Speech by Honourable Justice Bernard Georges at the 2018 tralac Annual Conference Dinner

Kigali, 22 March 2018

Distinguished Guests

Allow me to thank tralac for this invitation to speak to such a distinguished group of persons tonight. It is a very real joy to do so. My colleague Justice Gacuko and I are both honoured to have been asked to participate in your deliberations. As judges asked to apply the law of trade and commerce, this is a great learning experience for us as well. As we are gathered here at a time when African states have just signed the agreement to set up the African Continental Free Trade Area, I commend the 44 states which have signed.

I have been asked to speak on the theme **Regional economic integration – a Judge's perspective** and hope that I may bring a contribution to the issue.

Of late there has been a proliferation of regional courts accompanying regional integration among States, so this is rich ground for study and consideration. Events are moving fast in this field. Only yesterday in Nairobi we delivered a judgment concerning attempts to set up a Tripartite FTA between SADC, COMESA and the Eastern African Community; a day later we now are looking at a continent-wide FTA.

Trade and the Rule of Law or Democracy go hand-in-hand. China apart, and this is a discussion for another day, this is well recognized. Similarly, rules are important. A few years ago, I was confronted with this question in a canon law context while I was writing a book: why are rules needed to administer a church? The same question may be asked about trade. The short answer is that rules are cardinal; they are the foundation on which orderly conduct can ensue. If one wants a short, clear and comprehensive statement of this truism, all one has to do is to look at the back cover of the tralac brochure. There we read, in three lines, what I will spend the next half hour saying:

> '*We are committed to the principles of rules-based governance at the national, regional and international levels. We believe that better governance and strong institutions are essential elements for inclusive and sustainable growth*.'

Courts are important to ensure adherence to these rules. We are essential building blocks to ensure fairness and the Rule of Law. For it is a truism, and one we should not merely pay lip-service to, that investors will invest and traders will trade with countries which they feel safe with. And safety comes not with the agreement, the treaty or protocol, but with the ability of these to be meaningful. When things go wrong, the investors and traders must know that the fall-back is worthy of its name. For, investors, if I may use a description borrowed from Brexit, will not give up a three-course meal for the promise of a packet of chips in the future.

This morning, the Chair of tralac, George Lipimile, enjoined us to seek 'A Prosperous Africa for All'. That is a noble vision, and one which we all aspire to. So, where can we judges and courts help, or hinder, the attainment of this objective? I will try this evening to answer the question by reference to some cases decided before Regional Courts.

As we will see, national sovereignty is the major issue in the context of this discussion. The issue is highly topical. I was in Mauritius last week on the occasion of the 50th anniversary of that country's independence. There also the issue of the loss of sovereignty while entering into international and regional agreements arose. This morning, Prof Erasmus (or was it Trudi?) mentioned the word. In the Kigali New Times yesterday there was the headline 'Hiding Behind Sovereignty is an old Song'. And we all heard the words of a Tanzanian delegate at the AfCFTA signing on the subject: 'You can eat from Trade, but you can't eat Sovereignty.'

Sovereignty is on the tongues of many. The issue for me is one of Sovereignty versus the Rule of Law. That will be the thrust of my address tonight. I have identified 3 issues of importance in that context and will return to these at the end.

At the core of any decision to enter into a relationship with another person or body is a loss of independence, of sovereignty, of the supremacy of institutions. Those of us who are married realise this – too late, I grant you – as soon as the honeymoon is over. So too, between states and nations. There is inherent in a shared venture a requirement for give and take. In legal terms, this is called a loss of sovereignty. The loss is usually by the member state to the regional grouping. This was starkly put as early as 1964 by the European Court of Justice, the ECJ, in the celebrated case of *Costa v ENEL*:

> '*The transfer by the states from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights against which a subsequent unilateral act incompatible with the concept of Community law cannot prevail.*'

Once these international instruments are embodied into the law of the Member States, by ratification in various forms, the door out is pretty much closed and the Member States are locked into a system which they may regret, but about which they can do little. That most famous of British judges, Lord Denning, beloved of all, in an uncanny foreshadowing of Brexit, put it bluntly, as was his habit:

> '*Our sovereignty has been taken away by the European Court of Justice...Our courts must no longer enforce our national laws. They must enforce Community law...No longer is European law an incoming tide flowing up the estuaries of England. It is now like a tidal wave bringing down our sea walls and flowing inland over our fields and houses—to the dismay of all.*'

This dichotomy, between the embracing of the loss of some sovereignty to the regional bodies on the one hand for the greater good of trade and regional development, and the regret

that accompanies it through having to accept unpalatable rules and decisions on the other hand, is a good base from which to explore, through three important cases, the experiences of our region and of our peoples in regional grouping ventures.

Polytol

Polytol Paints and Adhesives Manufacturers Co Ltd was a Mauritian company, as its name suggests involved in the manufacture of paints and other allied products in Mauritius. One of the aims of COMESA is the elimination of customs duties and other tariffs imposed on goods between Member States of the common market. Mauritius, a COMESA Member State, imposed a 40% customs duty on specific products imported from Egypt, another Member State, including paint products imported by Polytol for its business. Eventually Mauritius reduced, and then removed entirely, the duty on the Egyptian products. Polytol, which in the interim had paid the duties, challenged the reintroduction of the duty and claimed a refund of all duties it had paid.

As it was obliged to do, Polytol brought its challenge before the Supreme Court of Mauritius first. Its application for judicial review of the decision to introduce duty on the paint products failed. Polytol took the matter to the Mauritius Revenue Authority and, unsuccessful there, on appeal to the Assessment Review Committee where it met the same fate. Aggrieved, it referred the matter to the COMESA Court of Justice (CCJ).

The CCJ was set up under the COMESA Treaty to promote a number of general aims and specific undertakings, all aimed at the convergence of the economies of Member States through full market integration.

The CCJ found for Polytol. It held that Mauritius had breached the Treaty in imposing the tariffs and it ordered a refund of these. In doing so the CCJ established a number of important benchmarks:

i. That a legal or natural person was only permitted to bring to the CCJ matters concerning an infringement of the Treaty; the responsibility for bringing a complaint of non-fulfilment of treaty obligations was reserved to Member States and the Secretary-General
ii. That the signatories of the COMESA Treaty had committed themselves to give some legal space in the Treaty to individuals who were resident in Member States to challenge the unlawfulness of acts of Member States, or infringement of the treaty and, in doing so had '*in some areas limited their sovereignty*'
iii. That residents of Member States had an enforceable right before the CCJ where they had been prejudiced by an act of the Council or of a member state which contravened the Treaty
iv. That the COMESA Treaty was more than an agreement creating rights between members; it gave enforceable rights to citizens of Member States
v. That Member States had no right to enter into (bilateral) agreements which defeated the main purpose of the Treaty.

Mauritius filed an appeal against the CCJ's judgment but did not pursue it. It complied with the judgment in full. In doing so, it acted a s a responsible member state and acknowledged that the regional grouping to which it belonged had authority over it, and it submitted to that authority.

The Polytol judgment constitutes a benchmark, but the decision of the CCJ was not altogether surprising. The matter under review was after all a trade matter, falling squarely within the aims and objectives of the treaty. What if the resident of the member state felt aggrieved at a non-trade matter which it felt nonetheless constituted an infringement of his or her rights within a greater and wider interpretation of the Treaty objectives? Could it approach the court in that case? Put differently, are regional courts *de facto* regional courts of appeal from municipal courts, giving residents of Member States a further forum for the resolution of disputes? That was the subject of the second case.

Campbell

Mike Campbell had a farm in Zimbabwe. At some point, the farm was targeted in the country's land acquisition programme for resettlement of indigenous Zimbabweans. In order to prevent owners from challenging the compulsory acquisition of land, the constitution of Zimbabwe was amended to oust the jurisdiction of national courts in challenges to land acquisition orders. Campbell challenged the constitutional amendment before the Zimbabwe High Court. All attempts at a national resolution of the dispute having failed, Campbell petitioned the SADC Tribunal. This had been constituted under Article 16.1 of the SADC Treaty '*…to ensure adherence to and the proper interpretation of the provisions of [the] Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it.*' The SADC Treaty in Article 4.c. enjoined the Community and Member States to '*act in accordance with the principles…[of] human rights, democracy and the rule of law*.'

The Tribunal ruled that it had jurisdiction to hear the application: '*It is clear to us that the Tribunal has jurisdiction in respect of any dispute concerning human rights, democracy and the rule of law…*' This was, it said, '*…in the light of the express provisions of Article 4(c) of the Treaty…*' In doing so, the Tribunal was granting to itself a purely human rights jurisdiction, nowhere specifically stated in the Treaty. To achieve this end, it used the foundational principles set out in the opening articles of the Treaty.

As for the right to access to courts, which the ouster clause in the Zimbabwe constitution had denied Campbell, the Tribunal reiterated that the Rule of Law, representative democracy and personal liberty were essential for the protection of human rights and that, in a democratic society, the rights and freedoms inherent in the human person, the guarantees applicable to them and the Rule of Law formed a triad. Each component '*defines itself, complements and depends on the others for its meaning*.' The right of access to courts was an aspect of the Rule of Law, and the Rule of Law was a foundational value on which constitutional democracy was erected. Courts would therefore treat with suspicion any attempt to subvert the Rule of Law by removing governmental action which affected the rights of individuals from judicial scrutiny.

Faced with this ruling, Zimbabwe had two options: comply or fight. It chose the latter, in clear breach of its international obligations imposed by the Treaty. Worse, all other SADC Heads of State went along with it and, instead of standing up to the Rule of Law, they chose to wind down the Tribunal. Eventually, a new Protocol for the Tribunal was drawn up, limiting its jurisdiction to disputes between Member States. The capacity of the Tribunal to hear human rights applications from individuals was effectively terminated.

Malawi Mobile Limited (MML)

MML was a telecommunications company in Malawi. It was contractually bound to roll out a mobile network in Malawi and, after some extensions had been given, the regulator terminated its contract. MML sued the government and the regulator before the courts of Malawi. It sought damages for the termination of its contract through a contractual claim against the regulator and a claim in tort against the government, accusing the later of having induced the regulator to terminate the contract.

MML won substantial damages in the High Court. The regulator and the government appealed the decision. This was reversed by the Malawi apex court. MML therefore filed a reference before the COMESA CCJ seeking the same relief it had sought before the Malawi courts. The Malawi government contended that the provision which allows the unlawful act of a member state to be examined by the CCJ only related to such acts as concerned a direct infringement of a direct Treaty-related matter and not its aims and objectives. The CCJ did not agree and took a wider view of the provision, following an East African Court of Justice ruling to the effect that fundamental principles '*must be followed and adhered to by Partner States in order that the objectives of the Community are achieved*.' So too, the COMESA Treaty had declared in its preamble that, with the ultimate objective of strengthening and achieving convergence of individual economies through full market integration, the Member States would observe the '*principles of liberty, fundamental freedoms and the rule of law*'.

On a second argument of Malawi that the CCJ had no jurisdiction because MML had not canvassed before the Malawi courts a breach of the Treaty, limiting its action there to a domestic breach of contract and tort, the CCJ disagreed, finding that the action brought before the Malawi courts had been canvassed at all levels of the domestic courts. A purposive reading of the provision revealed that in the Treaty Member States had '*intended to improve…residents' access to justice*'.

The government of Malawi appealed to the Appellate Division of the CCJ. The appeal was allowed. The Appellate Division found that the CCJ's jurisdiction was limited to the interpretation and application of the Treaty and the adjudication of matters referred to it pursuant to the Treaty. It had no jurisdiction to entertain a reference by a resident of a Member State grounded solely on an infringement of the national law. The main role of the CCJ was to '*guarantee the respect of national law in accordance with the implementation of the Treaty*'. Consequently, the CCJ was not '*a general supranational court with a task to control the legality of every national act unrelated to the Treaty*'.

The Appellate Division ruled that the CCJ was not '*an appellate court for all cases that entail a breach of municipal law even if that law has nothing to do with the Member States' Treaty obligations*.' The Appellate Division held that, in order for the CCJ to assume jurisdiction on the issue of exhaustion of local remedies, these very complaints should have first been ventilated before the domestic courts at least in substance. Since only an issue of domestic breach of contract and tort had exercised the national courts of Malawi in the matter, the CCJ had no jurisdiction to entertain it. The Appellate Division pointed to the Polytol case as an example of one where the issues raised before the CCJ had first been canvassed before the courts of Mauritius.

Summary

It is hoped that a consideration of these three cases will have focused attention on the thorny issues of the loss of sovereignty by Member States when they enter into regional agreements, and the extent of the *droit de regard* which courts of regional bodies have on the actions of the Member States. The two, of course, are inter-related. For, just as Britain had difficulties with the so-called interference of the European Courts – both of them – in its domestic affairs, so too are our nation states unhappy at the possible interference by regional courts in the domestic affairs of the state. This is only natural. Governments, by which I mean the executive branches in our countries, have the same unhappy relationship with domestic courts – at any rate when these rule against them.

The fundamental issue raised by a consideration of these cases is to what extent will Member States of regional groupings subject themselves to the overarching scrutiny of regional tribunals? The answer lies in the extent to which countries will agree that economic prosperity is desirable, and the Rule of Law a cornerstone of every sovereign nation worthy to be so called and, having so agreed, then accept that the two concepts are indivisible. Acceptance of these notions, and the mention of them in regional treaties, must *ipso facto* then be read as a desire by the Member States to adhere to the fullest extent to the notions. Anything less will simply be paying lip-service to obligations entered into. A purposive reading of treaty obligations will indubitably lead to submission by countries to the inevitable partial loss of sovereignty to regional bodies and to the inevitability of having occasionally to be subjugated to a higher decision. For what is the point of putting fine words in an international or regional agreement if the intent is thereafter to be circumscribed? In other words, is the solution Polytol, with a wide interpretation and a ready acquiescence to the outcome, or Campbell, with the nation state affirming its power over a tribunal of its own creation, or MML which, at the same time, acknowledges the existence of rights, but limits their effect by a strict interpretation of the words of the treaty?

***Quo Vadis*?**

The Polytol judgment marked the high tide of regional courts' intervention and Member States' acceptance of their role, and the Campbell ruling their low ebb; in the one a ready acceptance of the jurisdiction of the court and enforcement of its ruling by the unsuccessful

member state, and in the other the castration of a tribunal's jurisdiction for purely political motives by a Member State. As well as reminding us of the great political and democratic divides which exist among Member States of a region, they are also reminders of the uneasy relationship which characterizes the loss of sovereignty by Member States to regional bodies which they join. The greater good to which countries joining regional groupings aspire as members of these bodies is often subservient to political realities on the ground. That is why it is so important for a human rights jurisdiction to be clearly stated and made a cornerstone of the courts' mandates.

Charles Mkandawire was the previous registrar of the SADC Tribunal – the one emasculated by SADC itself at the behest of the Zimbabwe government. Speaking in 2009 to the South African newspaper Mail & Guardian, he said '*You cannot have development, you cannot have proper regional integration if you do not entrench the rule of law, democracy and human rights…*

Frederick Cowell describes the actions of Zimbabwe against the SADC Tribunal as the creation of '*a form of regional consensus about weakening the rule of law among SADC governments*' and that the politics around the SADC Tribunal debacle have created an impression that rather than human rights being a core value of the Community there was rather '*a common commitment to state solidarity and regime protection*.' That is in fact a real fear, as the same solidarity does pervade the regional courts themselves as well. The fear, the legal writer Hulse posits, is that of meeting a similar fate to the SADC Tribunal. Conversely, she points out, if a strong regional court is not available to uphold rights, investors may be wary of investing in countries with weak courts. The knife cuts both ways.

So at the end of the day, if I may be forgiven another idiom, the chips fall here: On the one hand, regional treaties allow for human rights to play a part in the broader purposes of the treaties; they have created courts to uphold the treaties, which include their fundamental principles, namely the Rule of Law and the upholding of individual rights; and they have provided a mechanism for individuals to approach the regional courts to attack contraventions of the treaty and to seek recourse where they have exhausted domestic legal remedies (such as Polytol) or where (as in Campbell) these were inaccessible to them. On the other hand, a number African States still possess democratic deficits, are reluctant to face a loss of national sovereignty and fear an opening of the floodgates alleging infractions in their countries against the Rule of Law, democracy and human rights.

It is hardly surprising, thus, that the President of Tanzania in 2011 is alleged to have remarked to his fellow SADC Heads of State about the SADC Tribunal that: '*We have created a monster that will devour us all*.'

We, the regional courts, have to navigate these reefs and shallows. Will Member States accept that the partial loss of national sovereignty is a small and inevitable price to pay for greater regional integration? Will we appropriate to ourselves a more active role in the upholding and promotion of democratic norms and individual rights? Will the we become effective supranational courts upholding the weaker states and ensuring investors' rights?

The answer may lie in steps such as those taken by the Gauteng High Court recently when it condemned the South African government for its part in the SADC Tribunal debacle, and the one reported by Capital FM last week: '*The judges of the Economic Community of West African States (Ecowas) Court of Justice are visiting the African Court on Human and Peoples' Rights (AfCHPR) in Arusha on a fact-finding mission. African Court President Sylvain Oré said the visit aims to strengthen ties with regional courts around the continent and* ***to 'learn best practices with a view to enhancing and incorporating the highest standards in the dispensation of justice'.***'

This gives reason to be hopeful that Africa will realise that the presence of, and access by parties to, regional courts are a good thing for trade as a whole, and the loss of some national sovereignty is a small price to pay for the reassurance that good regional courts, prepared to stand up to national interests, can bring to investors and traders.

In that context, as I mentioned at the start of this address, I have identified the following three factors as essential for the successful support of Continental and Regional FTAs. These are:

- That a dispute resolution mechanism is essential, with clear rules as to jurisdiction and parameters as to what the court can and cannot do. Mr Mene, the South African Trade Representative, this afternoon reiterated this.

- That States grant regional courts full freedom. This is to ensure that judges do not have to fear a SADC Tribunal end or, worse, tailor their judgments to suit the wishes of Member States so as to avoid such an end.

- That Member States ensure compliance with an acceptance and enforcement mechanism of regional courts' rulings. Member States must effectively domesticate international obligations. As Professor Erasmus reminded us this morning, States must respect their obligations.

I am happy to say that from all I heard at this conference today these things are, to use a trade term, acquis.

The newspaper yesterday ran this headline on the AfCFTA: 'Business Leaders Upbeat.' Well, so am I. And so are we all.

I thank you.