COMESA Court of Justice regarding imports falling under the COMESA Treaty, as Polytol Paints has done. If Zimbabwean companies are successful, how will the Zimbabwe react? By battling for the suspension of this regional court too? What will the other member states do? Perhaps Mauritius can set the right tone *ab initio* by respecting the present ruling.

Could the Tripartite FTA clear up this confusion? One of its objectives is to “*resolve the challenges of multiple membership and expedite the regional and continental integration processes*”.¹³ It has a very clear example at its disposal now as to what needs to be done and what the failure to act will cause.

¹³ Article 3(3) Draft Tripartite Agreement.

One may even argue that the *acquis* principle (one of the principles guiding the Tripartite negotiations) applies to the effects of this case.¹⁴ The *acquis* will cover tariff offers only; *“the negotiations should start from the point which the COMESA, EAC and SADC trade negotiations have reached. Tariff negotiations and the exchange of tariff concessions would be among Member/Partner States of the Tripartite FTA that have no preferential arrangements in place between them. This will both preserve the acquis and build on it.”*

What is the implication? The literal effect points to additional FTAs; between those tripartite states that do not presently have FTAs with each other. Those who are in FTAs will continue to trade in terms of existing regimes. The new agreements will have to be FTAs in their own right and this will result in more overlapping arrangements, not less.

The Polytol Paints case points to the confusion which will ensue as a result of the present thinking. The legal certainty brought by the recent judgment of the COMESA Court will in fact constitute an additional obstacle and amount to sanctioned discrimination. It should not.

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¹⁴ The clarified Tripartite Principles “*acquis*” is a French term meaning “that which has been agreed”.