Why are we discussing international trade dispute settlement in Africa? The Regional Economic Community Courts

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Outline

• The REC Courts
• Their conundrum
• The private party effect
• The Courts and selected recent rulings
• Comments and conclusion
The REC Courts

- 8 RECS, 3 Courts
  - COMESA Court of Justice
  - EAC Court of Justice
  - ECOWAS Community Court of Justice
- Jurisdiction over 36 of 55 AU member states
- If SADC Tribunal revives (rumours true?) 43 member states covered, not counting multiple memberships
- COMESA & EAC Courts: FID and AD
- ECOWAS CCJ: Single division
Established courts

• Histories differ, but all three ‘established’
  - Functioning more than 20 years
  - Rules and procedures transparent and accessible
  - Reasoned & published judgments/opinions/rulings
  - Key precedents
  - Result: Consistency & predictability of Treaty interpretation/application

• Enjoy academic attention: Researched & analysed
• Aware of role in dispute resolution & regional integration
• Actively participate in initiatives to promote/raise awareness
The conundrum

• Longstanding issue: Regional ECONOMIC Communities, but rather few ‘economic’ disputes in Courts
• Reason not lack of jurisdiction, standing (locus standi)
• Jurisdiction: final word on interpretation and application of Treaties
• Standing: Member states, SGs, private parties, REC employees
• SGs (o b o REC) and member states do not use Courts
• Litigation driven by private parties
• Access differs from Court to Court – defines ‘character’ of Courts
Private party access

- COMESA & EAC: *Natural & legal* persons may challenge infringement of Treaties by Council (COMESA)/ ‘institution’ (EAC) and member/partner states, BUT:
  - COMESA: Domestic remedies to be exhausted (art 26)
  - EAC: Proceedings instituted within 2 months (art 30(2))
- ECOWAS: *Natural persons* may challenge violation of human rights (art 9(4))
  - Court includes legal persons on narrow grounds (right to property, freedom of expression, right to fair trial)
COMESA

• Exhaustion requirement in line with international law
• Application of requirement challenging
• Led to landmark rulings: *Polytol Paints, Malawi Mobile, Agiliss*
• *Agiliss (AD August 2023)*: 2 appeals in one judgment; 6 Malawi Mobile principles fleshed out
• *Agiliss (AD March 2024)*: Review attempt dismissed

• NB: Insistence that Treaty issue raised/foreshadowed in domestic courts
EAC (1)

• Two month-rule: Hard and fast, no extension
• May force application while domestic remedies available
• 2023/24: FID – 10 out of 23 missed deadline: Some meritorious, e.g.
  - *EASSI v AG Uganda & Rwanda* (border closure)
  - *Lupain Group v South Sudan* (dishonored bank guarantees)
  - *Ruzizi SA v AG Burundi* (expropriation – appl one day late)
  - *Centre for Food and Adequate Living Rights v Uganda & Tanzania* (EA Crude Oil Pipeline)
  - *Elario Adam Cholong v AG South Sudan* (dredging of Naam River)
EAC (2)

• AD 2023/24 – 14 judgments

• *AG Tanzania v Mbowe* (AD confirmed FID ruling on Tanzania Political Parties Act – arts 6(d) & 7(2))

• *Ololosokwan Village Council v Tanzania* (land rights in/next to Serengeti – art 6(d), 7(2) and art 15 of Common Market Protocol – referred back to FID)

• *East African Law Society v Secretary General of the EAC* (NB ruling on composition and quorum of Council of Ministers)

• NB: Arts 6(d) & 7(2) ground for reference – ‘human rights’ push?
ECOWAS (1)

- Article 9 of Supplementary Protocol: jurisdiction extensively set out
- Art 9(4): ‘The Court has jurisdiction to determine case of violation of human rights that occur in any Member State’
- Easy access: Art 10(d): *Individuals* for violation of human rights, provided application (i) not be anonymous; nor (ii) made while same matter before another international court
- Legal persons allowed on narrow basis: right to property, free trial, freedom of expression
- 3-year time limit
ECOWAS (2)

• Any international human rights instrument invoked, but always African Charter
• Rulings reflect fraught situation in many member states (unlawful arrest, torture, detention without trial, violence, media freedom etc)
• *Ousmane Sonko v The Republic of Senegal*
• *Isaac Olamikan v Nigeria* (freedom of expression)
• *Association de Blogueurs de Guinée v Guinée* (expression/access to info)
ECOWAS (3)

• Effectively human rights court (Court would want to be more)
• Any international human rights instrument invoked, but always African Charter
• Regularly orders state to report back; also awards damages
• Court described as ‘go-to alternative for litigants who do not have faith in the judiciaries in their member states’
COMMENTS & CONCLUSION (1)

• States/SGs find alternative ways of resolving disputes, not the Courts
• The three REC Courts in different ‘orbits’:
  - Many EAC and COMESA cases won’t make it to COMESA Court – either resolved via domestic remedies or refused by Court for lack of connection to Treaty
  - ECOWAS – mere allegation of human rights violation gives access
  - EAC in between (arts 6(d)/7(2)) – pulled in human rights direction
• Courts (esp EACJ & ECOWAS) often tempted to be supra national courts of appeal (they resist)
• Courts partly to blame for few trade cases, many other factors play role: enforcement of orders; member state commitment; economic conditions; (different) state(s) of development; etc
• Courts competent when called upon (esp COMESA, EAC; ECOWAS only via human rights)
• Role may grow in importance with AfCFTA in swing
• If given choice, rather less perfect regional court than nothing ...
THANK YOU