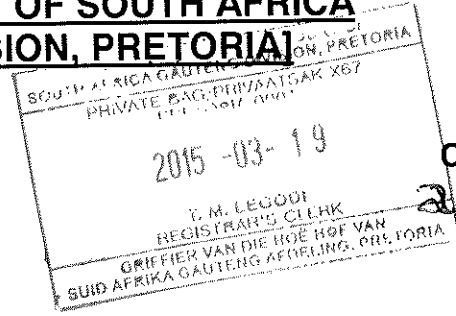


**IN THE HIGH COURT OF SOUTH AFRICA
[GAUTENG DIVISION, PRETORIA]**



CASE NO:
20382/15

In the matter between:

THE LAW SOCIETY OF SOUTH AFRICA

Applicant

and

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

First Respondent

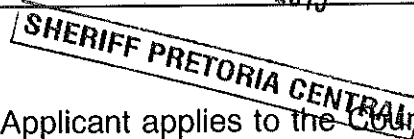
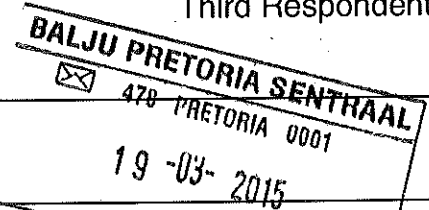
**THE MINISTER OF JUSTICE OF
THE REPUBLIC OF SOUTH AFRICA**

Second Respondent

**THE MINISTER OF INTERNATIONAL RELATIONS
AND CO-OPERATION OF
THE REPUBLIC OF SOUTH AFRICA**

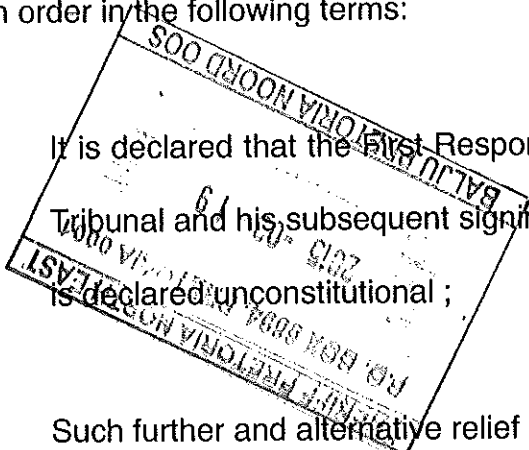
Third Respondent

NOTICE OF MOTION



PLEASE TAKE NOTICE THAT the above named Applicant applies to the Court for an order in the following terms:

- 1 It is declared that the First Respondent's participation in suspending the SADC Tribunal and his subsequent signing of the 2014 Protocol on the SADC Tribunal is declared unconstitutional ;
- 2 Such further and alternative relief as the Honourable deems fit.



BE PLEASED TO TAKE NOTICE FURTHER THAT the affidavit of **XOLANI MAXWELL BOQWANA** filed evenly herewith and the annexures thereto will be used in support hereof.

BE PLEASED TO TAKE NOTICE FURTHER THAT if you intend opposing this application you are required to:

1. notify the Applicant in writing within 20 days from date hereof whether you intend to oppose;
2. indicate in the said notice an address within 15 kilometres of this Honourable Court at which you will accept receipt of all pleadings and process in this matter;
3. within 15 days after filing your notice of intention to oppose, file your opposing papers, if any.

BE PLEASED TO TAKE NOTICE THAT the Applicant will accept notice of service of all pleadings and process at the office of its attorneys of record, Mothle Jooma Sabdia Inc Attorneys at Cnr Jan Shoba and Brooks Streets, Brooklyn, Pretoria.

BE PLEASED TO TAKE NOTICE FURTHER THAT should no notice of opposition be filed, application will be made to this above Honourable Court on _____ 2015 at 09h30 or as soon thereafter as counsel may be heard.

BE PLEASED to enrol the matter accordingly.

SIGNED AT PRETORIA ON THIS THE 19th DAY OF MARCH 2015.

[SGD: MR. T A MOTHLE]
MOTHLE JOOMA SABDIA INC
Attorneys for Applicant
Duncan Manor
Cnr Jan Shoba and Brooks Streets
Brooklyn
Pretoria
Tel: 012 – 362 3137
Fax: 086 6944
Ref: TA Mothle/Louise/TAM3499

**TO: THE REGISTRAR OF THE COURT
PRETORIA**

**AND TO THE MINISTER OF JUSTICE OF
THE REPUBLIC OF SOUTH AFRICA**
First Respondent
c/o The State Attorney's Office
316 Thabo Sehume Street
PRETORIA

FOR SERVICE BY THE SHERIFF

**AND TO: THE MINISTER OF JUSTICE OF
THE REPUBLIC OF SOUTH AFRICA**
Second Respondent
c/o The State Attorney's Office
316 Thabo Sehume Street
PRETORIA

FOR SERVICE BY THE SHERIFF

**AND TO: THE MINISTER OF INTERNATIONAL RELATIONS AND
COOPERATION OF THE REPUBLIC OF SOUTH AFRICA**
Third Respondent
c/o The State Attorney's Office
316 Thabo Sehume Street
PRETORIA

FOR SERVICE BY THE SHERIFF

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO:

In the matter between:

THE LAW SOCIETY OF SOUTH AFRICA

Applicant

and

THE PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA

First Respondent

THE MINISTER OF JUSTICE OF
THE REPUBLIC OF SOUTH AFRICA

Second Respondent

THE MINISTER OF INTERNATIONAL RELATIONS
AND CO-OPERATION OF THE REPUBLIC
OF SOUTH AFRICA

Third Respondent

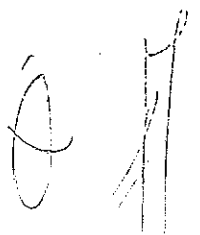
FOUNDING AFFIDAVIT

I the undersigned,

XOLANI MAXWELL BOQWANA

do hereby make oath and state that:

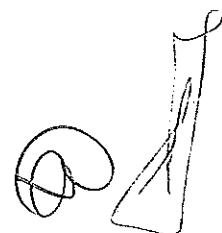
1. I am an adult male and practising attorney. I am also the co-chairperson of the Law Society of South Africa.



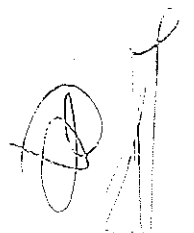
2. The facts contained herein fall within my personal knowledge, unless the context indicates otherwise, and are, to the best of my knowledge and belief, both true and correct.
3. The information set out herein below in respect of SADC and its operations as well as the Southern African Development Community Lawyers Association ("SADCLA") are furnished to me by the Applicant who is member of the SADCLA and represented by Mr Makanatsa Makonese whose confirmatory is attached hereto, marked as Annexure "FA14".
4. I am duly authorised to launch these proceedings on behalf of the Applicant.

THE PARTIES

5. The Applicant is **The Law Society of South Africa**. It is an association of the six constituent law societies of South Africa, namely the Cape Law Society, the KwaZulu-Natal Law Society, the Law Society of the Free State, the Law Society of the Northern Provinces, the Black Lawyers Association and the National Association of Democratic Lawyers.
6. The Applicant has, *inter alia*, the following fundamental, enduring and long-term aims and objectives:
 - 6.1 promote legal aid and the accessibility of all to the law and the courts;

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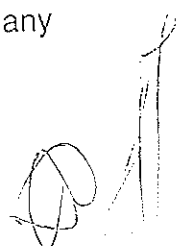
- 6.2 uphold, safeguard and advance the rule of law, the administration of justice, the Constitution of the Republic of South Africa, Act 108 of 1996 ("the Constitution") and the laws of the Republic of South Africa;
- 6.3 initiate, consider, promote, support, oppose or endeavour to modify legislation, whether existing or proposed;
- 6.4 initiate, consider, promote, support, oppose or endeavour to modify proposed reforms or changes in law, practice, procedure and the administration of justice;
- 6.5 strive towards the achievement of a system of law that is fair, just, equitable, certain and free from unfair discrimination;
- 6.6 the LSSA is a member of the SADCLA and, as such, promotes the objectives of the principles contained in the SADC Treaty. I will deal with this aspect herein below.
7. The First Respondent is the **President of the Republic of South Africa**. The First Respondent is the Head of State and Head of the national executive. He is obliged by section 83 of the Constitution to uphold, defend and respect the Constitution as the supreme law of the Republic and to promote the unity of the nation and that which will advance the Republic. He carries out his duties at the Union Buildings of South Africa and is served in these proceedings care of the State Attorney's Office situated at 316 Thabo Sehume Street, Pretoria.



8. For the purposes of this application the First Respondent is the responsible member of the executive who negotiates and signs international agreements on behalf of the Government of the Republic South Africa.
9. The Second Respondent is the Minister of Justice and Correctional Services of the Republic of South Africa. The Minister is the political head of the Departments of Justice and Correctional Services, whose responsibility includes, amongst others, advising the First Respondent and the national executive about the international law obligations of the Republic of South Africa.
10. The Third Respondent is the Minister of International Relations and Cooperation of the Republic of South Africa. The Minister is the political head of the Department of International Relations and Cooperation and this department is responsible, amongst others, for the Republic's foreign policy.

PURPOSE OF THIS APPLICATION

11. The purpose of this application is to seek the relief as set out more fully in the Notice of Motion to which this affidavit is annexed to. It entails a declaratory order that:
 - 11.1 the whole process of suspending the Tribunal;
 - 11.2 failure to appoint judges; and
 - 11.3 all steps related thereto including the voting for and signing of and any attempt to ratify the 2014 Protocol



to be unconstitutional.

12. The aforesaid process is unconstitutional as the objective is to infringe or deprive the vested rights of citizens to have access to the Tribunal as set out in the SADC Treaty, to which the Government of the Republic of South Africa is a party to and bound in law. The aforesaid process and conduct is in contrast with the objectives of the Constitution of the Republic of South Africa, not in the interest of justice or the citizens of the Republic of South Africa.
13. As will be demonstrated hereunder the First Respondent has acted in a manner which infringes the citizen's right of access to justice.

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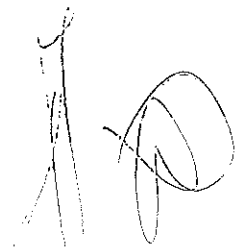
14. During the course of August 2014, the Summit of SADC signed the 2014 Protocol. I attach hereto, a communiqué of the 34th SADC Summit which confirms that the 2014 Protocol has been adopted, marked annexure "FA1".
15. Unlike the previous Protocol ("the 2000 Protocol"), the 2014 Protocol deprives the right of citizens to refer a dispute between particular citizens and its government to the SADC Tribunal whereas this was not the case under the 2000 Protocol.
16. I attach copies of the 2000 and 2014 Protocols as annexures "FA2" and "FA3" respectively.



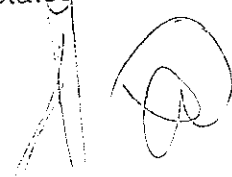
17. By signing the 2014 Protocol, the President infringed South African citizens' rights of access to justice. This right is a right contained in the Bill of Rights. I will return to this aspect later.
18. The President, at the Summit, signed and/or voted in favour of the 2014 Protocol. The 2014 Protocol must now be ratified in terms of the provisions of section 231 of the Constitution.
19. The other members of the SADC Lawyers Association have resolved to bring similar applications in their respective countries, to avoid the adopting and/or ratification of the proposed amended 2014 Protocol, by their Heads of State.
20. The Applicant launches this application acting in its own interest as well as in the interest of the public including the private sector, civil society, non-governmental organizations, workers and employers organizations and citizens in terms of Section 38 of the Constitution of the Republic of South Africa.

The Establishment of the Southern African Development Community (SADC), the Summit, the Council and the Tribunal:

21. The Southern African Development Community (SADC) is an African intergovernmental organisation, constituting one of the regional pillars of the African Economic Community (AEC) and formally recognised as a Regional Economic Community (REC) of the African Union.

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22. The SADC was established on 17 August 1992 via the Treaty establishing the Southern African Development Community ("SADC Treaty") and has fifteen (15) Member States, including South Africa, which are bound by the Treaty.
23. The Summit, comprising the Heads of State and Government from each Member State, has been established by Article 9(1)(a) to be the supreme policy making institution of the SADC pursuant to Article 10 of the SADC Treaty.
24. The SADC Council of Ministers, comprising Ministers from each Member State, has been established by Article 9(1)(b) of the SADC Treaty. The SADC Council of Ministers is mandated to oversee the functioning and development of the SADC and to ensure that SADC policies are properly implemented pursuant to Article 11 of the SADC Treaty.
25. Article 9(g) of the SADC Treaty established the SADC Tribunal as the community's judicial organ.
26. The Summit of Heads of State or Government, pursuant to Article 4(4) of the Protocol on the SADC Tribunal, appointed the First members of the Tribunal during its Summit of Heads of State or Government held in Gaborone, Botswana on 18 August 2005. The Tribunal has a complement of ten judges, of whom five are regular members. Ordinarily the Tribunal will sit with three members, and a full bench consists of five members.
27. The Tribunal is an international court applying SADC regional law, relevant international human rights instruments ratified by Member States and

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applicable national law. In terms of the 2000 Protocol, the Tribunal may be approached by SADC Member States, individuals (citizens), private entities and NGOs, and only after the exhaustion of available domestic remedies. As already explained, the 2014 Protocol limits the jurisdiction to disputes between SADC Member States only.

28. Under the 2000 Protocol, the SADC Tribunal was an important forum for citizens and juristic persons, in the event that their domestic judicial system failed to adequately provide for a remedy for violations of their rights and/or violations of the laws of SADC.

The SADC Treaty:

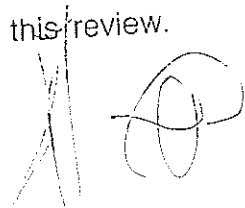
29. The 3rd preambular paragraph of the SADC Treaty observes that there is a need to *"ensure, through common action, the progress and well-being of the people of Southern Africa"*;
30. The 7th preambular paragraph of the SADC Treaty observes that there is a *"need to involve the people of the Region centrally in the process of development and integration, particularly through the guarantee of democratic rights, observance of human rights and the rule of law"*;
31. Article 4 requires SADC and its Member States to abide by principles of human rights, democracy and the rule of law, equity, balance and mutual benefit as well as the peaceful settlement of disputes;

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32. Article 23 of the SADC Treaty provides that SADC shall seek to involve fully the people of the region and key stakeholders, including the private sector, civil society, non-governmental organisations, workers and employers organisations
33. It is therefore clear from the aforesaid that SADC was brought about by the people's participation including but not limited to, the private sector, civil society, non-governmental organisations, workers and employers organisations, and for their benefit. The vested rights of the aforesaid people (citizens) are of utmost importance.

Events leading to the suspension of the SADC Tribunal and the drafting of a New Protocol on the Tribunal

34. During August 2010, the SADC Ministers of Justice recommended to the SADC Summit in Windhoek, Namibia, that a review of the role, functions and terms of reference of the Tribunal should be conducted.
35. The recommendations emanating from the review were adopted at the SADC Summit of August 2010. Following this SADC resolved not to reappoint or replace those Tribunal Members of the SADC Tribunal whose terms of office had expired, thereby preventing a quorum, and prohibiting the Tribunal from receiving any new cases pending the completion of the review. Attached hereto the minutes as annexure "FA4A"
36. Pursuant to the decision of the SADC Summit, the SADC Secretariat commissioned World Trade Institute Advisors (WTI) to undertake this review.



WTI submitted its Report on or about February 2011. The recommendations included:

- "a. *The Tribunal shall have jurisdiction over disputes between Member States and between natural or legal persons and Member States, provided that any such natural or legal persons have an interest of a legal nature in the subject matter of the dispute;*
- b. *Amend the SADC Tribunal Protocol to provide for an appellate tribunal to hear appeals from decisions of the SADC Tribunal; and*
- c. *Decisions of the Tribunal shall be binding upon the parties to the dispute in respect of that particular case and enforceable within the territories of the Member State concerned in accordance with domestic procedure governing the execution of judgments against the State."*

37. A copy of the recommendations is attached hereto as annexure "FA4B"

38. In April 2011, the SADC Ministers of Justice considered the Report of the WTI and adopted a set of recommendations which were presented to the Summit on 19 May 2011.

39. In May 2011, the SADC Summit mandated the Ministers of Justice and Attorneys General to continue with their review of the Tribunal and to submit a provisional Report at its August 2011 Summit, and a final Report at its August 2012 Summit. The Summit also extended the moratorium on the Tribunal receiving any new cases or hearing pending cases.

40. On 18 August 2012, the SADC Summit "resolved that a new protocol on the Tribunal should be negotiated and that its mandate should be confined to interpretation of the SADC Treaty and Protocols relating to disputes between Member States." This decision further

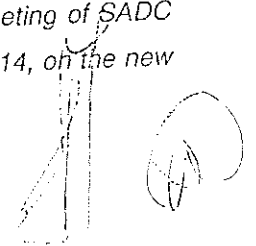


extended the suspension of the operations of the SADC Tribunal indefinitely since the first suspension in August 2010.

41. During the course of August 2014 the Attorneys General and Ministers of Justice in the SADC recommended that the Summit adopts the 2014 Protocol. The 2014 Protocol adversely reduces the jurisdiction of the SADC Tribunal rendering it an interstate Court.
42. All deliberations regarding the review of the Tribunal's mandate were conducted solely by the Heads of State and Governments of the SADC Member States, SADC Organs and SADC officials, to the exclusion of the citizens within SADC.
43. The Applicant addressed two letters, dated 28 February 2014 and 24 June 2014, to the First Respondent and the Second Respondent, respectively, wherein a meeting was requested to discuss the Tribunal. I attach copies of these letters as annexures "FA5" and "FA6". Both the First and the Second Respondent's attention were drawn to the memorandum of the SADC Lawyers' Association which was attached to the letters. The SADC Lawyers' Association recommended the following to the SADC Ministers:

"Recommendations to SADC Ministers

- (a) *The ministers must actively engage their respective Heads of State about not adopting a protocol that will dilute the powers, roles and responsibilities of the SADC Tribunal;*
- (b) *The ministers must engage other ministers of justice, during the meeting of SADC Council of Ministers, to be held in Lilongwe, Malawi from 6 March 2014, on the new*



protocol on the SADC Tribunal with a view to reinstate the tribunal according to its original mandate; and

- (c) *The ministers must encourage the SADC Heads of State and Government to facilitate the wider participation of the citizens of the region in the formulation of a new protocol on the SADC Tribunal.*

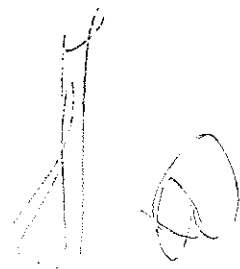
44. To date the First Respondent has failed to respond to the aforementioned letter.

45. In the aforementioned letter addressed to the Second Respondent he was informed that:

"The SADC Lawyers' Association desires the restoration of the Tribunal as an essential tool of access to justice and protector of human rights. The Tribunal must not only adjudicate in matters of interstate relevance, it must also attend to matters that are brought by the private society and civil society."

46. The Second Respondent was informed that the Applicant will apply to the Honourable Court for an order in the following terms:

- 46.1 declaratory orders concerning the role of our Government's responsible entities in the suspension of the Tribunal, termination of Tribunal members and the review of its jurisdiction and its protocol; and
- 46.2 an order that the responsible entities must undertake the necessary measures to correct a violation and refraining from voting on the Tribunal until such time that violations are corrected.



47. The Second Respondent's offices acknowledged receipt of the letter and advised that the matter is receiving the Second Respondent's attention. A copy of the correspondence by email is annexed hereto marked Annexure "FA7".

48. The Applicant addressed a further letter, dated 8 August 2014, to the First Respondent, attached hereto marked annexure "FA8". The Applicant contended that:

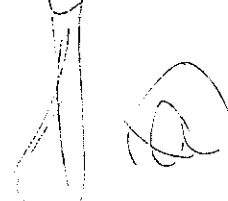
48.1 the decision to suspend the Tribunal and any proposed resolution in support of the 2014 protocol, affects all citizens of the member states including the citizens of South Africa;

48.2 requested the President, in accordance with the spirit and purpose of our Constitution and rule of law, to give an undertaking that he will object to the proposed protocol and seek a postponement of the voting on the 2014 Protocol.

49. The First Respondent has not yet responded to this letter.

50. A further letter dated 2 September 2014, was addressed to the Second Respondent by the Applicant to which no response has been received. A copy of the letter is attached hereto marked annexure "FA9".

51. The Respondents are challenged explicitly to be transparent to the Court and to the Applicant [which includes the public at large] and to explain fully the process, the advice and recommendations by the Second and Third

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Respondent to the First Respondent as well as the reasons for such advice, recommendation and conduct. The First Respondent must explain his conduct and the constitutionality thereof.

THE SOUTH AFRICAN CONSTITUTIONAL FRAMEWORK

52. The Constitution provides in section 1 that the Republic of South Africa is one, sovereign, democratic state, founded on the following values:

52.1 human dignity, achievement of equality and the advancement of human rights and freedom;

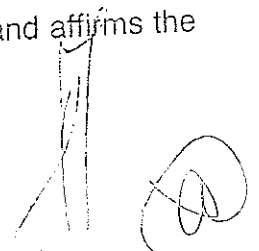
52.2 non-racialism and non-sexism;

52.3 supremacy of the Constitution and the rule of law;

52.4 universal suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

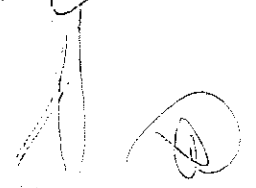
53. In terms of section 2, the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

54. Section 7 provides that the Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the



democratic values of human dignity, equality and freedom. The State must respect, protect, promote and fulfil their rights in the Bill of Rights.

55. Section 231 provides that an international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3). When entering into international agreements, the First Respondent is duty bound to "*respect, protect, promote and fulfil*" the rights contained in the Bill of Rights and any action which is in conflict with these principles is unconstitutional and therefore unlawful.
56. Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
57. The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.
58. Section 232 provides that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
59. For the purposes of this application, Article 16(2) of the Treaty is paramount. It provides that the Protocol (whether 2000 or 2014) forms an integral part of the SADC Treaty. This informs the procedure to be followed for amending the Treaty as contemplated by the Vienna Convention on Laws and Treaties, 1969.



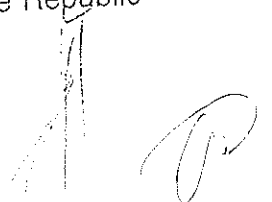
60. Our Constitutional Court has laid down the following principles in relation to international agreements:

60.1 Section 7(2) of the Constitution requires the State to "respect, protect, promote and fulfil the rights in the Bill of Rights".

60.2 The national legislative authority vests in Parliament. When exercising this legislative authority, Parliament is bound only by the Constitution and must act in accordance with and within the limits of the Constitution. When exercising its public power, Parliament must act within its constitutional constraints. One of these constraints is that "*there must be a rational relationship between the scheme which it adopts and the achievement of a legitimate governmental purpose*". Parliament may also not act capriciously or arbitrarily.

60.3 Under our constitutional scheme, it is the responsibility of the executive to develop and implement policy. It is also the responsibility of the executive to initiate legislation in order to implement policy and it is the responsibility of Parliament to make laws. When making laws, Parliament will exercise its judgment as to the appropriate policy to address the situation. This judgment is political and may not always coincide with the views of social scientists or other experts.

60.4 In promoting and expanding our constitutional values to the Southern regions our former State Presidents, Mr Mandela and Mr Mbeki assigned to the SADC Treaty for the benefit of citizens of the Republic

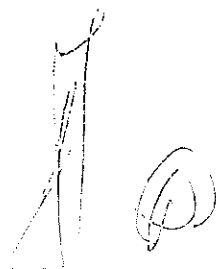


of South Africa. That decision and the actions thereto have been slowly inhibited by the actions of the First Respondent.

60.5 I am advised that the ratification of an international agreement by Parliament is a positive statement to signatories of the aforesaid agreement subject to the provisions of the Constitution, that the Republic will act in accordance with the ratified agreement. International agreements, both those that are binding and those that are not, have an important place in our law. While they do not create rights and obligations in our domestic legal space, international agreements, particularly those dealing with human rights, may be used as interpretive instruments to evaluate and understand our Bill of Rights.

61. In concluding that the Tribunal is a foreign court, the Constitutional Court placed much emphasis on the right of access to courts as the foundation of our Constitution which includes citizens' rights of access to the Tribunal, which is the only court in the SADC.

62. Our Courts have recognized the Tribunal a "*foreign court*" as well as the enforceability of the Tribunal's orders within our jurisdiction.

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THE SADC TRIBUNAL AND PROTECTION OF HUMAN RIGHTS


63. The SADC territory is home to approximately 240 million citizens and many human rights related provisions can be found within the legal framework of SADC.

64. The protection of human rights plays an essential role in economic development as it has an impact on the investment climate which contributes to growth, productivity and employment creation, which is important for the advancement of the citizens' social economic rights.

65. In the past, the Tribunal has been called upon to consider human rights implications of economic policies and programmes, the most obvious example is the matter of Mike Campbell (Pty) Ltd and others vs the Republic of Zimbabwe. The SADC Treaty refers to regional integration and to human rights directly or indirectly at several stages. For instance, in its preamble, the Treaty, *inter alia*, states the following:

"Recognises the need to involve the people of the region centrally in the process of development and integration, particularly through the guarantee of democratic rights, observance of human rights and the rule of law." (emphasis added)

66. Article 4(c) of the SADC Treaty provides that SADC and its Member States shall act in accordance with the principles of human rights, democracy and the rule of law.



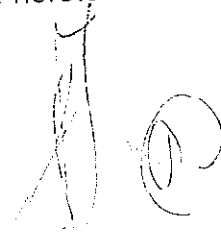
67. The principle of human rights, democracy and rule of law are principles already enshrined in the Constitution and other democratic Member States of SADC. The Treaty confirms that the principles are applicable within SADC.
68. Article 16(1) of the SADC Treaty provides that the primary mandate of the Tribunal is:

"The Tribunal shall be constituted 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."

69. Article 16(2) of the Treaty provides that the Protocol forms an integral part of the Treaty

THE CITIZEN'S RIGHTS

70. It is apparent that the jurisdiction of the Tribunal as it now stands inhibits the right of access to justice as well as the advancement and protection of human rights in general.
71. The right of access to justice is guaranteed in our Constitution which has been extended to the SADC Tribunal.
72. The right of access to justice was infringed when the Tribunal was suspended by the Summit. The Tribunal was suspended by the Summit held on 20 May 2011. The First Respondent was represented by the South African High Commission in Namibia. A copy of the communique is attached hereto marked Annexure "FA13"



73. The right continues to be infringed by virtue of the fact that the President signed the 2014 Protocol which limits the jurisdiction of the Tribunal between member states only.

74. I am advised that the First Respondent could not deprive the existing rights of citizens without their prior consultation and consent as the rights vests in them. Legal argument will be addressed hereon at the hearing of this application.

75. This is a contravention of the Constitution.

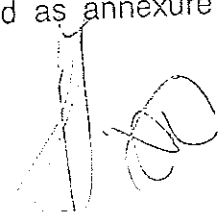
76. The Applicant has called for information and/or reasons from the First Respondent but to date he has refused, despite various demands, the First, Second and Third Respondents failed, refused and/or neglected to reply to the Applicant's request as aforesaid.

CORRESPONDENCE:

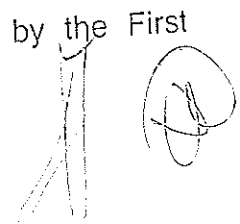
77. On 28 February 2014, the Applicant wrote a letter to the offices of the First Respondent requesting an audience with the First Respondent regarding the subject of this matter. A copy of the letter is annexed hereto marked annexure "FA5".

78. The First Respondent's Office never replied.

79. On 24 June 2014 a similar letter was addressed by the Applicant to the Second Respondent. A copy of the letter is annexed hereto marked as annexure "FA6".



80. A response was received from the Second Applicant as discussed in paragraph 49 of this affidavit. A copy of the email is annexed hereto marked as annexure "FA7".
81. On 8 August 2014, the Applicant wrote a letter to the offices of the First Respondent, the contents of the letter is self-explanatory and is of importance. A copy of the letter is annexed hereto marked as annexure "FA8".
82. No response was received from the offices of the First Respondent.
83. On 18 August 2014 the Applicant's attorney sent an email to the Third Respondent requesting the Third Respondent to indicate what the Government's point of view is, regarding the proposed protocol, *inter alia*, the limitation of the SADC Tribunal's jurisdiction and access to the Tribunal. A copy of the email is annexed hereto marked as annexure "FA10".
84. On 20 August 2014, Adv André Stemmet from the offices of the Third Respondent replied to the Applicants Attorney's correspondence regarding the summit held in Zimbabwe on 17 and 18 August 2014. He indicated that although the proposed Protocol was adopted, it was at that stage not binding as it was not ratified by the South African Government. A copy of this correspondence is annexed hereto marked as annexure "FA11".
85. On 2 September 2014, the Applicant's Attorney wrote a letter to the Second Respondent enquiring from the Second Respondent what the Government's stance is regarding the ratification of the Protocol voted for by the First

Handwritten signature and a circular stamp or mark at the bottom right of the page.

Respondent, what processes have been commenced with in regards to the ratification of same and at what stage of the process/es is the Government placed. A copy of the letter is attached hereto marked as annexure "FA9".

86. No response was received to this request.

87. Upon drafting of this application Mr L Sigwela, a representative from the office of the Third Respondent, confirmed that the office of the First Respondent had not tabled in Parliament nor in the National Council of Provinces any discussions and/or debates regarding the ratification of the adopted protocol.

CONCLUSION

88. In an open, transparent and democratic society that is envisaged by the Constitution of the Republic of South Africa:

88.1 the Applicant and the public at large are entitled to the information and/or reasons requested; and

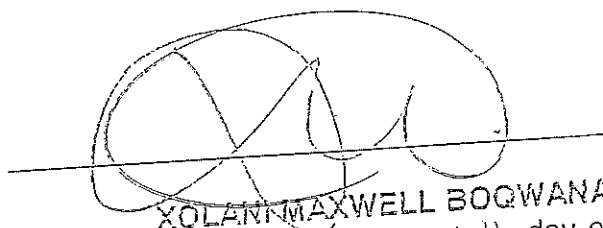
88.2 the Respondents are obliged to furnish the information and/or reasons requested by the Applicant.

89. The Respondent's failure to act as aforesaid since 28 February 2014 until date of signature of this affidavit demonstrates a disregard of the Constitution, the duties conferred upon the Respondents in terms thereof and the rights of citizens of the Republic of South Africa. This conduct should be frowned upon by the Honourable Court.



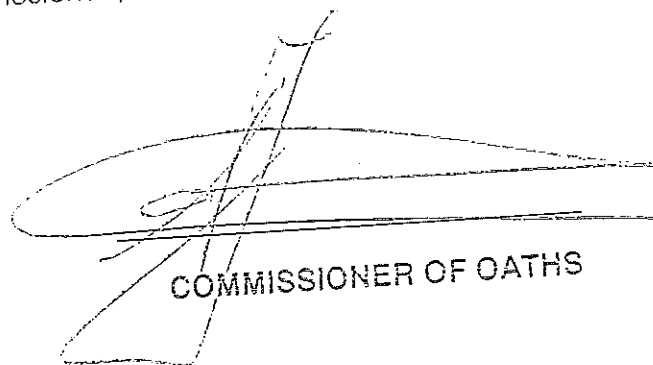
90. Despite various attempts to determine if any public participation was called for or engaged in, no such evidence could be established. The Respondents are specifically challenged to fully disclose to this Honourable Court any such public participation prior to taking action in voting in favour of a proposal resulting in the deprivation of existing rights of citizens of the Republic of South Africa. The Applicant reserves its rights to supplement to this aspect once the Respondents have disclosed all relevant information in this regard.

91. For the reasons set out above, I pray for an order as set out in the Notice of Motion.



XOLANI MAXWELL BOQWANA

THIS SIGNED AND SWORN TO BEFORE ME at Pretoria on this 11th day of March 2015 the deponent having acknowledged that he knows and understands the contents of this affidavit, that the deponent has no objection to taking the prescribed oath, that the oath which the deponent has taken in respect thereof is binding on the deponent's conscience, and that the contents of this affidavit are both true and correct.



COMMISSIONER OF OATHS

CAREL PIETER FOURIE
 COMMISSIONER OF OATHS
 FSF LAW CHAMBERS
 ONE BROOKLYN ROAD AND BROOKS ST
 MENLO PARK, PRETORIA
 PRACTISING ATTORNEY, R.S.A.

FAI

18 August 2014
18h50 Hours



COMMUNIQUE OF THE
34TH SUMMIT OF SADC HEADS OF STATE AND GOVERNMENT
VICTORIA FALLS, ZIMBABWE
AUGUST 17-18, 2014

1. The 34th Ordinary meeting of the Summit of the Heads of State and Government of the Southern African Development Community (SADC) was held in Victoria Falls, Republic of Zimbabwe on 17th and 18th August 2014.
2. The Summit took place under the theme: "SADC Strategy for Economic Transformation: Leveraging the Region's Diverse Resources for Sustainable Economic and Social Development through Value Addition and Beneficiation."
3. Summit elected H.E. President Robert Gabriel Mugabe of the Republic of Zimbabwe as Chairperson and H.E. Lt General Seretse Khama Ian Khama of the Republic of Botswana as Deputy Chairperson of SADC, respectively.
4. Summit also elected H.E. Jacob Gedleyihlekisa Zuma, President of South Africa, and the Right Honourable Thomas Motsoahae Thabane, Prime Minister of the Kingdom of Lesotho as Chairperson and Deputy Chairperson of the SADC Organ on Politics, Defence and Security Cooperation, respectively.
5. Summit was attended by the following Heads of State and Government and or their representatives:

| | | |
|--------------------------------|---|---|
| Botswana | : | H.E. President Lt. Gen. Seretse Khama Ian Khama |
| DRC | : | H.E. President Joseph Kabila Kabange |
| Lesotho | : | Rt. Hon. Prime Minister Thomas Motsoahae Thabane |
| Madagascar | : | H.E. President Hery Rajaonarimampianina |
| Malawi | : | H.E. President Prof. Arthur Peter Mutharika |
| Mauritius | : | Dr. the Rt. Honourable Navinchandra Ramgoolam Prime Minister |
| Mozambique | : | H.E. President Armando Emilio Guebuza |
| Namibia | : | H.E. President Hifikepunye Pohamba |
| Seychelles | : | H.E. President James Alix Michel |
| South Africa | : | H.E. President Jacob Gedleyihlekisa Zuma |
| United Republic of Tanzania | : | H.E. President Jakaya Mrisho Kikwete |
| Zimbabwe | : | H.E. President Robert Gabriel Mugabe, |
| Angola | : | Hon. Vice President Dr. Manuel Domingos Vicente |
| Swaziland | : | Rt. Hon. Sibusiso Barnabas Dlamini, Prime Minister |
| Zambia | : | Hon. Vice President Guy Scott |

6. Summit was also attended by H.E. Dr Nkosazana Dlamini-Zuma, Chairperson of the African Union Commission (AUC) and H.E. Dr. Stergomena Lawrence Tax, SADC Executive Secretary.
7. H.E. President Robert Gabriel Mugabe, incoming Chairperson and host of the 34th Summit welcomed the SADC Heads of State and Government and other delegates to the Republic of Zimbabwe. President Mugabe paid tribute to the outgoing Chairperson of SADC, H.E. President Prof. Arthur Peter Mutharika of the Republic of Malawi for having provided leadership to the Region during his tenure.
8. The Summit was also addressed by newly elected Heads of State and Government, namely, H.E. President Professor Arthur Peter Mutharika of the

Republic of Malawi and by H.E. Hery Rajaonarimampianina, First President of the IV Republic of Madagascar, who delivered their maiden speeches, in which they re-affirmed their governments' commitment to the SADC political, regional integration and developmental agenda..

9. Summit was also addressed by H.E. Dr. Nkosazana Dlamini-Zuma, the AUC Chairperson who expressed the AU's commitment to work with SADC in order to strengthen the region's peace and security initiatives, as well as in key priority areas of programmes implementation, within the framework of the AU Vision 2063.
10. Summit commended the people and governments of the four (4) SADC Member States namely, Swaziland, Madagascar, South Africa and Malawi for holding peaceful, free, fair and credible elections between the 33rd and 34th Ordinary Summits.
11. Summit congratulated their Excellencies, Hery Rajaonarimampianina, Jacob Gedleyihlekisa Zuma and Prof. Arthur Peter Mutharika for emerging victorious in the elections held in their respective countries.
12. Summit received a Report of the Outgoing Chairperson of the SADC Organ on Politics, Defence and Security Cooperation, H.E. Hifikepunye Pohamba, President of the Republic of Namibia highlighting the political and security situation as follows:
 - i) The Region remains generally peaceful and stable.
 - ii) On the Democratic Republic of Congo: Summit endorsed the decision by the last Joint SADC-ICGLR Ministerial Meeting that the voluntary surrender and disarmament by FDLR shall be done within a six month time frame. Summit also called upon the United Nations in co-operation with the African Union, to play its role in repatriating the FDLR elements that have voluntarily surrendered and disarmed or provide them with

temporary resettlement in third countries outside the Great Lakes Region.

- (ii) On the Republic of Madagascar: Summit reaffirmed its commitment to support Madagascar in the context of dialogue, national reconciliation and national building processes. Summit also appealed to the international community to support Madagascar in the development process. Summit urged all stakeholders in Madagascar to adhere to and ensure full implementation of the SADC roadmap.

 - (iii) On the Kingdom of Lesotho: Summit encouraged the Coalition Government Leaders to continue to provide leadership in its effort to find a lasting political solution to the current impasse, and underscored SADC's commitment to support the leaders of the Coalition Government. Summit further appealed to all political leaders and the people in general to refrain from any action that may undermine peace and stability in the country and urged political stakeholders to resolve the political challenges in accordance with the Constitution, laws of the land in line with the Democratic Principles.
13. Summit commended H.E. President Hifikepunye Pohamba for successfully steering the SADC Organ on Politics, Defence and Security Cooperation.

 14. Summit underscored the need to appropriately honour Founding Leaders who played an outstanding role in the liberation of Africa, at both regional and continental levels.

 15. Summit launched the SADC Hashim Mbita Project Publication outlining the history of the national liberation struggles in Southern Africa and the SADC Statistical Year Book. To this end, Summit urged Member States to honour Brigadier General Hashim Mbita as demonstrated by the Republic of Zimbabwe which conferred the highest honour for a foreign national, the Order of Munhumutapa.

16. On the Theme, Summit directed that industrialization should take centre stage in SADC's regional integration agenda. To this end, Summit mandated the Ministerial Task Force on Regional Economic Integration to develop a strategy and roadmap for industrialization in the region.
17. Summit noted progress in the review of the Regional Indicative Strategic Development Plan and directed its finalization and the preparation of an Implementation Plan in order to provide guidance towards the implementation of SADC programmes.
18. Summit received a report from the Committee of Ministers of Justice/Attorneys General relating to progress on negotiating a new Protocol on the SADC Tribunal, and adopted the new Protocol on the SADC Tribunal.
19. Summit received a report from the Ministerial Task Force on Regional Economic Integration, outlining among others, status in tariff phasedowns and intra-SADC trade. Summit also received a progress report on the ongoing tripartite free trade area negotiations and directed the expeditious completion of the Tripartite FTA negotiations in order to pave way for the Continental FTA process.
20. Summit reviewed the regional food and nutrition security and noted increases in food production during the 2013-2014 growing season. However, humanitarian assistance and malnutrition still remain a challenge. To this end, Summit endorsed a Regional Food and Nutrition Security Strategy for 2015 to 2025 to ensure improved food availability, accessibility and utilisation in a more sustainable manner.
21. Summit noted progress on the status of women's representation in politics and decision making and urged Member States to put in place effective legislation, policies and strategies necessary to sustain the achievements recorded so far.

22. Summit also noted progress in the prevention and control of HIV and AIDS, TB and Malaria, all of which have shown a declining trend. Summit also reviewed the threat posed by the Ebola Virus Disease and urged Member States to continue putting in place measures to prevent its outbreak and to effectively contain it in case of an outbreak in the SADC Region.
23. Summit signed the following Legal Instruments:
- (i) Protocol on the Tribunal in the Southern African Development Community;
 - (ii) Protocol on Environmental Management for Sustainable Development;
 - (iii) Protocol on Employment and Labour; and
 - (iv) Declaration on Regional Infrastructure Development.
24. Summit adopted a Declaration in support of Small Island Developing States ahead of the Third Conference of Small Island Development States (SIDS) to be held in Samoa in September 2014.
25. Summit did call upon all Member States to fully support the Legitimate Claim of the Republic of Mauritius for the restoration of its sovereignty over Chagos Archipelago without which the full decolonization of Africa is not complete.
26. Summit re-appointed Ms Emilie Ayaza Mushobekwa as the Deputy Executive Secretary – Finance and Administration, and noted the appointment of Dr Theminkosi Mhlongo as Deputy Executive Secretary – Regional Integration by Council, as mandated by Summit in Malawi in August, 2014.
27. During the Official Closing Ceremony, Summit received farewell statements from H.E. President Armando Emilio Guebuza of the Republic of Mozambique and H.E. President Hifikepunye Pohamba of the Republic of Namibia whose presidential terms of office are nearing their end.

28. In his remarks, H.E. President Guebuza commended SADC for the major achievements it has made since its existence, the solidarity and fraternal support he had received from other Heads of State and Government, and urged them to support his successor.
29. In his remarks, H.E. President Pohamba told the Summit that it had been an honour for him to have worked for the last nine years with his colleagues, the SADC Heads of States and Government, with whom they collectively made strides in addressing peace and security challenges, as well as advancing the SADC regional integration and development agenda.
30. Summit was officially closed by SADC Chairperson, H.E. President Robert Gabriel Mugabe of the Republic of Zimbabwe.
31. The Deputy Chairperson of Summit, H.E. Lt General Seretse Khama Ian Khama, President of the Republic of Botswana delivered a vote of thanks and invited the Heads of State and Government and all delegates to the next Summit to be held in Gaborone in August 2015.
32. Summit expressed its appreciation to the Government and people of Zimbabwe for hosting the Summit and for the warm hospitality extended to all the delegates.

DONE AT VICTORIA FALLS, ZIMBABWE
AUGUST 18, 2014

PROTOCOL

ON

TRIBUNAL

IN THE

SOUTHERN AFRICAN DEVELOPMENT
COMMUNITY

1



TABLE OF CONTENTS

| | |
|--|----|
| PREAMBLE | 1 |
| PART I Preliminary | 1 |
| ARTICLE 1 DEFINITIONS | 1 |
| PART III Organisation | 2 |
| ARTICLE 2 CONSTITUTION OF THE TRIBUNAL | 2 |
| ARTICLE 3 CONSTITUTION AND COMPOSITION | 2 |
| ARTICLE 4 NOMINATION, SELECTION AND APPOINTMENT OF MEMBERS | 2 |
| ARTICLE 5 SOLEMN DECLARATION | 3 |
| ARTICLE 6 TENURE OF OFFICE OF MEMBERS | 3 |
| ARTICLE 7 THE PRESIDENT | 4 |
| ARTICLE 8 RESIGNATION AND TERMINATION OF OFFICE | 4 |
| ARTICLE 9 DISQUALIFICATION OR REFUSAL | 4 |
| ARTICLE 10 IMMUNITY FROM LEGAL PROCEEDINGS | 4 |
| ARTICLE 11 TERMS AND CONDITIONS OF SERVICE AND SALARIES OF MEMBERS | 5 |
| ARTICLE 12 REGISTRAR | 5 |
| ARTICLE 13 SEAT OF THE TRIBUNAL | 5 |
| PART III Jurisdiction | 5 |
| ARTICLE 14 BASIS OF JURISDICTION | 5 |
| ARTICLE 15 SCOPE OF JURISDICTION | 6 |
| ARTICLE 16 PRELIMINARY RULINGS | 6 |
| ARTICLE 17 DISPUTES BETWEEN STATES AND COMMUNITY | 6 |
| ARTICLE 18 DISPUTES BETWEEN NATURAL OR LEGAL PERSONS AND COMMUNITY | 6 |
| ARTICLE 19 DISPUTES BETWEEN COMMUNITY AND STAFF | 7 |
| ARTICLE 20 ADVISORY | 7 |
| ARTICLE 21 APPLICABLE LAW | 7 |
| ARTICLE 22 WORKING LANGUAGES | 7 |
| PART IV Procedure Of The Tribunal | 7 |
| ARTICLE 23 RULES OF PROCEDURES | 8 |
| ARTICLE 24 DECISIONS | 8 |
| ARTICLE 25 DEFAULT DECISIONS | 8 |
| ARTICLE 26 APPLICATION FOR REVIEW OF A DECISION | 8 |
| ARTICLE 27 REPRESENTATION BEFORE THE TRIBUNAL | 9 |
| ARTICLE 28 INTERIM MEASURES | 9 |
| ARTICLE 29 LEGAL COSTS | 9 |
| ARTICLE 30 APPLICATION TO BE JOINED AS A PARTY | 9 |
| ARTICLE 31 FEES AND LEGAL AID | 9 |
| ARTICLE 32 ENFORCEMENT AND EXECUTION | 9 |
| ARTICLE 33 BUDGET | 10 |
| PART V Final Provisions | 10 |
| ARTICLE 34 SIGNATURE | 10 |
| ARTICLE 35 RATIFICATION | 10 |
| ARTICLE 36 ACCESSION | 10 |
| ARTICLE 37 AMENDMENT | 10 |
| ARTICLE 38 ENTRY INTO FORCE | 11 |
| ARTICLE 39 DEPOSITARY | 11 |



PREAMBLE

WE, the Heads of State or Government of:

The Republic of Angola
The Republic of Botswana
The Democratic Republic of Congo
The Kingdom of Lesotho
The Republic of Malawi
The Republic of Mauritius
The Republic of Mozambique
The Republic of Namibia
The Republic of Seychelles
The Republic of South Africa
The Kingdom of Swaziland
The United Republic of Tanzania
The Republic of Zambia
The Republic of Zimbabwe

DESIRING to conclude the Protocol on the Tribunal established by Article 9 as read with Article 16 of the Treaty,

HEREBY AGREE as follows:

PART I
Preliminary

ARTICLE I
DEFINITIONS

1. In this Protocol terms and expressions defined in Article 1 of the Treaty shall bear the same meaning unless the context otherwise requires.

2. In this Protocol, unless the context otherwise requires;

“Committee of Ministers” means the Committee of Ministers of Justice/Attorneys-General referred to in the Protocol on Legal Affairs;

“Member” means a Member of the Tribunal appointed in terms of Article 4 of this Protocol;



- "President" means President of the Tribunal elected in terms of paragraph 1 of Article 7 of this Protocol;
- "Rules" means the Rules of Procedures referred to in Article 23 of this Protocol; and
- "State" means a Member State of the Community

PART II
Organisation

ARTICLE 2
CONSTITUTION OF THE TRIBUNAL

The Tribunal of the Community (hereinafter referred to as "the Tribunal"), is hereby constituted in terms of Article 16 of the Treaty and shall function in accordance with the provisions of the Treaty and this Protocol.

ARTICLE 3
CONSTITUTION AND COMPOSITION

1. The Tribunal shall consist of not less than ten (10) Members, appointed from nationals of States who possess the qualifications required for appointment to the highest judicial offices in their respective States or who are jurists of recognised competence.
2. The Council shall designate five (5) of the Members as regular Members who shall sit regularly on the Tribunal. The additional five (5) Members shall constitute a pool from which the President may invite a Member to sit on the Tribunal whenever a regular Member is temporarily absent or is otherwise unable to carry out his or her functions.
3. The Tribunal shall be constituted by three (3) Members; provided that the Tribunal may decide to constitute a full bench composed of five (5) Members.
4. The President shall be responsible for selecting the Members who shall constitute the Tribunal for the purpose of hearing any case brought before it.
5. On a proposal from the Tribunal, the Council may increase the number of Members.
6. No two or more members may, at any time, be nationals of the same State.

ARTICLE 4
NOMINATION, SELECTION AND APPOINTMENT OF MEMBERS

1. Each State may nominate one candidate having the qualifications prescribed in Article 3 of this Protocol.



2. Due consideration shall be given to fair gender representation in the nomination and appointment process.
3. The Members shall be selected by the Council from the list of candidates so nominated by States. Nominations for the first appointment shall be called within three (3) months, and the selection shall be held within six (6) months, of the date of entry into force of this Protocol.
4. The Members shall be appointed by the Summit upon recommendation of the Council.
5. Where a Member is appointed to replace a Member whose terms of office has not expired, the Member so appointed shall serve for the remainder of his or her predecessor's term.
6. Any appointment to fill a vacancy referred to in paragraph 5 shall be conducted within three (3) months of the vacancy occurring. The procedure referred to in the preceding paragraphs shall apply *mutatis mutandis*.

ARTICLE 5
SOLEMN DECLARATION

Every Member shall, before taking up his or her duties, make a solemn declaration in open session that he or she will carry out his or her duties independently, impartially and conscientiously.

ARTICLE 6
TENURE OF OFFICE OF MEMBERS

1. The Members shall be appointed for a term of five (5) years and may only be re-appointed for a further term of five (5) years. However, of the Members initially appointed, the terms of two (2) of the regular and two (2) of the additional Members shall expire at the end of three (3) years. The Members whose term is to expire at the end of three (3) years shall be chosen by a lot to be drawn by the Executive Secretary immediately after the first appointment.
2. Subject to paragraph 3 of this Article, the Tribunal shall sit when required to consider a case submitted to it. The Members shall, therefore, not be appointed on a full-time basis.
3. On the recommendation of the President, the Council may at any time decide that the workload of the Tribunal requires that the Members should serve on a full-time basis. In that event:
 - (a) existing Members who elect to serve on a full-time basis shall not hold any other office or employment; and
 - (b) the Members subsequently appointed shall not hold any other office or employment.



ARTICLE 7
THE PRESIDENT

1. The Tribunal shall elect its President for a term of three (3) years.
2. If the President is temporarily absent or otherwise unable to carry out his or her functions, the other Members shall elect an Acting President.

ARTICLE 8
RESIGNATION AND TERMINATION OF OFFICE

1. The President may at any time resign his or her office by a letter to the Council delivered through the Executive Secretary.
2. A Member other than the President may at any time resign his or her office by a letter delivered to the President for transmission to the Council through the Executive Secretary.
3. No Member may be dismissed unless in accordance with the rules.
4. Notwithstanding the expiration of his or her term of office, a Member shall continue to hear and to complete those cases partly heard by him or her.

ARTICLE 9
DISQUALIFICATION OR RECUSAL

1. No Member may exercise any political or administrative function, or may hold any political office or any office in the service of a State, the Community or an organisation or engage in any trade, vocation or profession or any other occupation which might interfere with the proper exercise of his or her judicial functions, impartiality or independence.
2. No Member may participate in the decision of any case in which he or she has previously taken part as an agent, a representative or an advisor, or as a member of a national or international court or tribunal or in any other capacity or in any matter in which a State of which he or she is a national is a party to a dispute before the Tribunal.
3. Any dispute regarding the provisions of paragraphs 1 and 2 of this Article shall be resolved by a decision of the Tribunal sitting without the Member concerned.

ARTICLE 10
IMMUNITY FROM LEGAL PROCEEDINGS

The Members shall be immune from legal proceedings in respect of anything said or done by them in their judicial capacity. They shall continue to enjoy such immunity after they have ceased to hold office.



ARTICLE 11
TERMS AND CONDITIONS OF SERVICE AND SALARIES OF MEMBERS

The terms and conditions of service, salaries and benefits of the Members shall be determined by the Council.

ARTICLE 12
REGISTRAR

1. The Tribunal shall appoint a Registrar who shall, subject to overall supervision of the President, be responsible for the day to day administration of the Tribunal.
2. The Tribunal shall employ such other staff as may be required to enable it to perform its functions.
3. The terms and conditions of service, salaries and benefits of the Registrar and other staff shall be determined by the Council on the recommendation of the Tribunal.

ARTICLE 13
SEAT OF THE TRIBUNAL

The Tribunal shall have its seat at a place designated by the Council, provided it may in any particular case sit and exercise its functions anywhere within the Community if it considers it desirable.

PART III
Jurisdiction

ARTICLE 14
BASIS OF JURISDICTION

The Tribunal shall have jurisdiction over all disputes and all applications referred to it in accordance with the Treaty and this Protocol which relate to:

- (a) the interpretation and application of the Treaty;
- (b) the interpretation, application or validity of the Protocols, all subsidiary instruments adopted within the framework of the Community, and acts of the institutions of the Community;
- (c) all matters specifically provided for in any other agreements that States may conclude among themselves or within the community and which confer jurisdiction on the Tribunal.



ARTICLE 15
SCOPE OF JURISDICTION

1. The Tribunal shall have jurisdiction over disputes between States, and between natural or legal persons and States.
2. No natural or legal person shall bring an action against a State unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction.
3. Where a dispute is referred to the Tribunal by any party the consent of other parties to the dispute shall not be required.

ARTICLE 16
PRELIMINARY RULINGS

1. Subject to the provisions of paragraph 2 of this Article, the Tribunal shall have jurisdiction to give preliminary rulings in proceedings of any kind and between any parties before the courts or tribunals of States.
2. The Tribunal shall not have original jurisdiction but may rule on a question of interpretation, application or validity of the provisions in issue if the question is referred to it by a court or tribunal of a State for a preliminary ruling in accordance with this Protocol.

ARTICLE 17
DISPUTES BETWEEN STATES AND COMMUNITY

Subject to the provisions of Article 14 of this Protocol, the Tribunal shall have exclusive jurisdiction over all disputes between the States and the Community. Such disputes may be referred to the Tribunal either by the State concerned or by the competent institution or organ of the Community.

ARTICLE 18
DISPUTES BETWEEN NATURAL OR LEGAL PERSONS AND COMMUNITY

Subject to the provisions of Article 14 of this Protocol the Tribunal shall have exclusive jurisdiction over all disputes between natural or legal persons and the Community. Such disputes may be referred to the Tribunal either by the natural or legal person concerned or by the competent institution or organ of the Community.



ARTICLE 19
DISPUTES BETWEEN COMMUNITY AND STAFF

Subject to the provisions of Article 14 of this Protocol the Tribunal shall have exclusive jurisdiction over all disputes between the Community and its staff relating to their conditions of employment.

ARTICLE 20
ADVISORY

The Tribunal shall have jurisdiction to give advisory opinions, which may be requested by the Summit or by the Council in terms of paragraph 4 of Article 16 of the Treaty.

ARTICLE 21
APPLICABLE LAW

The Tribunal shall:

- (a) apply the Treaty, this Protocol and other Protocols that form part of the Treaty, all subsidiary instruments adopted by the Summit, by the Council or by any other institution or organ of the Community pursuant to the Treaty or Protocols; and
- (b) develop its own Community jurisprudence having regard to applicable treaties, general principles and rules of public international law and any rules and principles of the law of States.

ARTICLE 22
WORKING LANGUAGES

The working languages of the Tribunal shall be English, Portuguese and French. The Council may determine that any other language be used as a working language.

PART IV
Procedure Of The Tribunal

ARTICLE 23
RULES OF PROCEDURES

The rules annexed to this Protocol shall form an integral part thereof.



ARTICLE 24
DECISIONS

1. Decisions of the Tribunal shall be in writing and delivered in open court and shall state the reasons on which they are based.
2. Decisions of the Tribunal shall be taken by a majority.
3. Decisions and rulings of the Tribunal shall be final and binding.

ARTICLE 25
DEFAULT DECISIONS

1. The Tribunal may give a decision in default.
2. Before giving such decision the Tribunal shall satisfy itself that it has jurisdiction over the dispute and that the claim is well-founded in fact and law.
3. A party against whom a default decision is made may apply to the Tribunal for the rescission of such decision. The applicant shall set out the grounds for such application.

ARTICLE 26
APPLICATION FOR REVIEW OF A DECISION

An application for review of a decision may be made to the Tribunal if it is based upon the discovery of some fact which by its nature might have had a decisive influence on the decision if it had been known to the Tribunal at the time the decision was given, but which fact at the time was unknown to both the Tribunal and the party making the application; provided always that such ignorance was not due to negligence.

ARTICLE 27
REPRESENTATION BEFORE THE TRIBUNAL

1. The States and the institutions of the Community shall be represented before the Tribunal by an agent appointed for each case. The agent may be assisted by an advisor.
2. Other parties shall be represented by an agent or other persons before a court of a State.
3. Such agents, advisers and representatives shall, when they appear before the Tribunal, enjoy the rights, privileges and immunities necessary for the independent exercise of their duties, under conditions laid down in the rules of procedure.



4. As regards such agents, representatives and advisers who appear before it, the Tribunal shall have the powers normally accorded to courts of law, under conditions laid down in the rules of procedure.

ARTICLE 28
INTERIM MEASURES

The Tribunal or the President may, on good cause, order the suspension of an act challenged before the Tribunal and may take other interim measures as necessary.

ARTICLE 29
LEGAL COSTS

Unless the Tribunal decides otherwise, each party to a dispute shall pay its, his, or her own legal costs.

ARTICLE 30
APPLICATION TO BE JOINED AS A PARTY

Should a State, natural or legal person consider that it or he or she has an interest of a legal nature that may affect or be affected by the subject matter of a dispute before the Tribunal, it or he or she may submit by way of a written application in such a form and manner as the rules of procedure may prescribe a request to be permitted to intervene.

ARTICLE 31
FEES AND LEGAL AID

Fees payable by parties other than States and the granting of legal aid, within limits agreed by the budgetary authorities of the Community, may be prescribed by the rules.

ARTICLE 32
ENFORCEMENT AND EXECUTION

1. The law and rules of civil procedure for the registration and enforcement of foreign judgements in force in the territory of the State in which the judgement is to be enforced shall govern enforcement.
2. States and institutions of the Community shall take forthwith all measures necessary to ensure execution of decisions of the Tribunal.
3. Decisions of the Tribunal shall be binding upon the parties to the dispute in respect of that particular case and enforceable within the territories of the States concerned.
4. Any failure by a State to comply with a decision of the Tribunal may be referred to the Tribunal by any party concerned.



5. If the Tribunal establishes the existence of such failure, it shall report its finding to the Summit for the latter to take appropriate action.

ARTICLE 33
BUDGET

The budget of the Tribunal shall be funded through the regular budget of the Community, in accordance with criteria that the Council may, from time to time determine, and from such other sources as may be determined by the Council.

PART V
Final Provisions

ARTICLE 34
SIGNATURE

1. This Protocol shall be signed by the Heads of State or Government, or their duly authorised representatives.
2. This Protocol shall remain open for signature by the States listed in the Preamble, until the date of its entry into force.

ARTICLE 35
RATIFICATION

This Protocol shall be ratified by Signatory States in accordance with their constitutional procedures.

ARTICLE 36
ACCESSION

This Protocol shall remain open for accession by any State subject to Article 8 of the Treaty.

ARTICLE 37
AMENDMENT

1. Any State which is a Party to this Protocol may propose an amendment thereto.
2. Proposals for amendment to this Protocol may be made to the Executive Secretary who shall duly notify all States of the proposed amendment or amendments at least thirty (30) days in advance of consideration of the amendment by the Committee of Ministers. Such period of notice may be waived by the States.



3. An amendment to this Protocol shall be adopted by a decision of three (3) quarters of all the members of the Summit, and shall become effective subject to Article 36 of this Protocol.

ARTICLE 38
ENTRY INTO FORCE

This Protocol shall enter into force thirty (30) days after deposit, in terms of Article 43 of the Treaty, of instruments of ratification by two-thirds of the States.

ARTICLE 39
DEPOSITARY

1. The original text of this Protocol and all instruments of ratification and accession shall be deposited with the Executive Secretary, who shall transmit certified copies to all Member States.
2. The Executive Secretary shall register this Protocol with the Secretariats of the United Nations and the Organisation of African Unity.



SOUTHERN AFRICAN DEVELOPMENT COMMUNITY

IN WITNESS WHEREOF, WE, the Heads of State or Government, or duly authorised representatives, of SADC Member States have signed this Protocol.

Done at Windhoek..., this 7th day of August 2000 in three original texts in the English, French and Portuguese languages, all texts being equally authentic.

Austrea
REPUBLIC OF ANGOLA

Y. Moga
REPUBLIC OF BOTSWANA

DEMOCRATIC REPUBLIC OF CONGO

P. Mphahlele
KINGDOM OF LESOTHO

R. Thabo
REPUBLIC OF MALAWI

B. Shewk
REPUBLIC OF MAURITIUS

J. Chissano
REPUBLIC OF MOZAMBIQUE

[Signature]
REPUBLIC OF NAMIBIA

[Signature]
REPUBLIC OF SEYCHELLES

N. M. Mkhabela
REPUBLIC OF SOUTH AFRICA

Mswati III
KINGDOM OF SWAZILAND

Mwinyi Mwanuzi
UNITED REPUBLIC OF TANZANIA

[Signature]
REPUBLIC OF ZAMBIA

[Signature]
REPUBLIC OF ZIMBABWE

RULES



TRIBUNAL



TABLE OF CONTENTS

PART I PRELIMINARY 1

RULE 1 TITLE, INTERPRETATION, COMMENCEMENT 1

RULE 2 SCOPE OF APPLICATION 2

PART II CONSTITUTION AND FUNCTIONS OF THE TRIBUNAL 2

A. MEMBERS OF THE TRIBUNAL 2

RULE 3 SOLEMN DECLARATION 2

RULE 4 TENURE OF OFFICE 2

RULE 5 PRECEDENCE OF MEMBERS 3

B. THE PRESIDENCY 3

RULE 6 COMMENCEMENT OF TERM OF OFFICE 3

RULE 7 ELECTION OF THE PRESIDENT 3

RULE 8 FUNCTIONS OF THE PRESIDENT 3

RULE 9 VACANCY IN THE PRESIDENCY 4

C. THE REGISTRY 4

RULE 10 ELECTION AND APPOINTMENT OF REGISTRAR 4

RULE 11 VACANCY IN THE OFFICE OF REGISTRAR 4

RULE 12 REGISTRAR TO TAKE OATH OR AFFIRMATION OF OFFICE 4

RULE 13 APPOINTMENT OF ASSISTANT REGISTRAR 4

RULE 14 OTHER STAFF

RULE 15 DUTIES OF THE REGISTRAR 5

RULE 16 DUTIES OF ASSISTANT REGISTRAR 6

RULE 17 COMPOSITION OF THE REGISTRY 6

RULE 18 ORGANISATION OF THE REGISTRY 6

RULE 19 REMOVAL OF REGISTRAR AND ASSISTANT REGISTRAR 6

D. SEAT, SESSIONS AND SITTINGS OF THE TRIBUNAL 7

RULE 20 DATES AND TIMES OF SITTINGS AND DURATION OF SESSIONS 7

RULE 21 DELIBERATIONS OF THE TRIBUNAL 7

RULE 22 GENERAL LIST OF CASES 7

RULE 23 VACATIONS OF THE TRIBUNAL 7

PART III REPRESENTATION BEFORE THE TRIBUNAL 8

RULE 24 AGENTS, ADVISORS AND OTHER REPRESENTATIVES 8

RULE 25 IMMUNITIES AND PRIVILEGES 8

RULE 26 PROOF OF STATUS 9

RULE 27 WAIVER OF IMMUNITIES 9

RULE 28 EXCLUSION 9

PART IV LANGUAGES 10

RULE 29 WORKING LANGUAGES 10

RULE 30 TRANSLATION 10

RULE 31 AUTHENTIC TEXT 10

PART V WRITTEN PROCEDURE 10

RULE 32 INSTITUTION OF PROCEEDINGS 10

RULE 33 PROCEEDINGS INSTITUTED BY AN APPLICATION 11

RULE 34 PROCEEDINGS INSTITUTED BY SPECIAL AGREEMENT 12

RULE 35 SERVICE OF APPLICATIONS AND NOTIFICATIONS 12

RULE 36 DEFENCE 12

RULE 37 COUNTER-CLAIM 13

RULE 38 REPLY AND REJOINDER 13

RULE 39 JOINDER OF CASES 13

RULE 40 DOCUMENTS 13

RULE 41 CLOSURE OF PLEADINGS 14



PARTY VI COMMENCEMENT OF ORAL PROCEEDINGS..... 14

RULE 42 DATE OF HEARING 14

RULE 43 PRIORITY OF CASES 14

RULE 44 PLACE OF HEARING..... 14

RULE 45 CONDUCT OF PROCEEDINGS 15

RULE 46 ORDER OF PROCEEDINGS 15

RULE 47 QUESTIONS BY MEMBERS 15

RULE 48 CALLING OF WITNESSES 15

RULE 49 SUMMONING OF WITNESSES 16

RULE 50 EXAMINATION OF WITNESSES..... 17

RULE 51 EXPENSES OF WITNESSES AND EXPERTS..... 17

RULE 52 ADDRESS BY PARTIES 17

RULE 53 CLOSURE OF PROCEEDINGS..... 18

RULE 54 EXPERT WITNESS 18

RULE 55 RESUMPTION OF ORAL PROCEEDINGS 18

RULE 56 RECORD OF THE PROCEEDINGS 18

PART VII DECISIONS..... 18

RULE 57 DELIVERY OF DECISIONS 18

RULE 58 CONTENT OF DECISION 19

RULE 59 RECTIFICATION OF DECISION 19

PART VIII STAY OF PROCEEDINGS..... 20

RULE 60 APPLICATION FOR STAY OF PROCEEDINGS..... 20

PART IX SPECIAL PROCEEDINGS..... 21

RULE 61 SUSPENSION OF OPERATION 21

RULE 62 SERVICE OF APPLICATION 21

RULE 63 PRESIDENT TO DECIDE ON APPLICATION 21

RULE 64 DECISION ON THE APPLICATION..... 22

RULE 65 REJECTION OF APPLICATION 22

RULE 66 SUSPENSION OF ENFORCEMENT OF INTERIM MEASURE..... 22

RULE 67 PRELIMINARY APPLICATION 22

PART X DEFAULT DECISIONS..... 23

RULE 68 DECISION BY DEFAULT 23

RULE 69 APPLICATION TO SET ASIDE A DECISION BY DEFAULT 23

PART XI THIRD PARTY PROCEEDINGS 24

RULE 70 INTERVENTION..... 24

PART XII APPLICATION FOR REVISION OF A DECISION..... 24

RULE 71 WHEN APPLICATION MAY BE MADE..... 24

RULE 72 POWERS OF THE TRIBUNAL ON REVISION OF DECISION..... 25

PART XIII INTERPRETATION OF DECISIONS 25

RULE 73 APPLICATION FOR INTERPRETATION 25

PART XIV ENFORCEMENT OF DECISIONS..... 26

RULE 74 ENFORCEMENT..... 26

PART XV PRELIMINARY RULINGS IN NATIONAL COURTS OR TRIBUNALS 26

RULE 75 REFERENCE BY NATIONAL COURT TO THE TRIBUNAL..... 26

RULE 76 TRANSMISSION OF DECISIONS..... 26

RULE 77 THE HEARING 27

PART XVI COSTS..... 27

RULE 78 PARTY AND PARTY LEGAL COSTS..... 27

RULE 79 COSTS OF PROCEEDINGS 27



| | |
|--|----|
| RULE 80 CURRENCY OF PAYMENT | 28 |
| PART XVII DISCONTINUANCE..... | 28 |
| RULE 81 TRIBUNAL MAY DISCONTINUE CASE..... | 28 |
| RULE 82 DISCONTINUANCE IN PROCEEDINGS INSTITUTED BY APPLICATION..... | 28 |
| PART XVIII SERVICE | 29 |
| RULE 83 METHOD OF SERVICE..... | 29 |
| PART XIX TIME LIMITS..... | 29 |
| RULE 84 TIME LIMITS | 29 |
| RULE 85 EXTENSION OF TIME LIMITS..... | 30 |
| PART XX ADVISORY OPINIONS..... | 30 |
| RULE 86 REQUEST FOR OPINION | 30 |
| RULE 87 DELIBERATIONS ON THE REQUEST | 30 |
| RULE 88 DELIVERY OF OPINION..... | 31 |
| RULE 89 CONTENT OF OPINION..... | 31 |
| RULE 90 SUBMISSION OF OPINION..... | 31 |
| PART XXI ANNEXES | 32 |
| ANNEX 1 | 32 |
| ANNEX 2 | 33 |
| ANNEX 3 | 34 |



These Rules are made in terms of Article 23 of the Protocol:

PART I
Preliminary

Rule 1

Title, Interpretation, Commencement

1. These Rules shall be known as the Rules of Procedure of the Southern African Development Community (SADC) Tribunal.
2. The Tribunal shall function in accordance with the provisions of the Treaty, the Protocol and these Rules.
3. These Rules shall form an integral part of the Protocol and shall come into operation when the Protocol enters into force.
4. In these Rules unless the context otherwise provides:

| | |
|-------------------|--|
| "Agent" | means the person representing a party; |
| "Applicant" | means a person, Member State or institution that has submitted an application to the Tribunal; |
| "Institution" | means an institution of SADC established in terms of Article 9 of the Treaty; |
| "Member" | means a Member of the Tribunal appointed in terms of Article 4 of the Protocol; |
| "Person" | means natural or legal person; |
| "Pool of Members" | means Members who are called upon to sit on the Tribunal whenever a Regular Member is unavailable in terms of Article 3 of the Protocol; |
| "President" | means the President of the Tribunal elected in terms of Article 7 of the Protocol; |
| "Protocol" | means the Protocol on Tribunal of SADC; |
| "Reference" | means a request by a national court or tribunal to the Tribunal for a preliminary ruling on a matter; |
| "Regular Member" | means a Member who sits regularly on the Tribunal in terms of Article 3 of the Protocol; |
| "Respondent" | means the person, Member State or institution against whom proceedings have been brought by the applicant before the Tribunal; |



"Special Agreement" means an agreement by parties to refer any dispute to the Tribunal;

"Tribunal" means the Tribunal established in terms of Article 9 of the Treaty and constituted in terms of Article 2 of the Protocol.

Rule 2
Scope of Application

1. These Rules shall apply in all cases where the Tribunal has jurisdiction in terms of Article 16 of the Treaty and Articles 14 and 15 of the Protocol and it shall dispose of such matters in terms of these Rules.
2. Nothing in these Rules shall limit or otherwise affect the inherent power of the Tribunal to make such orders as may be necessary to meet the ends of justice.

PART II
Constitution and Functions of The Tribunal

A. MEMBERS OF THE TRIBUNAL

Rule 3
Solemn Declaration

1. Before taking up his or her duties, each Member shall in accordance with the provisions of Article 5 of the Protocol, in open session, make a solemn declaration to perform his or her duties impartially, independently and conscientiously and to preserve the secrecy of the Tribunal's deliberations.
2. The solemn declaration referred to in Article 5 of the Protocol shall be in accordance with the form prescribed in Annex 1.

Rule 4
Tenure of Office

1. The term of office of Members of the Tribunal shall begin to run from the date upon which he or she is appointed in accordance with Article 4 of the Protocol.
2. Apart from normal replacement or death, the duties of a Member shall terminate upon his or her resignation.
3. Where a Member resigns, the letter of resignation shall be addressed to the President of the Tribunal.



4. Upon notification of a Member's resignation a vacancy shall arise and the Member shall be replaced in accordance with Article 4 of the Protocol.

Rule 5
Precedence of Members

1. In terms of status, the President shall rank first and all the other members shall rank in precedence according to their seniority in office.
2. Where there is equal seniority in office, precedence shall be determined by age.
3. Retiring Members who are re-appointed shall retain their former precedence.

B. THE PRESIDENCY

Rule 6
Commencement of Term of Office

The term of office of the President shall begin to run from the date on which he or she is elected in accordance with Article 7 of the Protocol.

Rule 7
Election of the President

1. The regular Members of the Tribunal designated in terms of Article 3 of the Protocol shall constitute an electoral college for purposes of electing a President and shall designate one of their Members to preside over the election.
2. The election of the President in accordance with Article 7 (1) of the Protocol shall take place by secret ballot.
3. There shall be no nomination for purposes of the election. The Member of the Tribunal obtaining the votes of a majority of Members shall be declared elected, and shall enter forthwith upon his or her functions.

Rule 8
Functions of the President

1. The President shall preside at all meetings of the Tribunal and shall direct the work and supervise the administration of the Tribunal.
2. In the event of the inability of the President to exercise his or her functions, such functions shall be exercised by a Member elected as Acting President from among the Members in accordance with the provisions of Article 7 (2) of the Protocol and the provisions of subrules 1,2, and 3 of Rule 7 shall apply *mutatis mutandis*.



Rule 9

Vacancy in the Presidency

If a vacancy in the Presidency occurs the electoral college referred to in subrule 1 of Rule 7 shall proceed to elect one of their Members in accordance with the provisions of Article 7 (1) of the Protocol.

C. THE REGISTRY

Rule 10

Election and Appointment of Registrar

1. Whenever there is a vacancy in the post of a Registrar, the Tribunal shall elect the Registrar by secret ballot from amongst nationals of Member States qualified to hold high judicial office in their respective States from a list referred to in Rule 11.
2. The person elected in terms of subrule 1 shall be appointed Registrar and he or she shall hold office in accordance with Article 12 of the Protocol.

Rule 11

Vacancy in the Office of Registrar

1. The President shall give notice of a vacancy or impending vacancy to Member States and shall fix a date for the closure of the list of candidates so as to enable nominations and information concerning the candidates to be received by the Tribunal in sufficient time.
2. Nominations shall indicate the relevant information concerning the candidates and in particular information as to age, sex, nationality, present occupation, academic qualifications, knowledge of languages, any previous experience in law, or work in international organisations.

Rule 12

Registrar to take Oath or Affirmation of Office

Before taking up his or her duties, the Registrar shall take an Oath or affirmation of office at a meeting of the Tribunal in accordance with the form prescribed in Annex 2.

Rule 13

Appointment of Assistant Registrar

1. The Tribunal shall appoint an Assistant Registrar and the provisions of Rule 11 shall apply to such appointment of Assistant Registrar.
2. Before taking up his duties, the Assistant Registrar shall take an oath or affirmation of office at a meeting of the Tribunal in accordance with the form prescribed in Annex 2.



Rule 14
Other Staff

The Tribunal may employ such other staff as may be required to enable it to perform its functions on proposals submitted by the Registrar. Such appointments may, however, be made by the Registrar with the approval of the President.

Rule 15
Duties of the Registrar

The Registrar, in the discharge of his duties, shall:

- (a) be the regular channel of communication to and from the Tribunal, and in particular shall effect all communications, notifications and transmission of documents required by these Rules and ensure that the date of dispatch and receipt thereof is readily available;
- (b) keep in such form as may be laid down by the Tribunal, a General List of all cases, entered and numbered in the order in which the document instituting proceedings or requesting an advisory opinion are received in the Registry;
- (c) transmit to the parties copies of all pleadings and documents upon receipt thereof in the Registry;
- (d) communicate to the Government of the State in which the Tribunal is sitting and any other Governments which may be concerned, the necessary information as to the persons from time to time entitled to privileges, immunities or facilities;
- (e) be present in person or by his or her Assistant at meetings and sittings of the Tribunal and be responsible for the preparation of such minutes and records as necessary;
- (f) be responsible for the printing and publication of the Tribunal's advisory opinions, orders, decisions and of such other documents as the Tribunal may direct to be published;
- (g) be responsible for all administrative work and in particular for the accounts and financial administration in accordance with financial procedures prescribed by Council;
- (h) deal with enquiries concerning the Tribunal and its work; and
- (i) have custody of the seals, stamps and archives of the Registrar.



Rule 16

Duties of Assistant Registrar

1. The Assistant Registrar shall assist the Registrar, act as Registrar in the latter's absence, and in the event of the office becoming vacant, exercise the functions of Registrar until the vacancy has been filled.
2. If both the Registrar and his or her Assistant are unable to carry out the duties of Registrar, the President shall appoint an official of the Registry to discharge those duties for such time as may be necessary.

Rule 17

Composition of The Registry

The Registry shall comprise of the Registrar, the Assistant Registrar and such other staff as are appointed in terms of Rule 14.

Rule 18

Organisation of the Registry

1. The Tribunal shall prescribe the organisation of the Registry.
2. Instructions for the running of the Registry shall be drawn by the Registrar with the approval of the President.
3. The staff of the Registry shall be subject to Staff Regulations drawn by the Tribunal and approved by the Council.

Rule 19

Removal of Registrar and Assistant Registrar

1. The Registrar may be removed from office only if, in the opinion of two-thirds of the Members of the Tribunal, he or she has either become permanently incapacitated from exercising his functions, or has committed a serious breach of his duties or a serious act of misconduct.
2. Before a decision is taken under this Rule, the Registrar shall be informed by the President of the action contemplated, in writing, giving the ground therefore and any relevant evidence. The Registrar shall be afforded an opportunity to be heard at a meeting of the Tribunal before a decision is taken.
3. The Assistant Registrar may be removed from office only on the same grounds and by the same procedure as the Registrar.



D. SEAT, SESSIONS AND SITTINGS OF THE TRIBUNAL

Rule 20

Dates and Times of Sittings and Duration of Sessions

1. The dates and times of the sittings of the Tribunal shall be fixed by the President.
2. The duration of the sessions shall be determined by the President having due regard to the business before the Tribunal.

Rule 21

Deliberations of the Tribunal

1. All deliberations of the Tribunal shall be conducted in closed sessions and shall remain secret.
2. Only those Members who were present at the oral proceedings of the case may take part in the deliberations.
3. Every Member taking part in the deliberations shall give his or her opinion in writing and the reasons for it.
4. The conclusions reached by the majority of the Members of the Tribunal after the final deliberations shall be the decision of the Tribunal.
5. Any differences of view on the substance or wording or order of questions shall be settled by the Tribunal.

Rule 22

General List of Cases

The list of cases before the Tribunal shall be prepared by the President.

Rule 23

Vacations of the Tribunal

1. The vacations of the Tribunal shall be determined by the President who shall publish the days of vacation in each calendar year.
2. During such vacations the President shall exercise his or her functions at the Seat of the Tribunal either by himself or through any other Member designated by the President to exercise such functions.
3. In a case of urgency, the President may convene the Tribunal during the vacations.



4. The Tribunal shall observe the official public holidays of the Member State where it has its Seat and those of any Member State where it is holding its sittings during those sittings.
5. The President may in appropriate cases grant leave of absence to any Member after consultation with other Members.

PART III
Representation Before The Tribunal

Rule 24
Agents, Advisors and Other Representatives

1. Member States and Institutions shall be represented before the Tribunal by an agent appointed for each case.
2. The agent may be assisted by an advisor.
3. Other persons shall be represented by agents or other persons authorised by him or her or it.

Rule 25
Immunities and Privileges

1. Agents, advisors and other representatives shall, when they appear before the Tribunal enjoy immunity in respect of words spoken or written by them concerning the case or the Parties.
2. Agents, advisors and other representatives shall enjoy the following further privileges and facilities:
 - (a) their papers and documents relating to the proceedings shall be exempt from both search and seizure; in the event of a dispute the customs officials or police may seal the papers and documents and immediately forward them to the Tribunal for inspection in the presence of the Registrar and the parties concerned;
 - (b) they shall be entitled to:
 - (i) such allocation of foreign currency as may be necessary for the performance of their duties;
 - (ii) travel in the course of duty without hindrance.



Rule 26
Proof of Status

In order to qualify for the privileges, immunities and facilities specified in Rule 25, agents, advisors and other representatives shall furnish proof of their status by producing:

- (a) an official document issued by the Member State or institution or party which they represent; and
- (b) a certificate signed by the Registrar whose validity shall be limited to a specified period. The period may be extended or curtailed by the Registrar according to the length of proceedings.

Rule 27
Waiver of Immunities

1. The privileges, immunities and facilities specified in Rule 25 are granted exclusively in the interest and proper conduct of proceedings.
2. The Tribunal may waive the privileges and immunities where it considers that the proper conduct of proceedings will not be hindered thereby.

Rule 28
Exclusion

1. Any agent, advisor or representative whose conduct towards the Tribunal, a Member or the Registrar is incompatible with the dignity of the Tribunal, or who uses his rights for purposes other than those for which they are granted may, at any time, be excluded from the proceedings by order of the Tribunal after having been given an opportunity to defend himself.
2. An order issued under this Rule shall have immediate effect.
3. Where an agent, advisor or representative is excluded from the proceedings, the proceedings shall be suspended for a period fixed by the President in order to allow the party concerned to appoint another agent, advisor or representative.
4. The Tribunal may rescind a decision made in terms of this Rule on application by the agent, advisor or representative on good cause shown.



PART IV
Languages

Rule 29
Working Languages

1. In terms of Article 22 of the Protocol the working languages of the Tribunal shall be English, French and Portuguese.
2. The Council may, at any time determine that any other language be used as a working language.
3. The working languages shall be used in the pleadings and oral submissions of the parties, in supporting documents and also in the record and decisions of the Tribunal.
4. Any supporting documents expressed in another language other than a working language of the Tribunal shall be accompanied by a translation into a working language. In the case of lengthy documents, translations may be confined to extracts unless otherwise ordered by the Tribunal on its own motion or at the instance of a party.
5. Where a witness or expert is unable to adequately express himself or herself in one of the working languages, the Tribunal may authorise him to give his or her evidence in another language and the Registrar shall cause any such evidence to be interpreted into a working language.

Rule 30
Translation

The Registrar shall, at the request of any Member, or of a party, arrange for anything said or written in the course of proceedings before the Tribunal to be translated into any of the working languages.

Rule 31
Authentic Text

The texts of documents drawn up in the working languages of the Tribunal shall be deemed to be authentic.

PART V
WRITTEN PROCEDURE

Rule 32
Institution of Proceedings

Proceedings before the Tribunal shall be instituted by either an application or a special agreement between the parties to the proceedings.



Rule 33
Proceedings Instituted by An Application

1. The application shall state:
 - (a) the name and address of the applicant
 - (b) the name, designation and address of the respondent
 - (c) the precise nature of the claim together with a succinct statement of the facts
 - (d) the form of relief or order sought by the applicant
2. The application shall state the name and address of the applicant's agent to whom communications on the case, including service of pleadings and other documents should be directed.
3. Any application which does not comply with the requirements of sub-rules 1 and 2 shall render the application inadmissible.
4. The original of the application shall be signed by the agent of the party submitting it.
5. The original of the application accompanied by all annexes referred to therein shall be filed with the Registrar together with five copies for the Tribunal and a copy for every other party to the proceedings. All copies shall be certified by the party filing them.
6. Where the application seeks the annulment of a decision, it shall be accompanied by documentary evidence of the decision for which the annulment is sought.
7. An application made by a legal person shall be accompanied by:
 - (a) the instrument regulating the legal person or recent extract from the register of companies, firms or associations or any other proof of its existence in law;
 - (b) proof that the authority granted to the applicant's agent has been properly conferred on him or her by someone authorised for the purpose.
8.
 - (a) If an application does not comply with requirements set out in sub-rules 4 to 7, the Registrar shall prescribe a reasonable period within which the applicant is to comply with them whether by putting the application itself in order or by producing any of the documents.
 - (b) If the applicant fails to put the application in order within the time prescribed, the Tribunal shall, after hearing the agents decide whether the non-compliance renders the application formally inadmissible.



Rule 34

Proceedings Instituted by Special Agreement

1. The notification may be effected by the parties jointly or by anyone or more of them. If the notification is not a joint one, a certified copy of it shall forthwith be communicated by the Registrar to the other party.
2. The notification shall be accompanied by an original or certified copy of the special agreement and shall to the extent not apparent from the agreement indicate the precise subject of the dispute and identifies the parties. It shall also be accompanied by five copies for the Tribunal.
3. The party making the notification shall state the name of its agent. Any other party to the special agreement, upon receiving from the Registrar a certified copy of such notification or as soon as possible thereafter shall inform the Tribunal of the name of its agent.

Rule 35

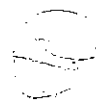
Service of Applications and Notifications

1. The Registrar shall transmit forthwith a certified copy of the application or notification to the respondent or other party to the proceedings.
2. All agents shall have an address for service at the Seat of the Tribunal to which all communications concerning the case are to be sent. Communications addressed to agents of the parties shall be considered as having been addressed to the parties.

Rule 36

Defence

1. The respondent shall file a defence within thirty (30) days of service of the application or notification stating:
 - (a) the name and address of the respondent;
 - (b) the name and address of the respondent's agent;
 - (c) arguments of facts relied upon;
 - (d) the form of order sought by the respondent;
 - (e) the nature of any evidence offered by him or her or it in defence.
2. The time limit prescribed in this Rule may be extended by the President upon application by the respondent giving reasonable explanation for his or her or its inability to comply with the prescribed time limit.





Rule 37
Counter-Claim

1. A respondent may, as part of its, his or her defence make a counter-claim provided that the counter-claim is directly connected with the subject matter of the claim of the other party and that it comes within the jurisdiction of the Tribunal.
2. A counter-claim shall be made in the defence of the party presenting it and shall form part of the submissions of that party.

Rule 38
Reply and Rejoinder

1. The application initiating proceedings and the defence may be supplemented by a reply from the applicant and a rejoinder from the respondent provided that no new issues may be raised through a reply or a rejoinder.
2. The President shall determine the time-limits within which a reply and rejoinder, if any, are filed.
3. The introduction of any new facts may only be permitted by way of an amendment to the pleadings if it relates to matters that only came to the knowledge of the party seeking to introduce them in the course of the proceedings. In such a case, the Tribunal shall allow the other party to answer to the new facts within time-limits prescribed by the President.

Rule 39
Joinder of Cases

The Tribunal may at anytime direct that the proceedings in two or more cases be joined for purposes of written or oral submissions or of the final decisions.

Rule 40
Documents

1. The Tribunal may require the parties to produce all documents and to supply additional information which the Tribunal considers desirable. Formal note shall be taken of any refusal.
2. The Tribunal may also require Member States and institutions not parties to the case to supply all information which the Tribunal considers necessary for the proceedings.





Rule 41
Closure of Pleadings

1. Pleadings shall close after the completion of written proceedings.
2. No further documents may be submitted to the Tribunal by either party after the closure of pleadings except with the consent of the other party.

PARTY VI
Commencement Of Oral Proceedings

Rule 42
Date of Hearing

1. Upon the closure of pleadings the case shall be ready for hearing. The President shall fix the date for the opening of oral proceedings.
2. The Tribunal may also decide, should the occasion arise, that the opening or the continuance of the oral proceedings be postponed.

Rule 43
Priority of Cases

1. When fixing the date for, or postponing the opening of the oral proceedings, the Tribunal shall have regard to the circumstances of each particular case including the urgency of a particular case.
2. Where the pleadings in several cases are completed simultaneously, the order in which they are to be dealt with shall be determined by the date of entry in the register of applications initiating them.
3. The President may in special circumstances order that a case be given priority over others.
4. The President may in special circumstances, after hearing the parties, either on his or her own initiative or at the request of one of the parties, defer a case to be dealt with at a later date.

Rule 44
Place of Hearing

The Tribunal may, if it considers it desirable, decide pursuant to Article 13 of the Protocol that all or part of the proceedings in a case shall be held at a place other than the seat of the Tribunal. Before so deciding the Tribunal shall ascertain the views of the parties.





Rule 45
Conduct of Proceedings

1. The proceedings shall be held in public unless the Tribunal otherwise directs either on its own motion or the application of any of the parties. Such a decision may concern either the whole or part of the hearing and may be made at any time.
2. The proceedings shall be commenced and presided over by the President or an acting President who shall be responsible for the proper conduct of the hearing.
3. No reference may be made during the oral proceedings to the contents of any document which has not been produced as part of the pleadings or produced in accordance with Rule 40, unless the document is part of a publication readily available.
4. Without prejudice to the provisions of these Rules concerning the production of documents, each party shall communicate to the Registrar, in sufficient time before the opening of the proceedings, information regarding any evidence which it intends to produce or which it intends to request the Tribunal to obtain. This communication shall contain a list of all names, nationalities, description and places of residence of the witnesses and experts whom the party intends to call.

Rule 46
Order of Proceedings

The order in which the parties will be heard, the method of handling the evidence and examining of any witnesses and experts, and the number of agents or representatives to be heard on behalf of each party, shall be settled by the Tribunal.

Rule 47
Questions by Members

The President and the other Members may in the course of the hearing put questions to the agents, representatives or advisors of the parties.

Rule 48
Calling of Witnesses

1. The parties may call any witnesses or experts appearing on the list communicated to the Tribunal pursuant to sub-rule 4, Rule 45.
2. If at anytime during the hearing a party wishes to call a witness or expert whose name was not on the list it shall so inform the Tribunal and the other party and shall supply the information required by Rule 45 sub-rule 4. A witness or expert may be called if the other party makes no objection or if the Tribunal is satisfied that his or her evidence seems likely to prove relevant.





3. Every witness called to testify shall take the oath or affirmation prescribed in terms of Annex 3.
4. Witnesses and experts shall be examined by the agents or representatives of the parties under the control of the President. Questions may be put to the witnesses and experts by the President and by other Members.

Rule 49
Summoning of Witnesses

1.
 - (a) The Tribunal may either of its own motion or on application by a party direct that certain facts be proved by oral testimony.
 - (b) The order of the Tribunal shall set out the facts to be established.
2. The Tribunal may summon a witness of its own motion or on application by a party.
3. Where an application for the examination of a witness is made by a party, such application shall state precisely about what facts and for what reasons the witness should be examined.
4.
 - (a) The witnesses shall be summoned by an order of the Tribunal stating the following information:
 - (i) the names, description and address of the witness;
 - (ii) the precise facts the witness is to be examined on;
 - (iii) in appropriate cases particulars of the arrangements by the Tribunal for the reimbursement of expenses incurred by the witness and the penalties for failure to comply with the other;
 - (b) The order shall be served on the parties and the witnesses.
5.
 - (a) The Tribunal may make the summoning of the witness at the instance of a party conditional upon such party, depositing with the Registrar a sum sufficient to cover expenses of calling such a witness.
 - (b) The quantum of the deposit shall be determined by the Tribunal.
6. Once the witness is located the parties shall be notified of the date and time when the witness is to appear before the Tribunal.



Rule 50
Examination of Witnesses

1. The Tribunal may impose a pecuniary penalty upon a witness who having been duly summoned fails to appear or having appeared, refuses without good reason, to give evidence or to take the oath or affirmation.
2. The imposition of the penalty shall not absolve the witness from the obligation to give evidence. The Tribunal may order that further summons be served on the witness at such witness's own expense.
3. The Tribunal may cancel the pecuniary penalty imposed on a witness if the witness proffers a valid excuse. It may also reduce the pecuniary penalty at the request of the witness where the witness established that the penalty is disproportionate to his or her income.
4. Witnesses and experts may be heard on oath or affirmation taken in the manner laid down by the law of their country of residence.
5.
 - (a) A Member State shall treat any violation of an oath or affirmation by a witness or expert in the same manner as if the offence had been committed before one of its courts with jurisdiction in civil proceedings.
 - (b) The Member State concerned shall prosecute the offender before its competent court at the instance of the Tribunal.

Rule 51
Expenses of Witnesses and Experts

1. Witnesses and experts called by the Tribunal on its motion shall be entitled to reimbursement of their travel and subsistence expenses. These payments may be made in advance by the Registrar.
2. In addition, witnesses and experts referred to in sub-rule 1 may claim compensation for actual loss of earnings or reasonable expert fees for their services.
3. The Registrar shall pay witnesses and experts their compensation or fees after they have carried out their respective duties or tasks.

Rule 52
Address by Parties

1. A party may address the Tribunal only through his or her agent, advisor or representative.



2. The oral statements made on behalf of each party shall be directed to the issues that still divide the parties, and shall not go over the whole ground covered by the pleadings, or merely repeat the facts and arguments these contain.

Rule 53
Closure of Proceedings

After the agents or advisors or representatives have made their submissions the President shall declare the proceedings closed.

Rule 54
Expert Witness

The Tribunal may call an expert to address them during oral hearings on any technical matter for the Tribunal's benefit.

Rule 55
Resumption of Oral Proceedings

The Tribunal may after hearing the agents, order the resumption of the proceedings.

Rule 56
Record of the Proceedings

1.
 - (a) The Registrar shall keep the record of every hearing.
 - (b) The record shall be signed by the President and by the Registrar and shall constitute an official record.
2. The parties may inspect the record at the Registry and obtain copies at their own expense.

PART VII
Decisions

Rule 57
Delivery of Decisions

1. When the Tribunal has completed its deliberations and adopted its decisions the parties shall be notified of the date upon which it shall be delivered.
2. The decision shall be delivered at a public sitting of the Tribunal



2. The oral statements made on behalf of each party shall be directed to the issues that still divide the parties, and shall not go over the whole ground covered by the pleadings, or merely repeat the facts and arguments these contain.

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PART VII
Decisions

Rule 57
Delivery of Decisions

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2. The decision shall be delivered at a public sitting of the Tribunal



Rule 58
Content of Decision

1. The Decision shall contain, *inter alia*, the following information:
 - (a) the date on which and the place where it was delivered;
 - (b) the names of Members of the Tribunal who participated in the case;
 - (c) the names of the parties;
 - (d) the names of agents, advisors and representatives of the parties;
 - (e) a summary of the proceedings;
 - (f) the submissions of the parties;
 - (g) a statement of facts;
 - (h) the applicable law;
 - (i) the operative provisions of the decision;
 - (j) the decision in regard to costs; and
 - (k) the number and names of Members constituting the majority of the decision.
2. Every opinion written by any Member in any matter shall be attached to the decision of the Tribunal.
3. One copy of the decision duly signed and sealed, shall be placed in the archives of the Tribunal and other copies shall be transmitted to each of the parties.
4. The Registrar shall send copies of the decision to:
 - (a) the Council; and
 - (b) other States entitled to appear before the Tribunal.

Rule 59
Rectification of Decision

1. Without prejudice to the provisions relating to the interpretation of decisions, the Tribunal may, of its own motion or on application by a party made within two weeks after the delivery of its decision, rectify clerical mistakes, errors in calculation and other such matters.
2. Where the decision has been rectified in terms of sub-rule 1 Registrar shall duly notify the parties concerned of such rectification and they may file with the Registrar their written objections or observations within the period specified in the notice.
3. The Tribunal shall give its decision on any objections filed under sub-rule 2.
4. The original of the rectification order shall be annexed to the original of the rectified decision and a note of the order shall be made in the margin of the original of the rectified decision.



PART VIII
Stay Of Proceedings

Rule 60
Application for Stay of Proceedings

1. At any stage of the proceedings, the Tribunal may at its own instance or on the application of a party to the proceedings or a party which not being a party to the proceedings establishes that it has substantial interest in the subject matter of the action or will be adversely affected by the decision in the matter, may order that the proceedings be stayed where:
 - (a) a national court is already seized of the matter and the same relief is sought;
 - (b) a party fails to give security for costs ordered by the Tribunal;
 - (c) a party to the proceedings, dies or becomes mentally incompetent or insolvent;
 - (d) the respondent relies on a counter claim or set off which extinguishes wholly the applicant's claim;
 - (e) an agreement between the parties provides for submission of the subject matter of the action to arbitration and the other party pleads the question of going to arbitration first and applies for a stay of proceedings pending arbitration; and
 - (f) the Tribunal finds it appropriate.
2. Where the proceedings have been stayed for failure by a party to comply with an order of the Tribunal or a condition for the commencement or continuation of the action, they may be resumed once the order or condition has been satisfied.
3. The stay of proceedings shall take effect on the date on which the order or decision is taken.
4. Unless the stay of proceedings is for a specified period, no further action, including the filing of pleadings, shall be taken until an order for the resumption has been made by the Tribunal.
5. The order for stay of proceedings for an indefinite period shall end on the date on which a decision for the resumption of proceedings is made.
6. From the date of resumption, time shall begin to run afresh for the purposes of the time limits as set out in these Rules.
7. The orders and decisions referred to in this Rule shall be served on the parties.



PART IX
Special Proceedings

Rule 61
Suspension of Operation

1. An application to suspend the operation of any measure adopted by a Member State or an institution made pursuant to the Treaty, shall be admissible only if the applicant is challenging that measure in proceedings before the Tribunal.
2. An application for any other interim measure shall be admissible only if it is made by a party to a case before the Tribunal and relates to that case.
3. The application may be made at any time during the course of the proceedings in the case in connection with which the request is made.
4. The application shall state the subject-matter of the proceedings, the reasons for the application, the possible consequences if it is not granted and the interim measure requested.
5. The application for an interim measure shall take priority over all other cases.

Rule 62
Service of Application

1. The application referred in Rule 61 shall be served on the other party and the President shall prescribe shorter periods for the making of written or oral submissions by the parties.
2. (a) In urgent cases the President may grant, the application even before the submissions or observations of the other party have been submitted;
(b) A decision under this sub-rule may be varied or cancelled even without any application being made by the other party.

Rule 63
President to Decide on Application

1. The President shall fix a date for the hearing of the application which will afford the parties an opportunity of being represented at the hearing.
2. The President shall either decide on the application himself or herself or refer it to the Tribunal.
3. If the President is absent or prevented from attending, the Acting President shall decide on the application in accordance with sub-rule 2.



4. Where the application is referred to the Tribunal, the Tribunal shall, in accordance with sub-rule 5 of Rule 61 postpone all other cases and shall give a decision on the application.

Rule 64

Decision on the Application

1. The decision on the application shall take the form of a reasoned order which shall be final and served on the parties forthwith.
2. The enforcement of the order may be made conditional on the lodging of security of an amount and nature to be determined in the light of the circumstances of the case.
3. Unless otherwise stated in the order, the interim measure shall lapse when final decision is delivered. The Tribunal may, however, revoke or modify any decision upon application of a party if, in its opinion, some change in the situation justifies such revocation or modification.
4. The order shall have only an interim effect without prejudice to the decision of the Tribunal on the substance of the case.

Rule 65

Rejection of Application

The rejection of an application for an interim measure shall not act as a bar to the party who made it from making a further application on the basis of new facts which were not within the knowledge of that party at the time the first application was made.

Rule 66

Suspension of Enforcement of Interim Measure

The Tribunal may suspend the enforcement of its decision on any measure adopted by a Member State or institution referred to in Rule 61 sub-rule 1 either of its own motion or upon application by a party affected by the decision for any good cause.

Rule 67

Preliminary Application

1. A party to the proceedings may apply to the Tribunal on a preliminary objection or preliminary plea not going to the substance of the case. Such application shall be made by a separate document.
2. The application shall set out the facts and law on which the objection is based, the form of order sought by the applicant and be accompanied by any supporting documents.



3. As soon as the application has been filed, the President shall prescribe the period within which the opposite party may file a written statement of its observations and submissions and any documents in support.
4. Unless otherwise decided by the Tribunal, further proceedings shall be oral.
5. (a) The Tribunal shall decide on the application.
(b) If the application is refused the President shall prescribe new time limits for further steps in the proceedings.

PART X
Default Decisions

Rule 68
Decision by Default

1. Where a respondent on whom an application initiating proceedings has been duly served fails to file a defence to the application in the proper form within the time prescribed in the rules, the applicant may apply for decision by default.
2. The application shall be served on the respondent and the President shall fix the date for the hearing of the application.
3. (a) Before granting the application, the Tribunal must be satisfied that the application initiating the proceedings is properly before it, discloses a cause of action and that appropriate formalities have been complied with.
(b) A decision by default shall be enforceable in the same manner as any other decision or order of the Tribunal.

Rule 69
Application to Set Aside a Decision by Default

1. The respondent may apply to set aside a default decision.
2. The application setting out the grounds upon which it is made, must be made within one month from the date of service of the decision upon the respondent and must be filed in the form prescribed by Rule 38.
3. After the application has been filed, the President shall prescribe the period within which the other party may file its submissions.
4. In determining the application, the Tribunal shall consider:
 - (i) Whether the applicant had good and reasonable cause for his or her or its failure to comply or file a defence;



- (ii) Whether the respondent has a reasonable defence on the merits of the matter;
 - (iii) Any other material fact that may affect the consequences of either setting aside the decision or confirm it.
5. The Tribunal may by way of decision set aside the default decision or dismiss the application.

PART XI
Third Party Proceedings

Rule 70
Intervention

1. A Member State, Institution, or person may apply to intervene in any proceedings.
2. An application in terms of this Rule shall be made as soon as possible and not later than the closure of the written proceedings or in exceptional cases, and upon good cause shown, not later than the date set for the oral hearing.
3. The application shall specify the following:
 - (a) the case to which it relates;
 - (b) the precise object of the intervention;
 - (c) the interest, which must be of a legal nature, which the intervener considers may be affected by the decision of the case;
 - (d) any basis for jurisdiction; and
 - (e) a list of documents in support of the application.
4. The application must be made against all parties to the proceedings.
5. The Tribunal shall decide whether or not to grant the application.
6. If the application to intervene in terms of this Rule is granted then the intervener shall be supplied with copies of the pleadings and documents produced and shall be entitled to submit a written statement within the time limit set by the Tribunal.

PART XII
Application For Revision Of A Decision

Rule 71
When Application May be Made



1. Where a party discovers a fact which by its nature might have had a decisive influence on the decision of the Tribunal had it been known at the time that the decision was given, that party may make an application for revision of the decision of the Tribunal.
2. Rule 38 and Rule 41 shall apply to an application for revision of a decision.
3. The application shall also include the following:
 - (a) a copy of the decision being contested;
 - (b) the points upon which the decision is being contested;
 - (c) the facts upon which the application is based.
4. The application shall be made within 3 (three) months from the date upon which the facts on which the application is based came to the applicant's knowledge.
5. The application must be made against all parties to the case in which revision of decision is sought.

Rule 72

Powers of the Tribunal on Revision of Decision

1. The Tribunal shall, in closed session, consider the written observations of the applications and shall decide on the admissibility of the application.
2. If the Tribunal finds the application admissible, it shall consider the substance of the application and proceed to give its decision in accordance with Rules 57 and 58.
3. The original of the revised decision shall be annexed to the original of the first decision handed down by the Tribunal

PART XIII

Interpretation Of Decisions

Rule 73

Application for Interpretation

1. An application for interpretation of a decision may be made where there is a dispute as to the meaning and scope of a decision of the Tribunal.
2. The application must be made against all the parties to the case in which the decision was given.
3. The application must be in accordance with Rule 33.
4. In addition, the application shall specify:
 - (a) the decision to be interpreted; and
 - (b) the passages on which interpretation is sought.



5. The Tribunal shall give the parties an opportunity to submit their written observations and may hear oral submission from the agents, representatives or advisors.
6. The Tribunal shall give its decision in accordance with Rules 57 and 58 and the original of the interpreting decisions shall be annexed to the original of the decision interpreted.

Part XIV
Enforcement Of Decisions

Rule 74
Enforcement

A party applying for recognition or enforcement of a decision of the Tribunal in accordance with the provisions of Article 32(3) of the Protocol shall supply the following:

- (a) the duly authenticated original decision by the Tribunal; and
- (b) the original application or special agreement submitting the matter to the Tribunal.

PART XV
Preliminary Rulings In National Courts Or Tribunals

Rule 75
Reference by National Court to the Tribunal

1. Where a question is raised before a court or tribunal of a Member State concerning the application or interpretation of the Treaty or its Protocols, directives and decisions of the Community or its Institutions, such a court or tribunal shall, if it considers that a ruling on the question is necessary to enable it to give judgement, request Tribunal to give a preliminary ruling thereon.
2. A court or tribunal of a Member State against whose judgment there are no judicial remedies under national law, shall refer to the Tribunal a case pending before it where any question as that referred to in sub-rule 1 of this Rule is raised.

Rule 76
Transmission of Decisions

The decisions of the Tribunal shall be communicated to the national court or tribunal concerned in the original version, accompanied by a translation where necessary, into one of the working languages of the Tribunal.



Rule 77
The Hearing

1. The Tribunal shall take account of the rules of procedure of the national court or tribunal which made the reference as regards representation and attendance of the parties to the main proceedings in the preliminary ruling procedure.
2. Where a question referred to the tribunal for a preliminary ruling is substantially identical to a question on which the Tribunal has already ruled, the Tribunal may after informing the court or Tribunal which referred the question to it and considering any observations submitted by the parties to it, give its reasoned order making reference to its previous decision.
3.
 - (a) Without prejudice to sub-rule 2, the procedure before the Tribunal shall also include an oral part.
 - (b) The Tribunal may, however, decide otherwise, after considering the submissions referred to in sub-rule 2 of this Rule and acting on a report from a judge or judges of the court or tribunal which referred the case, provided that none of the parties has asked to present oral arguments.
4. The costs of the reference shall be determined by the national court or tribunal.
5. In special circumstances, the Tribunal may grant by way of legal aid, assistance for purpose of facilitating the representation or attendance of a party.

PART XVI
Costs

Rule 78
Party and Party Legal Costs

1. Each party to the proceedings shall pay its own legal costs.
2. The Tribunal may, in exceptional circumstances, order a party to the proceedings to pay costs incurred by the other party.

Rule 79
Costs of Proceedings

Proceedings before the Tribunal shall be free of charge, except that:

- (a) Where a party has caused the Tribunal to incur unnecessary considerable costs, the Tribunal may order that such party re-imburse the expenses incurred by the Tribunal.



- (b) Where the copying or translation work is carried out at the request of a party, the costs shall, in so far as the Registrar considers excessive, be paid for by that party.

Rule 80
Currency of Payment

1. Sums due to the Tribunal shall be paid in the currency of the Member State where the Tribunal has its seat.
2. Any sum due to any other person shall be paid in the currency of the Member State in which the expenses was incurred.
3. Conversion of currency shall be made at the prevailing market exchange rate ruling on the day of payment in the Member State where the Tribunal has its seat.

PART XVII
DISCONTINUANCE

Rule 81
Tribunal May Discontinue case

1. If at any time before the final decision on the merits has been delivered the parties, either jointly or separately notify the Tribunal in writing that they have agreed to discontinue the proceedings, the Tribunal shall make an order directing that the case be removed from the list.
2. If the parties have agreed to discontinue the proceedings in consequence of having reached a settlement of the dispute and if they so desire, the Tribunal shall record this fact in the order for the removal of the case from the list.
3. If the Tribunal is not sitting, any order under this Rule may be made by the President.

Rule 82
Discontinuance in Proceedings Instituted by Application

1. If in the course of proceedings instituted by means of an application, the applicant informs the Tribunal in writing that he or she or it is not continuing with the proceedings, and if, at the date on which this communication is received in the Registry the respondent has not as yet taken any step in the proceedings, the Tribunal shall make an order officially recording the discontinuance of the proceedings and directing the removal of the case from the list. A copy of such order shall be sent by the Registrar to the respondent.



2. If at the time when notice of discontinuance is received, the respondent has already taken some steps in the proceedings:
 - (a) the Tribunal shall fix a time-limit which the respondent may indicate whether it, he or she opposes the discontinuance;
 - (b) if no objection is made to the discontinuance before the expiration of the time-limits, acquiescence will be presumed and the Tribunal shall order the discontinuance of the proceedings and removal of the case from the list; and
 - (c) if objection is made, the proceedings shall continue.
3. The powers of the Tribunal under this Rule may be exercised by the President when the Tribunal is not sitting.

PART XVIII

Service

Rule 83

Method of Service

1. (a) Any notice or other document which is required to be served by these Rules shall be served by registered post with a form for acknowledgement of receipt or by personal delivery of the copy against a receipt.
 - (b) A notice shall be deemed to have been served if there is proof of personal delivery or registered postage in terms of paragraph (a).
2. The Registrar shall certify copies to be served, save where the parties themselves supply the copies in accordance with sub-rule 5 of Rule 33.
3. All communications addressed or delivered, to the representatives of the parties or institutions shall be deemed to be addressed or delivered, as the case may be, to the parties or institutions.

PART XIX

Time Limits

Rule 84

Time Limits

1. Any period of time prescribed in terms of these Rules for the taking of any procedural step shall be reckoned as follows:
 - (a) A period expressed in days, weeks or months or years shall be calculated from the moment at which an event occurs or an action takes place, provided that the day during which that event occurs or action takes place, shall not be counted as falling within the period in question;



- (b) Where the period is expressed in months and days, it shall first be reckoned in whole months, then in days;
 - (c) Periods shall include official holidays, Saturdays and Sundays;
 - (d) Periods shall not be suspended during the judicial vacations.
2. If the period would otherwise end on a Saturday, Sunday or an official holiday, it shall be automatically extended until the end of the first following working day.

Rule 85

Extension of Time Limits

1. Any time limit prescribed under these Rules may be extended by whoever prescribed it.
2. No right shall be prejudiced in consequence of the expiry of a time limit if the party concerned proves the existence of unforeseeable circumstances.

PART XX

Advisory Opinions

Rule 86

Request for Opinion

1. (a) The Summit or the Council may request the Tribunal for an opinion in accordance with Article 16(4) of the Treaty and Article 20 of the Protocol.
(b) Such a request shall be served by the Tribunal on the Summit or the Council, as the case may be.
2. (a) The President shall prescribe the period within which the Summit and the Council may submit their written submission.
(b) The written submissions shall be served on the Summit or the Council, as the case may be.

Rule 87

Deliberations on the Request

Deliberations on the Request shall be in closed session and shall remain secret.



Rule 88
Delivery of Opinion

When the Tribunal has completed its deliberations and adopted its advisory opinion, the opinion shall be read at a public sitting of the Tribunal.

Rule 89
Content of Opinion

1. The Advisory opinion shall contain:
 - (i) the date on which it is delivered;
 - (ii) the names of the Members participating;
 - (iii) a summary of the proceedings;
 - (iv) a statement of the facts;
 - (v) the reasons in point of law;
 - (vi) the number and names of the Members constituting the majority.
2. Every advisory opinion written by any member in any matter shall be attached to the advisory opinion of the Tribunal.

Rule 90
Submission of Opinion

The opinion shall be communicated to the Summit and the Council.



PART XXI
Annexes

ANNEX 1

(In terms of Rule 3)

"I solemnly declare that I shall perform my duties and exercise my powers as Member of the Tribunal honourably, faithfully, impartially, independently and conscientiously".

.....
SIGNATURE OF MEMBER

.....
SIGNATURE OF PRESIDENT

.....
SIGNATURE OF REGISTRAR



ANNEX 3

(In terms of Rule 48)

"I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth".



ANNEX 2

(In terms of Rule 12)

"I solemnly declare that I shall perform the duties incumbent upon me as Registrar of the Tribunal in all loyalty, discretion and good conscience and that I shall faithfully observe all the provisions of the Protocol and the Rules of the Tribunal".

.....
SIGNATURE OF REGISTRAR

.....
SIGNATURE OF PRESIDENT



PART XXI
Annexes

ANNEX 1

(In terms of Rule 3)

"I solemnly declare that I shall perform my duties and exercise my powers as Member of the Tribunal honourably, faithfully, impartially, independently and conscientiously".

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.....
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.....
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.....
SIGNATURE OF PRESIDENT



ANNEX 3

(In terms of Rule 48)

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SADC/MJ/1/2014/4



(February 21, 2014) 17.40hrs

**DRAFT NEW PROTOCOL ON THE TRIBUNAL
IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY**

PREAMBLE

WE, the Heads of State or Government of:

The Republic of Angola
The Republic of Botswana
The Democratic Republic of Congo
The Kingdom of Lesotho
The Republic of Madagascar
The Republic of Malawi
The Republic of Mauritius
The Republic of Mozambique
The Republic of Namibia
The Republic of Seychelles
The Republic of South Africa
The Kingdom of Swaziland
The United Republic of Tanzania
The Republic of Zambia
The Republic of Zimbabwe

NOTING that a review of the role, responsibilities and terms of reference of the Southern African Development Community (SADC) Tribunal led to recommendations that require a new Protocol on Tribunal in the SADC;

DESIRING to establish a new Protocol on the Tribunal in the Southern African Development Community;

HEREBY AGREE as follows:

A handwritten signature in dark ink, appearing to be a stylized name, is located in the bottom right corner of the page.

**PART I
PRELIMINARY**

ARTICLE 1

DEFINITIONS

1. In this Protocol, terms and expressions defined in Article 1 of the Treaty shall bear the same meaning unless the context otherwise requires.
2. In this Protocol, unless the context otherwise requires:

| | |
|---------------|--|
| "Judge" | means a Member of the Tribunal appointed in terms of Article 4 of this Protocol; |
| "President" | means the President of the Tribunal as provided for under Article <u>15(1)</u> of this Protocol; |
| "Protocol" | means this Protocol on the Tribunal in the Southern African Development Community; |
| "Rules" | means Rules of Procedure of the Tribunal referred to in Article 28 of this Protocol; and |
| "State Party" | means a Member State that is a Party to this Protocol. |

**PART II
ORGANISATION
SECTION A – THE SADC TRIBUNAL**

**ARTICLE 2
CONSTITUTION OF THE TRIBUNAL**

The SADC Tribunal (hereinafter referred to as the "Tribunal"), is hereby constituted in terms of Article 16 of the Treaty and shall function in accordance with the provisions of the Treaty, this Protocol and the Rules.

SECTION B – JUDGES OF THE TRIBUNAL

ARTICLE 3 COMPOSITION

1. The Tribunal shall consist of not less than ten (10) Judges, appointed in terms of Article 4 of this Protocol from nationals of Member States who possess the qualifications required for appointment to the highest judicial offices in their respective Member States or who are jurists of recognised competence or expertise in international law.
2. The Council shall designate five (5) of the Judges as regular Judges who shall sit regularly on the Tribunal. The additional five (5) Judges shall constitute a pool from which the President may invite a Judge to sit on the Tribunal whenever a regular Judge is temporarily absent or is otherwise unable to carry out his or her functions.
3. The Tribunal shall be constituted by three (3) Judges; provided that the Tribunal may decide to constitute a full bench composed of five (5) Judges.
4. The President shall be responsible for selecting the Judges who shall constitute the Tribunal for the purpose of hearing any case brought before it.
5. On a proposal from the Tribunal, the Council may increase the number of Judges.
6. No two or more Judges may, at any time, be nationals of the same Member State.

ARTICLE 4 SELECTION AND APPOINTMENT OF JUDGES

1. Each Member State may nominate, as candidates, not more than two of its nationals having the qualifications prescribed in Article 3 (1) of this Protocol.
2. When nominating and appointing Judges, due consideration shall be given to fair gender representation and fair representation of the different SADC Member State legal systems.
3. The Judges shall be selected by the Council from the list of candidates so nominated by Member States. Nominations for the first appointment shall be called within three (3) months, and the selection shall be held within six (6) months, of the date of entry into force of this Protocol.

4. The Judges shall be appointed by the Summit upon recommendation of the Council in accordance with guidelines adopted by the Summit from time to time.
5. Notwithstanding the provisions of Article 6(1), where a Judge is appointed to replace a Judge whose term of office has not expired, the Judge so appointed shall serve for the remainder of his or her predecessor's term.
6. Any appointment to fill a vacancy referred to in paragraph 5 shall be conducted within six (6) months of the vacancy occurring. The procedure referred to in the preceding paragraphs shall apply *mutatis mutandis*.

ARTICLE 5
APPOINTMENT OF PRESIDENT

1. One of the Judges referred to in Article 4(4) shall be appointed President by the Summit for a term of three (3) years.

~~2. Notwithstanding the provisions of paragraph 1 and Article 8(1), the first President of the Tribunal shall serve for a five (5) year term without prejudice to him or her being reappointed as Judge for another five (5) year term.~~

3. The Judges shall elect an Acting President in the event that:

(a) Summit has not appointed a President under paragraph 1;

(b) if the President is temporarily absent or otherwise unable to carry out his or her functions.

ARTICLE 6
SOLEMN DECLARATION

1. Every Judge shall, before taking up his or her office as a Judge, make a solemn declaration before the Chairperson of SADC that he or she will carry out his or her duties independently, impartially, conscientiously and preserve the confidentiality of the Tribunal's deliberations.
2. The solemn declaration shall be in accordance with the form prescribed in Annex 1 of this Protocol.

ARTICLE 7
TENURE OF OFFICE OF JUDGES

1. Subject to Article 8, the Judges shall be appointed for a term of five (5) years and may only be re-appointed for one (1) further term of five (5) years.

2. The term of office of each Judge of the Tribunal shall commence from the date upon which he or she is appointed.

ARTICLE 8 INITIAL JUDGES

1. Out of the Judges initially appointed, the terms of two (2) of the regular Judges and two (2) of the additional Judges shall expire at the end of three (3) years. The Judges whose term is to expire at the end of three (3) years shall be chosen by a lot to be drawn by the Executive Secretary immediately after the first appointment. Judges will be eligible for reappointment for a further five (5) year term.
2. In the event that the draw of a lot is not done pursuant to paragraph 1, for Judges of the Tribunal whose term of office is to expire at the end of three (3) years, their term of office shall be deemed to be extended for a period that would have elapsed between the date of first appointment and the date of making the draw; provided that such period shall not exceed five (5) years.
3. In the event that there is a delay in drawing a lot under paragraph 1, the term of office of the Judge whose term is to expire at the end of five (5) years shall not be affected by the drawing of the lot.

ARTICLE 9 PART TIME AND FULL TIME JUDGES

1. Subject to paragraph 2, the Tribunal shall sit when required to consider a matter submitted to it. The Judges shall, therefore, not be appointed on a full-time basis.
2. On the recommendation of the President, the Council may at any time decide that the workload of the Tribunal requires that the Judges should serve on a full-time basis.
3. Judges appointed to serve on a full-time basis shall not hold any other office or employment.

ARTICLE 10 RESIGNATION AND EXPIRATION OF TERM

1. A Judge may at any time resign from his or her office by a letter delivered to the President for transmission to the Council through the Executive Secretary and upon delivery of the letter, a vacancy arises.

2. Notwithstanding the expiration of his or her term of office, a Judge shall continue to hear and to complete those cases partly heard by him or her.

ARTICLE 11
REMOVAL OF JUDGE FROM OFFICE

1. A Judge may be removed from office only if he or she has either become permanently incapacitated from exercising his or her functions, or has committed a serious breach of his or her duties or a serious act of misconduct.
2. A Judge shall only be removed from office under paragraph 1 if the question of his or her removal from office has been referred to an ad hoc independent tribunal appointed for this purpose by the Summit and the ad hoc tribunal has recommended that the Judge be removed from office following due process.

ARTICLE 12
RECUSAL

1. No Judge may exercise a political or administrative function, or hold a political office or an office in the service of a Member State, SADC or engage in a trade, vocation or profession or other occupation which might interfere with the proper exercise of his or her judicial functions, impartiality or independence.
2. No Judge may hear any matter in which he or she has previously taken part as an agent, a representative or an adviser, or as a Judge of a national or international court or tribunal or in any other capacity or in any matter in which a Member State of which he or she is a national is a party to a dispute before the Tribunal.
3. A Judge shall recuse himself or herself in any matter in which he or she might reasonably have a conflict of interest.
4. Conflict of interest includes without limitation, the possession by a Judge, or a close family member of a Judge or associate of a Judge, of any financial and property interests relevant to the dispute, and the affiliations or employment of a close family member of a Judge or associate of a Judge on interests relevant to the dispute.
5. Any dispute regarding the provisions of paragraphs 1, 2 and 3 of this Article shall be resolved by a decision of the Tribunal, sitting without the Judge concerned.

ARTICLE 13
IMMUNITY FROM LEGAL PROCEEDINGS

A Judge shall be immune from legal proceedings in respect of anything said or done by him or her in his or her judicial capacity. He or she shall continue to enjoy such immunity after he or she has ceased to hold office.

ARTICLE 14
TERMS AND CONDITIONS OF SERVICE

The terms and conditions of service, salaries and benefits of a Judge shall be determined by the Council and shall not be altered to the disadvantage of the Judge during his or her tenure of office.

ARTICLE 15
DUTIES OF THE PRESIDENT

1. The President shall be the Head of the Tribunal.
2. The President shall:
 - (a) be responsible for the administration and supervision of the Tribunal;
 - (b) direct the work of the Tribunal;
 - (c) represent the Tribunal;
 - (d) regulate the disposition of the matters brought before the Tribunal;
 - (e) appoint the Registrar of the Tribunal; and
 - (f) perform such acts and duties as may be incidental to the matters set out in paragraphs (a) to (e).

SECTION C
THE REGISTRY

ARTICLE 16
REGISTRY

There shall be a Registry consisting of the Registrar and such other staff as may be appointed pursuant to Article 26 of this Protocol.

ARTICLE 17
THE REGISTRAR

1. There shall be a Registrar who shall, subject to overall supervision of the President, be responsible for the day to day administration of the Tribunal.
2. Instructions for the running of the Registry shall be drawn up by the Registrar with the approval of the President.

ARTICLE 18
DUTIES OF THE REGISTRAR

The Registrar shall:

- (a) be a regular channel of communication to and from the Tribunal, and in particular effect all communications, notifications and transmission of documents required by this Protocol and ensure that the date of dispatch and receipt thereof is readily available;
- (b) keep in such form as may be laid down by the Tribunal, a general list of all cases, entered and numbered in the order in which the documents instituting proceedings are received in the Registry;
- (c) transmit to the parties copies of all pleadings and documents upon receipt thereof in the Registry;
- (d) communicate to the Government of a Member State in which the Tribunal is sitting and any other Governments which may be concerned, the necessary information as to the persons from time to time entitled to privileges, immunities or facilities;
- (e) be present in person or be represented by an assistant at meetings and sittings of the Tribunal and be responsible for the preparation of such minutes and records as necessary;
- (f) be responsible for the printing, publication and authentication of the Tribunal's, orders, decisions and of such other documents as the Tribunal may direct to be published;
- (g) be responsible for all administrative work and in particular for the accounts and financial administration in accordance with financial procedures prescribed by the Council;
- (h) deal with enquiries concerning the Tribunal and its work;
- (i) have custody of the seals, stamps and archives of the Tribunal;

- (j) carry out taxation of costs; and
- (k) perform such acts and duties as may be incidental to the matters set out in paragraphs (a) to (j).

ARTICLE 19
ELECTION AND APPOINTMENT OF THE REGISTRAR

1. The President shall give notice of a vacancy or impending vacancy to Member States and shall fix a date for the closure of the list of candidates so as to enable nominations and information concerning the candidates to be received by the Tribunal in sufficient time.
2. Nominations shall indicate the relevant information concerning the candidates and in particular information as to age, sex, nationality, present occupation, academic qualifications, knowledge of languages, any previous experience in law, or work in international organisations.
3. The Registrar shall be elected by the Tribunal by secret ballot from candidates nominated by Member States from nationals who are qualified to hold similar office in their respective States.
4. The person elected shall be appointed as Registrar by the President.

ARTICLE 20
TENURE OF OFFICE OF THE REGISTRAR

The Registrar shall serve for a term of five (5) years and will be eligible for reappointment for one further term.

ARTICLE 21
OATH OR AFFIRMATION OF OFFICE

1. Before taking up his or her duties, the Registrar shall take an oath or affirmation of office before the President immediately upon his or her appointment.
2. The oath or affirmation of office shall be taken in accordance with the form prescribed in Annex 2 of this Protocol.

ARTICLE 22
REMOVAL OF THE REGISTRAR

1. The Registrar may be removed from office only if he or she:

- (a) has become permanently incapacitated, whether arising from infirmity of body or mind, and can no longer perform the functions of the office of Registrar; or
 - (b) has committed a serious breach of the duties of Registrar, or a serious act of misconduct.
2. Where an allegation is made against the Registrar, he or she shall be presented with the full particulars of the allegation that has been made against him or her and any evidence thereof, and shall be accorded the right to be heard under the process provided for in paragraph 3.
3. If the President considers that the allegations against the Registrar ought to be investigated, the President shall select three (3) Judges from amongst the members of the Tribunal, who shall:
 - (a) inquire into, and determine, the matter and report on the facts thereof to the President; and
 - (b) advise the President whether or not the person holding the office of Registrar should be removed from office on any of the grounds set out in paragraph 1 and the President shall act on the advice of the Judges.

ARTICLE 23
APPOINTMENT OF ASSISTANT REGISTRAR

1. The President shall appoint an Assistant Registrar and the provisions of Article 19 shall apply *mutatis mutandis* to such appointment.
2. Before taking up his or her duties, the Assistant Registrar shall take an oath or affirmation of office before the President immediately upon his or her appointment.
3. The oath or affirmation of office shall be taken in accordance with the form prescribed in Annex 2 of this Protocol.

ARTICLE 24
DUTIES OF THE ASSISTANT REGISTRAR

1. The Assistant Registrar shall assist the Registrar, act as Registrar in the latter's absence, and in the event of the office becoming vacant, exercise the functions of Registrar until the vacancy has been filled.

2. If the Registrar and Assistant Registrar are unable to carry out the duties of Registrar, the President shall appoint an official of the Registry to discharge those duties for a maximum period of six (6) months.

ARTICLE 25
REMOVAL OF THE ASSISTANT REGISTRAR

Article 22 shall apply *mutatis mutandis* to the removal of the Assistant Registrar.

ARTICLE 26
APPOINTMENT OF OTHER STAFF

On a proposal submitted by the Registrar and approved by the President, the Tribunal may employ such other staff as may be required to enable it to discharge its functions.

ARTICLE 27
TERMS AND CONDITIONS OF SERVICE

The terms and conditions of service, salaries and benefits of the Registrar, Assistant Registrar and other staff shall be determined by the Council on the recommendation of the Tribunal.

SECTION D
THE SEAT OF THE TRIBUNAL

ARTICLE 28
SEAT

The Tribunal shall have its seat at Windhoek, Republic of Namibia; provided that it may in any particular case sit and exercise its functions anywhere within SADC if it considers it desirable.

SECTION E
THE FUNCTIONING OF THE TRIBUNAL

ARTICLE 29
RULES OF PROCEDURE OF THE TRIBUNAL

1. The Tribunal shall determine its own Rules.
2. The Judges shall adopt the Rules by a two-thirds majority.

ARTICLE 30
VACATIONS

1. Vacations of the Tribunal shall be determined by the President.
2. The President shall publish the days of vacation in each calendar year, as informed by the schedule of hearings.
3. During such vacations the President shall exercise his or her functions at the seat of the Tribunal either by himself or through any other Judge designated by the President to exercise such functions.
4. The President may, if he or she determines that a matter is urgent, convene the Tribunal during the vacations.
5. The Tribunal shall, during its sittings, observe the official public holidays of the Member State where it has its seat and those of any Member State where it is holding its sittings.
6. The President may, in appropriate cases, grant leave of absence to any Judge after consultation with other Judges.

ARTICLE 31
WORKING LANGUAGES

The working languages of the Tribunal shall be English, French and Portuguese and such other languages as Council may determine.

SECTION F
REPRESENTATION BEFORE THE TRIBUNAL

ARTICLE 32
REPRESENTATION

1. Parties competent to appear before the Tribunal shall be represented by an adviser, agent or representative of their choice.
2. As regards such advisers, agents and representatives who appear before it, the Tribunal shall have the powers normally accorded to courts of law, under conditions laid down in the Rules.
3. All advisers, agents and representatives shall, when they appear before the Tribunal, enjoy the rights, privileges and immunities necessary for the independent exercise of their duties, subject to conditions laid down in the Rules.

PART III JURISDICTION

ARTICLE 33 MATERIAL JURISDICTION

The Tribunal shall have jurisdiction on the interpretation of the SADC Treaty and Protocols relating to disputes between Member States.

ARTICLE 34 ADVISORY OPINIONS

The Tribunal shall give advisory opinions on such matters as the Summit or Council may refer to it.

ARTICLE 35 APPLICABLE LAW

The Tribunal shall apply the SADC Treaty and the applicable SADC Protocols.

PART IV SITTINGS AND DELIBERATIONS

ARTICLE 36 SITTINGS

1. The sittings shall be held in public unless the Tribunal otherwise directs either on its own motion or the application of any of the parties that the sittings are held in closed sessions. Such a decision may concern either the whole or part of the hearing and may be made at any time.
2. The proceedings shall be commenced and presided over by the President or an acting President who shall be responsible for the proper conduct of the hearing.

ARTICLE 37 DELIBERATIONS

1. All deliberations subsequent to the sittings of the Tribunal shall be conducted in closed sessions and shall remain confidential.
2. Only those Judges who were present at oral proceedings of a case may take part in the deliberations.

3. Every Judge taking part in the deliberations shall give his or her opinion in writing and the reasons for it.
4. The conclusions reached by the majority of the Judges after the final deliberations shall be the decision of the Tribunal.
5. Any differences of views on the substance or wording or order of questions shall be settled by the Tribunal.

PART V DECISIONS

ARTICLE 38 DECISIONS

1. Decisions of the Tribunal shall be in writing and delivered at a public sitting of the Tribunal.
2. Decisions of the Tribunal shall be made by a majority of the Judges.
3. Subject to Article 34, decisions and rulings of the Tribunal shall be final and binding.
4. One copy of the decision duly signed and sealed, shall be placed in the archives of the Tribunal and a copy shall be transmitted to each of the parties to the dispute.
5. The Registrar shall send copies of the decision to:
 - (a) the Council; and
 - (b) other Member States.

ARTICLE 39 DEFAULT DECISIONS

1. The Tribunal may give a decision in default when a respondent:
 - (a) on whom an application initiating proceedings has been duly served fails to file a defence to the application in the proper form within the time prescribed in the Rules; or
 - (b) fails to appear for a hearing of the application in accordance with the Rules.

2. A Party against whom a default decision has been made may apply to set it aside in accordance with the Rules.

ARTICLE 40
APPLICATION FOR REVIEW OF A DECISION

An application for review of a decision may be made to the Tribunal if it is based upon the discovery of some fact which by its nature might have had a decisive influence on the decision if it had been known to the Tribunal at the time the decision was given, but which fact at the time was unknown to both the Tribunal and the party making the application; provided always that such ignorance was not due to negligence.

ARTICLE 41
INTERIM MEASURES

The Tribunal may, on good cause, order the suspension of an act challenged before the Tribunal and may take such interim measures as may be necessary.

ARTICLE 42
APPLICATION FOR INTERVENTION

A Member State may, with leave of the Tribunal, intervene in a dispute before the Tribunal.

ARTICLE 43
CONSOLIDATION

The Tribunal may order the consolidation of proceedings involving substantially the same dispute and the same Member States.

ARTICLE 44
ENFORCEMENT AND EXECUTION

1. Member States and institutions of SADC shall take forthwith all measures necessary to ensure execution of decisions of the Tribunal.
2. A decision of the Tribunal shall be binding upon the parties to the dispute in respect of that particular case and must be complied with.
3. Any failure by a Member State to comply with a decision of the Tribunal may be referred to the Tribunal by any Member State affected by the decision.
4. If the Tribunal establishes the existence of such failure, it shall report its findings to the Summit for the latter to take appropriate action.

PART VI
FINANCIAL MATTERS

ARTICLE 45
BUDGET

The budget of the Tribunal shall be funded through the regular annual budget of SADC and from such other sources as may be determined by the Council, based on a three (3) year work-plan prepared by the Registrar.

ARTICLE 46
COSTS

1. Unless the Tribunal decides otherwise, each State Party to a dispute shall pay its own legal costs.
2. Unless the Tribunal decides otherwise, proceedings before the Tribunal shall be free of charge.
3. Where a State Party to a dispute has caused the Tribunal to incur unnecessary considerable costs, the Tribunal may order that such State Party reimburse the expenses incurred by the Tribunal.
4. Where the copying or translation work is carried out at the request of a State Party to a dispute, the costs shall, in so far as the Registrar considers excessive, be paid for by that State Party.
5. Sums due to the Tribunal shall be paid in the currency of the State Party where the Tribunal has its seat.
6. Conversion of currency shall be made at the prevailing market exchange rate ruling on the day of payment in the State Party where the Tribunal has its seat.

ARTICLE 47
FEES

Fees payable by Member States within limits agreed by the budgetary authorities of SADC may be prescribed by the Rules.

PART VII FINAL PROVISIONS

ARTICLE 48 REPEAL OF THE 2000 PROTOCOL ON THE TRIBUNAL IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY

The 2000 Protocol on the Tribunal in the Southern African Development Community is repealed with effect from the date of entry into force of this Protocol.

ARTICLE 49 SETTLEMENT OF DISPUTES

1. States Parties shall strive to resolve any dispute regarding application, interpretation or implementation of the provisions of this Protocol amicably.
2. Any dispute arising from the application, interpretation or implementation of this Protocol, which cannot be settled amicably, shall be referred to the SADC Tribunal.

ARTICLE 50 WITHDRAWAL

1. A State Party may withdraw from this Protocol upon the expiration of twelve (12) months from the date of giving written notice to that effect to the Executive Secretary.
2. Such State Party shall cease to enjoy all rights and benefits under this Protocol upon the withdrawal becoming effective.
3. Notwithstanding the provisions of paragraphs 1 and 2, such State Party shall continue to be bound by obligations that arise out of this Protocol and are outstanding on the date of the withdrawal until such obligations are discharged.

ARTICLE 51 SIGNATURE

This Protocol shall be signed by the Heads of State or Government of SADC Member States, or their duly authorised representatives.

PART VII FINAL PROVISIONS

ARTICLE 48 REPEAL OF THE 2000 PROTOCOL ON THE TRIBUNAL IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY

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1. States Parties shall strive to resolve any dispute regarding application, interpretation or implementation of the provisions of this Protocol amicably.
2. Any dispute arising from the application, interpretation or implementation of this Protocol, which cannot be settled amicably, shall be referred to the SADC Tribunal.

ARTICLE 50 WITHDRAWAL

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2. Such State Party shall cease to enjoy all rights and benefits under this Protocol upon the withdrawal becoming effective.
3. Notwithstanding the provisions of paragraphs 1 and 2, such State Party shall continue to be bound by obligations that arise out of this Protocol and are outstanding on the date of the withdrawal until such obligations are discharged.

ARTICLE 51 SIGNATURE

This Protocol shall be signed by the Heads of State or Government of SADC Member States, or their duly authorised representatives.

ARTICLE 52
RATIFICATION

This Protocol shall be ratified by Member States who have signed the Protocol in accordance with their constitutional procedures.

ARTICLE 53
ENTRY INTO FORCE

This Protocol shall enter into force thirty (30) days after the deposit of the Instruments of Ratification by two-thirds of the Member States.

ARTICLE 54
ACCESSION

This Protocol shall remain open for accession by any Member State.

ARTICLE 55
DEPOSITARY

1. The original texts of this Protocol and all Instruments of Ratification and Accession shall be deposited with the Executive Secretary of SADC who shall transmit certified copies to all Member States.
2. The Executive Secretary shall register this Protocol with the Secretariat of the United Nations and the Commission of the African Union.

IN WITNESS WHEREOF WE, the Heads of State or Government, or duly authorised representatives, of SADC Member States have signed this Protocol.

Done at....., this day of August 201... in three (3) original texts in the English, French and Portuguese languages, all texts being equally authentic.

REPUBLIC OF ANGOLA
REPUBLIC OF BOTSWANA
DEMOCRATIC REPUBLIC OF CONGO
KINGDOM OF LESOTHO
REPUBLIC OF MADAGASCAR
REPUBLIC OF MALAWI
REPUBLIC OF MAURITIUS
REPUBLIC OF MOZAMBIQUE
REPUBLIC OF NAMIBIA
REPUBLIC OF SEYCHELLES
REPUBLIC OF SOUTH AFRICA
KINGDOM OF SWAZILAND
UNITED REPUBLIC OF TANZANIA
REPUBLIC OF ZAMBIA
REPUBLIC OF ZIMBABWE



ANNEXES



ANNEX 1

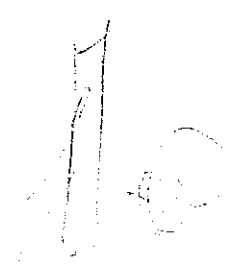
(IN TERMS OF ARTICLE 6)

"I _____(Name)_____solemnly declare that I shall perform my duties and exercise my powers as Judge of the Tribunal honourably, faithfully, impartially, independently and conscientiously".

SIGNATURE OF THE JUDGE

SIGNATURE OF THE CHAIRPERSON OF SADC

Done this.....day of.....at.....



ANNEX 2
(IN TERMS OF ARTICLE 21 OR ARTICLE 23)

"I ___(Name)___solemnly declare that I shall perform the duties incumbent upon me as Registrar/Assistant Registrar of the Tribunal in all loyalty, discretion and good conscience and that I shall faithfully observe all the provisions of the Protocol and the Rules of the Tribunal".

SIGNATURE OF THE REGISTRAR/ASSISTANT REGISTRAR

SIGNATURE OF THE PRESIDENT

Done this.....day of.....at.....




ANNEX 2
(IN TERMS OF ARTICLE 21 OR ARTICLE 23)

"I ___(Name)___ solemnly declare that I shall perform the duties incumbent upon me as Registrar/Assistant Registrar of the Tribunal in all loyalty, discretion and good conscience and that I shall faithfully observe all the provisions of the Protocol and the Rules of the Tribunal".

SIGNATURE OF THE REGISTRAR/ASSISTANT REGISTRAR

SIGNATURE OF THE PRESIDENT

Done this.....day of.....at.....





COMMUNIQUE
EXTRAORDINARY SUMMIT HEADS OF STATE AND GOVERNMENT
OF THE SOUTHERN AFRICA DEVELOPMENT COMMUNITY
WINDHOEK, REPUBLIC OF NAMIBIA
20 MAY 2011

1. The Summit of Heads of State and Government of the Southern African Development Community (SADC) was held in Windhoek, Republic of Namibia on May 20, 2011.
2. The Summit was officially opened by His Excellency Hifikepunye Pohamba, President of the Republic of Namibia and SADC Chairperson.
3. The Summit was attended by the following Heads of State and Government or their representatives:

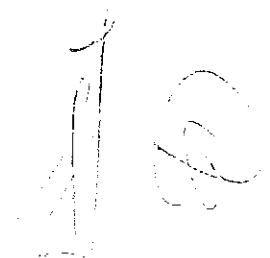
| | | |
|------------|---|--|
| Botswana | : | H.E. Lt. Gen. Seretse Khama Ian Khama, |
| DRC | : | H.E. Joseph Kabila Kabange |
| Mauritius | : | Dr. the Hon. Navinchandra Ramgoolam, GCSK |
| Mozambique | : | H.E. Armando Emilio Guebuza |
| Namibia | : | H.E. Hifikepunye Pohamba |
| Tanzania | : | H.E. Jakaya Mrisho Kikwete |
| Zambia | : | H.E. Rupiah Bwezani Banda |
| Zimbabwe | : | H.E. Robert Gabriel Mugabe |
| Lesotho | : | The Hon. Mr. Lesao A Lehohla, Deputy Prime Minister |
| Angola | : | Hon. George Chicotty, Minister of External Relations |
| Malawi | : | Hon. Eta E Banda, MP, Minister of Foreign Affairs |

South Africa : H.E. YLM Myakayaka-Manzini, South African High
Commissioner to Namibia

Swaziland : Hon. Rev. David Mathse, Minister for Justice and
Constitutional Affairs

4. The Summit was also attended by SADC Executive Secretary Dr. Tomaz A. Salomão.
5. In attendance at the Summit was also H.E. Joaquim A. Chissano, former President of the Republic of Mozambique, and SADC Mediator on Madagascar.
6. Summit received and considered the Report of the Committee of Ministers of Justice and Attorneys General on the review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal in accordance with Summit Decision 20 of August 2010 taken in Windhoek, Namibia.
7. Summit decided as follows:
 - mandated the Ministers of Justice/Attorneys General to initiate the process aimed at amending the relevant SADC legal instruments and submit a progress report at the Summit in August 2011 and the final report to Summit in August 2012;
 - not to reappoint members of the Tribunal whose term of office expired on August 31, 2010; and
 - not to replace members of the Tribunal whose term of office will expire on October 31, 2011.

8. Summit further reiterated the moratorium on receiving any new cases or hearings of any cases by the Tribunal until the SADC Protocol on the Tribunal has been reviewed and approved.
9. Summit also received a report on preparations for the 2nd Tripartite Council and Summit to be held on June 12, 2011 at Sandton, South Africa, noting, amongst other, progress made towards the launching of negotiations for the COMESA-EAC-SADC Tripartite Free Trade Area.
10. Summit endorsed the pillars of the Tripartite integration process as market integration, infrastructure development and industrial development.
11. Summit considered the report of the SADC Mediator on Madagascar, His Excellency Joaquim A. Chissano, former President of the Republic of Mozambique, noting the development of the roadmap for returning that country to constitutional normalcy.
12. The Summit commended His Excellency Joaquim A. Chissano, former President of the Republic of Mozambique, and SADC Mediator on Madagascar for his efforts in bringing together the Malagasy stakeholders in the process of reconciliation and finding a lasting solution for that country.
13. Summit reiterated the need for an all inclusive political process towards finding a lasting solution of the challenges facing the country. In this regard, Summit mandated the SADC Chairperson, Chairperson of the SADC Organ on Politics, Defence and Security Cooperation and SADC Mediator on Madagascar to, as soon as possible, convene a meeting with all Malagasy stakeholders to be held at SADC Headquarters in Gaborone Botswana.
14. Summit expressed sympathy and solidarity with the members of the Angolan and Namibian populations who have been adversely affected by the recent floods.



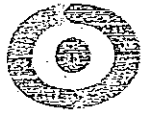
15. The Summit expressed its appreciation to the Government and People of the Republic of Namibia for the warm hospitality extended to all delegates and facilities placed at their disposal that made this Summit a success

WINDHOEK, REPUBLIC OF NAMIBIA

MAY 20, 2011

A handwritten signature or set of initials, possibly 'CFA', written in dark ink. The signature is somewhat stylized and appears to be written over a faint, possibly printed, signature line.

FA4B



W I T
advisors

An Affiliate of the World Trade Institute

Review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal

Final Report

Dr Lorand Bartels

Faculty of Law, University of Cambridge

United Kingdom

6 March 2011

Contents

| | |
|---|----|
| 1. Introduction..... | 6 |
| 2. SADC law and national laws | 7 |
| 2.1 The nature of SADC law..... | 7 |
| 2.2 The role of national courts..... | 8 |
| 2.3 Human rights in SADC law..... | 9 |
| i. Article 4(c) of the SADC Treaty..... | 9 |
| ii. Article 6(2) of the SADC Treaty..... | 12 |
| iii. Article 6(1) of the SADC Treaty..... | 12 |
| iv. Other SADC Protocols and instruments | 13 |
| v. Implications of a specific reference to a human rights instrument..... | 13 |
| 2.4 SADC law as national law | 15 |
| i. Norms capable of being enforced at the domestic level | 15 |
| ii. Norms in the SADC 'Treaty' | 15 |
| iii. Means of implementing Article 6(5) | 15 |
| 3. The law applied by the SADC Tribunal..... | 19 |
| 3.1 Introduction..... | 19 |
| 3.2 Jurisdiction and applicable law clauses..... | 19 |
| 3.3 The SADC Tribunal: jurisdiction clauses | 19 |
| i. Articles 14 and 15 of the Tribunal Protocol | 20 |
| ii. Other jurisdiction clauses..... | 20 |
| 3.4 The SADC Tribunal: the applicable law clause | 21 |
| 3.5 Tribunal decisions affecting national laws and courts..... | 22 |

| | |
|---|----|
| 4. Specific jurisdictional issues..... | 24 |
| 4.1 Basis of jurisdiction (Article 16(1) and Article 32 of the SADC Treaty; Article 14 of the SADC Tribunal Protocol)..... | 24 |
| 4.2 Jurisdiction over SADC Protocols and subsidiary instruments (Article 32 of the SADC Treaty and Article 14 of the SADC Tribunal Protocol)..... | 25 |
| 4.3 Scope of jurisdiction (Article 15 of the SADC Tribunal Protocol)..... | 27 |
| 4.4 Preliminary rulings (Article 16 of the SADC Tribunal Protocol) | 30 |
| i. Questions which may be referred..... | 30 |
| ii. The duty of a national court to make a reference | 31 |
| iii. The power of a national court to make a reference | 31 |
| iv. Other issues..... | 32 |
| 4.5 Disputes between Member States and the Community (Article 17) and between persons and the Community (Article 18) | 34 |
| 4.6 Staff cases (Article 19 of the SADC Tribunal Protocol)..... | 34 |
| 4.7 Advisory jurisdiction (Article 15(4) of the SADC Treaty and Article 20 of the SADC Tribunal Protocol)..... | 34 |
| i. Applicable law | 34 |
| ii. Intervention..... | 35 |
| 4.8 Appellate jurisdiction (Article 20A of the SADC Tribunal Protocol)..... | 35 |
| 4.9 Revisions of decisions (Article 26)..... | 36 |
| 4.10 Interpretation of decisions (Rule 73) | 36 |
| 4.11 Intervention (Article 30 and Rule 70)..... | 37 |
| i. Cases in which intervention is possible..... | 37 |
| ii. The requirement of an 'interest of a legal nature'..... | 37 |
| 5. Instruments governing the powers of the SADC Tribunal | 40 |
| 5.1 Power to make rules of procedure | 40 |
| 5.2 Structure of the SADC Tribunal Protocol and Rules of Procedure..... | 40 |

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| | | |
|-----|---|----|
| 6. | SADC Tribunal decisions: compliance and enforcement | 42 |
| 6.1 | Nature of SADC Tribunal decisions | 42 |
| | i. Decisions on the law..... | 42 |
| | ii. Remedies | 42 |
| 6.2 | Compliance with Tribunal decisions | 42 |
| | i. Obligation to comply | 42 |
| | ii. Non-compliance as a violation of Article 32(2) of the SADC Tribunal Protocol..... | 43 |
| | iii. Non-compliance and 'actions' and 'sanctions' adopted by Summit..... | 43 |
| | iv. Improving compliance | 47 |
| 6.3 | Domestic enforceability of SADC Tribunal decisions | 49 |
| | i. Obligations concerning domestic enforceability of decisions | 49 |
| | ii. Relationship to the obligation to comply with SADC Tribunal decisions..... | 50 |
| | iii. Enforcement of SADC Tribunal decisions as foreign judgments..... | 52 |
| | iv. Domestic enforcement in other SADC Member States | 54 |
| 7. | Qualifications and appointment of SADC Tribunal Members..... | 56 |
| 7.1 | Qualifications..... | 56 |
| | i. Eligibility for domestic judicial office: the question of age limits | 57 |
| | ii. Jurists of recognized competence..... | 57 |
| | iii. Personal criteria | 59 |
| | iv. Independence and impartiality | 59 |
| | v. Representativeness | 59 |
| 7.2 | Appointment process..... | 60 |
| | i. Nomination..... | 61 |
| | ii. Selection | 63 |
| | iii. An alternative: an independent appointment process..... | 64 |

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| | |
|--|----|
| 8. Impartiality and independence of the SADC Tribunal and its Members | 67 |
| 8.1 Independence..... | 67 |
| i. Tribunal budget | 67 |
| ii. Tribunal Members' terms and conditions of service, salaries and benefits | 68 |
| iii. Immunity of Tribunal Members | 69 |
| iv. Tenure and reappointment | 69 |
| v. Removal of Tribunal Members..... | 70 |
| 8.2 Impartiality | 71 |
| i. General rule..... | 71 |
| ii. Nationality of Members hearing cases..... | 72 |
| 9. Legal status of the SADC Tribunal Protocol..... | 73 |
| 9.1 The Summit decision to adopt the 2001 Agreement..... | 73 |
| i. Article 36 of the SADC Treaty..... | 73 |
| ii. Legality of the decision to adopt the 2001 Agreement under Article 36 | 75 |
| 9.2 The 2001 Agreement as an amending treaty under international law | 76 |
| 9.3 Subsequent conduct..... | 77 |
| 9.4 Changes brought about by the 2001 Agreement | 79 |
| 9.5 Consent to jurisdiction | 81 |
| Annex 1: Recommendations | 82 |
| Annex 2: Observations | 88 |

1. Introduction

This report on the role, responsibilities and terms of reference of the SADC Tribunal was commissioned by SADC in November 2010. A draft report was presented at the SADC Member State Senior Officials Meeting in Swakopmund on 21 February 2011, and discussed by the Senior Officials on 22 February 2011. This report, which takes into account the responses of the Senior Officials, is presented to the SADC Member State Ministers of Justice and Attorneys-General Meeting in Swakopmund on 14 and 15 April 2011.

This report is concerned with the legal framework of the SADC Tribunal, including the nature of SADC law and its relationship with national law. Its object is twofold: to provide an analysis of the SADC legal system and of the role of the SADC Tribunal and the national courts of the SADC Member States, and to make concrete recommendations directed at improving the functioning and operation of the SADC Tribunal within this legal framework. To this end, the report analyzes the legal instruments governing the SADC Tribunal, especially the SADC Treaty, the SADC Tribunal Protocol and Rules of Procedure, and other related instruments, as well as relevant national laws of the SADC Member States. This analysis is based on primary and secondary legal sources as well as on an empirical exercise involving questionnaires and interviews with government officials, Tribunal Members, and key stakeholders. Insofar as the report seeks to identify best practice, it also takes into account the law and practice of other international tribunals, especially those in the region.

There are a number of matters concerning the practical functioning of the Tribunal which are critical to the practical effectiveness of the Tribunal, but which are not addressed here, such as outreach and accessibility, infrastructure, case management and training. These issues are largely outside the scope of this study, and have in any case been comprehensively addressed in various recent projects. The SADC Tribunal Secretariat adopted a Strategic Plan in December 2010, based on own initiative studies on the practical functioning of the Tribunal, and on a study conducted by GTZ on the institutional and practical needs of the Tribunal; and the consultancy AGORA 2000 concluded a study on the institutional capacity of the SADC Tribunal in December 2010.¹ There is no need to replicate the comprehensive work in these studies, and this report does not deal with these issues, except in one respect: to recommend the Tribunal be given specific power to establish its own rules of procedure.

¹ SADC Tribunal, *Strategic Plan*, December 2010; Ulrik Spliid and Marian Nell, *Study on the Southern African Development Community (SADC) Tribunal Capacity Needs Assessment* (GTZ, October 2009); AGORA '2000, *Developing the Institutional Capacity of the SADC Tribunal – Final Report and Annexes*, December 2010.

2. SADC law and national laws

2.1 The nature of SADC law

In concluding the SADC Treaty, the SADC Member States established a 'Community' under international law, and a number of Community institutions with general and specific powers. The norms set out in the SADC Treaty, in Protocols to the Treaty, in other instruments concluded by SADC Member States in the framework of the Community, and in instruments and other 'acts' adopted by SADC institutions in the exercise of their powers, have the status of international law.² In short, SADC is an international organization, which is both governed by international law and, within its powers, generates norms with the status of international law. This basic fact is the starting point for a consideration of the relationship between SADC law and the national laws of the SADC Member States.

The most important consequence of this is as follows: under international law, a State may not rely on its national laws (including norms of constitutional status) as a defence to a violation of an international obligation.³ This means that, if a SADC Member State's national law violates a SADC norm, that law must be brought into line with the SADC norm. In *Gondo*, the SADC Tribunal held that section 5(2) of the State Liability Act of Zimbabwe was in breach of the SADC Treaty in so far as it provided that State-owned property was immune from execution, attachment or process to satisfy a judgment debt.⁴ Zimbabwe then came under an obligation to revoke the SADC-inconsistent elements of this legislation. It may be noted that, in this respect, the status of the national law is irrelevant. Parties to treaties may need to amend even their constitutions to comply with their international obligations: thus Ireland, France and Germany each amended their constitutions to comply with their EU obligations.⁵

Two final points need to be made. First, simply because SADC law is, as a matter of international law, capable of requiring changes to national laws, including constitutions, does not mean that SADC law necessarily requires any change to national laws. This all depends on the nature of the SADC laws at issue. Second, the position expressed here is the default rule under international law. This default rule could be changed by SADC Member

² Wilfred Jenks, *The Proper Law of International Organisations* (Dobbs Ferry, New York: Oceana Publications, 1962) at 3-4; C F Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd ed (Cambridge: CUP, 2009), 14-15. There are rare circumstances in which legal relations between SADC and individuals might be governed by national laws on contract, tort and property: cf Finn Seyersted 'Applicable Law in Relations Between Intergovernmental Organizations and Private Parties' (1967-III) 122 *Receuil des Cours* 427.

³ Article 27 of the Vienna Convention of the Law of Treaties; cf also Article 3 of the International Law Commission's Articles on State Responsibility. In *Pulp Mills (Argentina/Uruguay)* [2010] ICJ Rep (not yet reported), 20 Apr 2010, para 121, the International Court described Article 27 as reflecting a 'well-established customary rule'. See also *Gramara* (HC 33/09) [2010] ZWHHC 1, in the context of Zimbabwe's obligations under the SADC Treaty.

⁴ *Gondo*, Case No SADC (T) 05/2008, 9 Dec 2010.

⁵ T C Hartley, *The Foundations of European Law*, 7th ed (Oxford: OUP, 2010), 259.

States to provide that SADC law is subject to the constitutions of the Member States. But this has not so far been done.

Observation 1

All of SADC law is international law, and consequently binds SADC Member States regardless of their national laws, including their constitutions.

2.2 *The role of national courts*

The foregoing considerations do not take into account the fact that, under national law, a national court may not have the power to reach any other decision under the law by which it is bound. In *Ex parte CFU* the Zimbabwean Supreme Court said this, in relation to the SADC Tribunal:

The decisions of the Supreme Court are final. No appeal lies from the Supreme Court to any other Court. No appeal lies to the SADC Tribunal from the Supreme Court. The decisions of the SADC Tribunal are at best persuasive but certainly not binding.

The SADC Tribunal has not been domesticated by any municipal law and therefore enjoys no legal status in Zimbabwe. I believe the same obtains in all SADC States, that is, that there is no right of appeal from the South African Constitutional Court, the Namibian Supreme Court, the Lesotho Supreme Court, the Swaziland Supreme Court, the Zambian Supreme Court and the Supreme Courts of other SADC countries to the SADC Tribunal.⁶

This is most likely a correct statement of the position of domestic courts, at least in the context of dualist legal systems.⁷ But it is also irrelevant to a State's obligations under international law.⁸

Indeed, by issuing a decision contrary to State's international obligations, a national court may itself, by that act, violate that State's international obligations.⁹ This is because, under international law, a national court is considered to be an organ of the State,¹⁰ just like the

⁶ *Ex parte Commercial Farmers Union*, Judgment No SC 31/10 (Supreme Court of Zimbabwe, 26 Nov 2010, unreported), per Chidyausiku CJ, 14. A similar statement was made in *Etheredge* [2009] ZWHHC 1, although on the confusing grounds (in part) that the SADC Tribunal Protocol did not have the intention of creating a tribunal which would be superior to the courts in the subscribing countries. This is both irrelevant and, at least in terms of preliminary rulings, inaccurate: see below at 30.

⁷ See below at 16.

⁸ See also below at 22.

⁹ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* [1999] ICJ Rep 62, para 62; this is also a commonplace in WTO law. In the EU, a Member State is liable to pay damages to an individual as a result of a final court ruling that manifestly violates EU law: Case C-224/01, *Köbler* [2003] ECR I-10239. The European Court of Human Rights has sanctioned States for the acts of their courts that violate human rights: ECtHR, *Zullo*, 29 March 2006 (delay).

¹⁰ Article 4 of the ILC Articles on State Responsibility, reflecting customary international law, states that: '(t)he conduct of any State organ shall be considered an act of that State under international law, whether the organ

legislature and executive. Of course, a national court may be helpless, under national law, to avoid this situation. But the solution is for the State to ensure, if necessary by constitutional amendment, that its national laws are consistent with its international obligations. This is a perhaps radical consequence from a domestic perspective, but it is entirely normal in international law – it is, in fact, the usual consequence of entering into international legal obligations.

Observation 2

SADC Member State national courts are organs of the State. Consequently, if a SADC Member State national court makes a decision under national law that is inconsistent with SADC law, the SADC Member State violates SADC law. Furthermore, it follows from Observation 1 that, if the national court is unable, under national law, to come to an alternative decision, it is for the SADC Member State to bring national law, including, if necessary, its constitution, into line with SADC law.

2.3 Human rights in SADC law

In *Campbell* the SADC Tribunal determined that Article 4(c) and Article 6(2) of the SADC Treaty required SADC Member States to comply with human rights, democracy and the rule of law,¹¹ and in *Gondo* the Tribunal added that Article 6(1) of the SADC Treaty was to the same effect.¹² This section discusses these provisions, and considers the proposition that a specific human rights instrument be incorporated, either expressly or by reference, into the SADC Treaty.

i. Article 4(c) of the SADC Treaty

Article 4(c) of the SADC Treaty states that 'SADC and its Member States shall act in accordance with the following principles: ... human rights, democracy and the rule of law'. The verbal phrase ('shall act') is in the usual language of obligations, and the object of the sentence ('in accordance with the following principles ...') is clearly defined. On its face, Article 4(c) therefore constitutes a binding obligation.

Human rights as 'principles'

A number of objections have been raised against this view. The first is that the norms referred to are described as 'principles', and are therefore of non-binding effect. It is doubtful whether such a distinction between 'principles' and 'rules' can be drawn, even as a

exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.'

¹¹ *Campbell*, SADC (T) Case No 2/2007 [2007] SADCT 1, 13 Dec 2007.

¹² *Gondo*, above at n 4. In *Campbell*, *ibid*, the Court also found a violation of Article 6(1) of the SADC Treaty (at 26-27) but did not repeat this finding in the operative part of the decision.

matter of legal theory,¹³ let alone in the more precise context of legal instruments. In any case, this objection ignores the longstanding usage in international law of the term 'principles' to refer to binding obligations. For example, Article 38(1)(c) of the ICJ Statute mandates the International Court to apply 'the general principles of law recognized by civilized nations'. For the same reason, it is irrelevant that the title of Article 4 is also 'Principles'.

A related objection is to the effect that the 'principles' referred to here ('the ... principles of human rights, democracy and the rule of law') are not susceptible of objective determination, and are consequently non-justiciable. This is not tenable, as can be seen from the judgment of the Grand Chamber of the European Court of Justice in *Kadi*. Article 6(1) of the EU Treaty, as in force at the relevant time, stated that 'the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States'. The Court referred to other treaty provisions authorizing certain measures and continued as follows: '[t]hose provisions cannot, however, be understood to authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union.'¹⁴ The measures were held to be invalid.

It goes without saying that a simple reference to the principles of 'human rights' is sufficiently clear to be interpreted and applied by any tribunal, especially when read in the light of more detailed applicable human rights norms.¹⁵ But the same can be said of the principles of 'democracy' and 'the rule of law'. The principle of 'democracy' has been applied by the EU Court of First Instance:¹⁶ at its most fundamental, it can be seen as an expression of Article 3 of Protocol 1 of the European Convention of Human Rights, which states that the parties 'undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature'.¹⁷ As to the 'the rule of law', in *Katabazi* the EAC Court held that 'the intervention by the armed security agents of Uganda to prevent the execution of a lawful Court order violated the principle of the rule of law and consequently contravened the Treaty'.¹⁸ In sum, each of the principles mentioned in Article 4(c) has been interpreted and applied by tribunals in specific cases, and the jurisprudence of the SADC Tribunal on these matters cannot be seen as anything other than routine.

¹³ Ronald Dworkin used the example of *Riggs v Palmer* 115 NY 506 (1889) to demonstrate that a principle could override a rule: *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), 20.

¹⁴ Joined Cases C-402/05P and C-415/05P, *Kadi* [2008] I-6351, para 303.

¹⁵ On this, see below at Section 3.4.

¹⁶ Case T-222/99, *Martinez* [1999] ECR II-3397. The Court held against the applicant, but this was on the facts of the case, not because the principle of democracy was not capable of objective determination.

¹⁷ See *Matthews* (1999) 28 EHRR 361.

¹⁸ *Katabazi* [2007] EACJ 3.

Indeterminacy of 'principles' in Article 4 of the SADC Treaty

A somewhat different objection is that, whatever the 'principles of human rights, democracy and the rule of law' might be capable of meaning in other instruments, the context of Article 4(c) shows that these principles were not, in this case, intended to have legal effect. It is important to point out that this argument is not based on the 'bindingness' of the language used to indicate whether there is an obligation: as mentioned, this language is entirely binding. Rather, the argument is that the other 'principles' referenced in Article 4 are not capable of objective determination, and therefore neither are the principles in Article 4(c). These are the principles of 'sovereign equality of all Member States; solidarity, peace and security; equity, balance and mutual benefit; and peaceful settlement of disputes'.

There are two responses to this objection. The first is that the argument suffers from a *non sequitur*: even if it were true that the other principles were not capable of objective determination, it does not follow that the principles in Article 4(c) are not capable of objective determination. Indeed, one might even make the opposite claim, that if the principles in Article 4(c) are determinate norms, so too must be the other norms in Article 4. But aside from this, it bears noting that, in international law as in national law, courts and tribunals never fail to apply norms simply because they are expressed at a level of generality. Indeed, in the *South West Africa Cases*, the International Court of Justice had no difficulty in deciding that a case could be heard involving the question whether various laws and regulations promoted the 'material and moral well-being and the social progress of the inhabitants' of a mandated territory.¹⁹ More generally, it is well established that an international court or tribunal will not refuse to adjudicate by declaring a *non liquet* ('the law is unclear').²⁰

Thus, while it is not necessarily possible to state what 'human rights', 'democracy' or 'the rule of law' might mean in the abstract, this does not mean that these norms cannot be interpreted and applied in any given case. In sum, there is no reason to doubt the correctness of the rulings in *Campbell* and *Gondo* that Article 4(c) of the SADC Treaty constitutes an obligation binding on the SADC Member States.

Relevance of *Kéïta* and *Katabazi*

It has been suggested that the foregoing conclusions are contradicted by the cases of *Kéïta* in the ECOWAS Court and *Katabazi* in the EAC Court. However, for different reasons, this is not the case. In *Kéïta*, the ECOWAS Court declined to exercise jurisdiction over a matter because the matter had already come before a national court.²¹ This ruling, which is in any case of dubious merit,²² is inapplicable to the SADC Tribunal, where it is clear, *inter alia*, from

¹⁹ *South West Africa Cases (Ethiopia/South Africa; Liberia/South Africa) (Preliminary Objections)* [1962] ICJ Rep 319. See also Judge Jessup (Sep Op), 428-9; but *contra* Judges Spender and Fitzmaurice (Joint Diss Op), 466-7.

²⁰ H Lauterpacht, 'Some Observations on the Prohibition of "Non Liqueet" and the Completeness of the Law' in FM van Asbeck et al (eds), *Symbolae Verzijl* (The Hague: Nijhoff, 1958), 196-221.

²¹ *Kéïta*, ECOWAS Case No ECW/CJ/APP/05/06, unreported, 22 Mar 2007, para 30.

²² For criticism, see Solomon Ebobrah, 'Litigating Human Rights Before Sub-Regional Courts in Africa: Prospects and Challenges' (2009) 17 *African Journal of International and Comparative Law* 79, 99-100 and 'Critical Issues

the rule on exhaustion of local remedies, that jurisdiction exists in these cases. *Kéïta* is therefore irrelevant to the question at issue. *Katabazi*, by contrast, is relevant, but its meaning is not what has been claimed.²³ This case concerned two articles concerning the jurisdiction of the EAC Court. Article 27(1) stated that '[t]he Court shall initially have jurisdiction over the interpretation and application of this Treaty', while Article 27(2), which has no counterpart in the SADC Treaty or SADC Tribunal Protocol, stated that '[t]he Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, the Partner States shall conclude a protocol to operationalise the extended jurisdiction.' The EAC Court held that despite its plenary grant of jurisdiction in Article 27(1), the effect of Article 27(2) was that it lacked jurisdiction with respect to human rights until the conclusion of the protocol foreseen in that provision.²⁴ However, the Court also held that it had jurisdiction with respect to the principle of the rule of law, referred to in the Treaty, and *not* covered by the exclusion in Article 27(2) of the EAC Treaty.²⁵ In other words, *Katabazi* does not undermine *Campbell*; to the contrary, it supports it.

ii. Article 6(2) of the SADC Treaty

Article 6(2) of the SADC Treaty is another provision on human rights. It states:

SADC and Member States shall not discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture or disability.

There is simply no plausible way of reading this as anything but as a fully effective obligation in its own express and – after decades of international jurisprudence on the point – well understood terms. The ruling of the SADC Tribunal to this effect in *Campbell* cannot be faulted.

iii. Article 6(1) of the SADC Treaty

The case of Article 6(1) of the SADC Treaty, applied by the SADC Tribunal in *Gondo*, is more complicated.²⁶ This provision states:

Member States undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and shall refrain from taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty.

As with Article 4(c), the language used in this provision is that of binding obligations: Member States *inter alia* 'shall refrain' from taking certain measures. However, the difficulty

in the Human Rights Mandate of the ECOWAS Court of Justice' (2010) 54 Journal of African Law 1, 14-15 (referring to this as an 'ostrich approach').

²³ *Katabazi*, above at n 18.

²⁴ *ibid*, at 15.

²⁵ *ibid*, at 16 ff.

²⁶ *Gondo*, above at n 4.

is determining whether these measures are sufficiently well defined to be capable of objective determination, and therefore justiciable. The prohibited measures are, firstly, those that are 'likely to jeopardise the sustenance of [SADC's] principles'; second, those that are likely to jeopardise the achievement of [SADC's] objectives, and thirdly those that are likely to jeopardise the implementation of the provisions of [the SADC] Treaty'.

As mentioned, courts will not decline to hear a case on the basis that norms are expressed at a level of generality. At the same time, it may be difficult for a plaintiff to demonstrate that a measure is jeopardising the achievement of some of SADC's objectives, such as, for example, 'promot[ing] self-sustaining development on the basis of collective self-reliance, and the interdependence of Member States' (Article 5(1)(d)). More specifically, insofar as Article 6(1) references the principles in Article 4(c), this provision establishes a clear benchmark capable of objective determination. Whether it can be demonstrated that any given measure 'is likely to jeopardize the sustenance' of these principles is another matter, but it is certainly possible, and the finding on this point in *Gondo* appears beyond reproach.

iv. Other SADC Protocols and Instruments

A number of the SADC instruments deal with human rights, most obviously the Protocol on Gender and Development (not yet in force), the Protocol on Health, and the Charter of Fundamental Social Rights in SADC, but also others. These may not all be applicable to all SADC Member States, nor of the same legal status. However, to the extent that they are applicable (on which see the next section), they constitute relevant context for the interpretation of the core references to human rights in Article 4(c), Article 6(1) and Article 6(2) of the SADC Treaty.

v. Implications of a specific reference to a human rights instrument

Respondents to this study have differed on whether it would be desirable for a specific reference to be made to a human rights instrument, so that more definition can be given to the human rights provisions of the SADC Treaty. Some argue in favour, on the grounds of precision, while others consider this unnecessary, on the grounds that the interpretation of a treaty norm is a judicial and not an executive function.

It may be observed that, if the proposal is to make a reference to instruments that are already binding on all SADC Member States, such as the International Covenant on Civil and Political Rights or the African Charter on Human and Peoples' Rights (ACHPR),²⁷ there is nothing to be gained by including such a reference, insofar as cases involving the Member States are concerned. Such instruments are already relevant context for the interpretation

²⁷ ICCPR; ACHPR: Angola (10 Jan 1992; 9 Oct 1990); Botswana (8 Sep 2000; 22 Jul 1986); DRC (1 Nov 1976; 28 Jul 1987); Lesotho (9 Sep 1992; 27 Feb 1992); Madagascar (21 Jun 1971; 19 Mar 1992); Malawi (22 Dec 1993; 23 Feb 1990); Mauritius (12 Dec 1973; 1 Jul 1992); Mozambique (21 Jul 1993; 7 Mar 1990); Namibia (28 Nov 1994; 16 Sep 1992); Seychelles (5 May 1992; 30 Apr 1992); South Africa (10 Dec 1998; 9 Jul 1996); Swaziland (26 Mar 2004; 9 Oct 1995); Tanzania (11 Jun 1976; 9 Mar 1984); Zambia (10 Apr 1994; 2 Feb 1984); Zimbabwe (13 May 1991; 12 Jun 1986): <http://treaties.un.org/doc/Publication/MTDGS/Volume%20I/Chapter%20IV/IV-4.en.pdf> and http://www.achpr.org/english/ratifications/ratification_african%20charter.pdf.

of the norms set out in the SADC Treaty. This follows from the customary rule reflected in Article 31 of the Vienna Convention on the Law of Treaties, according to which a tribunal is required to interpret treaty norms in light of their ordinary meaning and context, taking into account 'relevant rules of international law applicable in the relations between the parties'.²⁸ In addition, as will be discussed further below, the SADC Tribunal has the power under Article 21(b) of the SADC Tribunal Protocol, to 'develop its own Community jurisprudence having regard to applicable treaties, general principles and rules of public international law and any rules and principles of the law of Member States'. In sum, these human rights instruments, and no doubt others as well, are in this way already *de facto* incorporated into the SADC Treaty.

It is of course true that there may be some legal effect to the addition of a reference to an instrument, or to specific norms, which are *not* binding on all SADC Member States. There is no legal obstacle to doing so. The problem in this respect is different: it seems inappropriate that a SADC Member State that is not already bound by such norms *directly* should agree to be bound by these norms *indirectly* by incorporating them into the SADC Treaty.

Observation 3

The SADC Tribunal has the power to interpret the SADC Treaty in light of human rights treaties binding on the SADC Member States, and to this extent there is nothing to be gained by amending the SADC Treaty to include a reference to any such human rights treaties.

²⁸ The 'parties', for this purpose, may be taken to mean the parties to the SADC Treaty.

2.4 SADC law as national law

Article 6(5) of the SADC Treaty imposes a particular obligation on SADC Member States. It provides that:

Member States shall take all necessary steps to accord this Treaty the force of national law.

This amounts to an obligation on Member States to ensure that the norms in the SADC Treaty are enforceable in the domestic legal order in the same way as national norms. Nonetheless, it raises a number of further issues.

i. Norms capable of being enforced at the domestic level

In the first place, it must be noted that, necessarily, this obligation applies only to norms capable of being enforced in a domestic legal system. Taking as a guide EU law, where this issue has been the subject of a decades-long jurisprudence, it may be said that these norms are those that are unconditional and precise, and not requiring any further legislative or administrative implementation.²⁹

ii. Norms in the SADC 'Treaty'

A further question concerns the meaning of the SADC 'Treaty' which must be given the force of national law under Article 6(5). Article 1 of the SADC Treaty defines the 'Treaty' as 'this Treaty establishing SADC and includes any amendment hereto'. It is open to question whether the other SADC norms over which the Tribunal exercises jurisdiction under Article 14(b) of the SADC Tribunal Protocol (which includes Protocols, other instruments adopted by SADC, and the acts of SADC institutions) are also to be given the force of national law.

However, there is an answer in Rule 75 of the Rules of Procedure, which expands on the preliminary rulings procedure, and which is an integral part of the SADC Treaty.³⁰ By definition, the preliminary rulings procedure is restricted to SADC norms that have the force of national law, which is to say, those referred to in Article 6(5) of the SADC Treaty. It is in this respect relevant that Rule 75 states that the preliminary rulings procedure applies to 'question[s] concerning the application or interpretation of the Treaty or its Protocols, directives and decisions of the Community or its Institutions'. To read the reference in Article 6(5) of the SADC Treaty in a more limited way would be to render Rule 75 largely redundant: such an interpretation must be rejected.

²⁹ The leading case is Case C-26/62, *Van Gend en Loos* [1963] ECR 1.

³⁰ The SADC Tribunal Rules of Procedure are an integral part of the SADC Tribunal Protocol (by Article 23 of the Protocol), and therefore also an integral part of the SADC Treaty (by Article 16(2) of the SADC Treaty).