The broad picture

By ‘the REC Courts’, we refer to three Courts of Justice: the COMESA Court of Justice, the East African Court of Justice and the ECOWAS Community Court of Justice. Together, they exercise jurisdiction over 38 of the 55 member states of the AU. This is noteworthy, as COMESA, the EAC and ECOWAS are only three of the eight Regional Economic Communities – RECs – that are recognised by the African Union as building blocks of the Abuja Treaty-inspired African Economic Community (AEC) of the early 1990s. More recently REC free trade areas (FTAs) are recognised as building blocks of the African Continental Free Trade Area (AfCFTA). (If ever a SADC tribunal is revived, and not counting overlapping memberships, the number of states would grow to 43.)

Although their histories differ, in their current form all three Courts have been functioning for 20 years or more. At this point, they may safely be regarded as ‘established’. They hear cases in terms of accessible and transparent rules and procedures; they render reasoned and published judgments or opinions; over time they have built up key precedents on the interpretation and application of their foundational treaties and associated instruments. The result, to which their recent rulings bear testimony, is predictability and consistency – especially in the areas of jurisdiction, standing, admissibility, court rules and their approach to the foundational provisions of the respective Treaties.

Added to this, the Courts are researched, analysed and written about, and they enjoy recognition in the family of international tribunals and judicial institutions. They regularly figure in some or other form at tralac Annual Conferences, and for good reason. They are the final interpreters,appers and upholders of their RECs’ founding treaties, protocols and other relevant instruments, and they appreciate their role in dispute resolution and regional integration.

This must be one of the reasons why all three Courts participate in initiatives to raise awareness of their existence and significance, to strengthen ties with the regional and national legal communities and governments in their RECs, and offer training programmes in their workings and the treaty environments in which they function.
The conundrum

The positive picture so far hides the fact that the REC Courts do not fare well in respect of a primary reason for their existence, namely upholding and reinforcing the rules-based economic and trading system of their RECs. In all three Courts trade-related cases are far and few between. The reason surely is not a lack of jurisdiction and standing (locus standi). The Courts are the final interpreters of the REC Treaties and their subsidiary instruments. All three Treaties endow the Courts with arbitration powers as well. The member states, the RECs themselves (through their Secretaries General), private parties and Community employees all have standing in the Courts.

Part of the problem is this: by design, the Secretaries General and the member states bear the primary responsibility for monitoring and ensuring that obligations under the respective Treaties are fulfilled. Yet, in none of the RECs the Secretary General or member states approach their Community Court to seek compliance with their Treaty. Initiating judicial control over a member state’s observance of the Treaty is therefore left in the hands of aggrieved private parties. Their access is specifically circumscribed, excludes a general right to compel a member state to observe the Treaty, and differs from one REC to the other. By now it is trite that the dissimilarities had a marked effect on the ‘character’ of each Court.

The private party effect

Briefly, the situation in the three RECs is the following:

- In COMESA and the EAC, residents of member states may approach their Community Courts to test the legality of acts of the Communities and member states against the respective Treaties. ‘Residents’ include natural and legal persons. Here the similarity ends.

- In COMESA, applicants may not approach the Court of Justice unless their domestic remedies have been exhausted. This is in line with general principles of international law. The approach of the COMESA Court to the exhaustion requirement may be described as cautious. The development of its jurisprudence over more than a decade in the trade-based judgments of Polytol Paints v Mauritius, Malawi v Malawi Mobile and the recent line of Agiliss v Mauritius rulings is noteworthy and instructive. After the Appellate Division’s seminal judgment of 14 August 2023, prospective litigants must have a clearer understanding of the six principles developed in Malawi Mobile. (An application by Agiliss in March 2024 for the Appellate Division to review its August 2023-ruling was dismissed by the Court.) The Court also remains firm in its insistence that already in the domestic courts a connection with the COMESA Treaty must be shown or foreshadowed. The domestic remedies requirement may be one of the reasons why the COMESA Court does not receive the same steady flow of references as the EAC and ECOWAS Courts.
In the EAC, domestic remedies need not be exhausted but a reference must be filed in the EACJ within two months of the alleged treaty violation, or within two months of the applicant becoming aware of the violation. The rule has become hard and fast in the jurisprudence of the Court. In 10 out of 23 judgments posted in 2023 and up to March 2024 the applicants were unsuccessful for missing the two-month deadline. On their merits, six of these involved economic, trade or environmental elements. Another aspect of the Court's approach to the EAC Treaty that has become firmly established and widened access to the Court, is the right of private parties to rely on articles 6(d) and 7(2) – good governance, rule of law, democracy and more – to found an action. (This is not allowed by the COMESA Court.)

In ECOWAS, matters have taken a different turn. Where the COMESA and EAC Treaties allow both natural and legal persons standing in their courts, the ECOWAS Treaty reserves the right to natural persons. It further restricts actions against member states to human rights violations. By way of exception, the ECOWAS Court allows legal persons standing on the narrow basis of three ‘fundamental rights’ closely related to their existence, namely the right to a fair trial, the right to property and the right to freedom of expression. While it offers a small window for ‘commercial’ litigation in the Court, the ECOWAS Court has effectively developed into a human rights court. The particular political dynamic in the ECOWAS region caused an observer to describe the Court as ‘a go-to alternative for litigants who do not have faith in the judiciaries in their member states’. [1] Recent jurisprudence confirms this trend. So far, the Court has strenuously resisted attempts by applicants to draw it into the role of a supra-national court of appeal. (One such case towards the end of 2023 involved the current Prime Minister of Senegal, Mr Ousmane Sonko, who was in detention at the time and whose political party had been banned.) It is not unusual for the Court to hear complaints about human rights violations relating to detention without trial, torture, and political unrest and oppression. The Court does not shy away from ordering a member state to bring its laws in line with its international human rights obligations and to set deadlines for a report-back on remedial steps taken. Where warranted, it would also award damages to a successful applicant.

Where does this leave us in 2024?

The question in the title is whether it is business as usual or whether the three REC Courts offer hope for trade dispute resolution and integration. The answer is ‘both, but ...’. On the one hand, the Courts continue to hear matters mostly brought by private parties against their REC member states and sometimes the Secretaries General as representative of the RECs. Recent jurisprudence confirms that the three Courts remain in their different orbits. Many cases that would make it to the EACJ and the ECOWAS Court will in COMESA either be resolved during the exhaustion of domestic remedies, or not be admitted by the COMESA Court for lack of the required connection to the Treaty. At the other side of the spectrum, a mere allegation of a human rights
violation may gain an applicant access to the ECOWAS Court. The EACJ is somewhere in between, having allowed itself through a generous interpretation of articles 6(d) and 7(2) of the EAC Treaty to be under regular pressure to veer in the direction of a human rights court – an invitation it tries hard to resist.

On the other hand, provided applicants overcome the admissibility hurdles and survive respondent states’ regular attempts to derail a case through preliminary applications, all three Courts deliver well-reasoned judgments on the merits. That the majority of cases continue to have little to do with trade and regional integration is attributable less to the Courts than to other factors, such as the political and economic environments in which they operate, or a member state’s reluctance to enforce a Court’s orders. Given the opportunity, the three Courts have shown themselves competent to decide trade-based cases. In this regard they remain – arguably – beacons of hope.

As a parting aside, if the choice is between a less than perfect regional court dispensation and no court at all – as in SADC – the answer is clear.