



# DISPUTE RESOLUTION FRAMEWORKS AND THE MENACE STRANDING AFRICAN REGIONAL INTEGRATIONS: A CASE STUDY OF THE SADC TRIBUNAL

*Kassian Clemence Mshomba\** and *Dr. Damas Daniel Ndumbaro\*\**

## Abstract

*Regional integration forms the world's cooperation in safeguarding economies and political stability. Integration faces legal issues for determination in implementing the formed objectives necessitating intervention by conflict resolution organs. On the part of the SADC, there exists a Tribunal to fascinate some principles under the United Nations Charter under article 1(3) targeting at resolving international disputes in safeguarding*

*human dignity and all forms of freedoms. Establishment of such an organ aimed at preventing perseverance of any likelihood that seems to endanger or impair maintenance and subsistence of international peace and security under article 33(1) of the Charter of the United Nations.*

*Despite establishment of the SADC Tribunal with a number of cases heard and determined, execution of the decreed findings has constantly remained a nightmare. This article determines efficacy of the Tribunal and the way forward. With regard to the methodology, a comparative analysis method to the European Union has been invoked with some theoretical recommendations accorded towards appropriate legislative and institutional frameworks suiting the international benchmarks. Findings and recommendations for legal and institutional reforms for the sake of improving efficacy and sustainability of the integration have been accorded with some local content based scholarships emulated from the EU mode.*

**Key Words:** *Dispute Resolution, and regional integration law*

\* LL. B (Hons) (University of Dar es Salaam—UDSM), (LLM—International Law with International Relations (Tumaini University Makumira), (PhD Candidate—The Open University of Tanzania), Senior Resident Magistrate and Special Personal Assistant to the Attorney General of the United Republic of Tanzania, an Advocate of the High Court and subordinate Courts, also, a Notary Public & Commissioner for Oaths.

\*\* LL. B, LL.M, (University of Dar es Salaam, Tanzania), PhD in Law (The Open University of Tanzania), Legal Researcher, Legal Practitioner [Registered Arbitrator by Tanzania Institute of Arbitrators, Advocate of the High Court of Tanzania and Zanzibar, Notary Public & Commissioner for Oaths], Academician (UDSM and OUT), Member of Parliament of the United Republic of Tanzania (Songea Urban Constituency), Minister for Constitution and Legal Affairs in the United Republic of Tanzania, EX—Senior Lecturer, Post Graduate Coordinator in the Faculty of Law, Associate Dean Faculty of Law and Dean Faculty of Law in the Open University of Tanzania.

## 1.0. Introduction

An exploration for survival against mega economies and search for individual security, global communities found it crucially impeccable for States to join efforts against internal and external threats and forces. In safeguarding their meagre economies, developing States especially in Africa have attempted to detach from colonial ties and build independent, stable and sustainable economies capable of competing with strong global economies. From a general perspective, dispute resolution mechanisms cover single, bilateral, tripartite and multilateral States with multilateralism resorted into as revival strategy for securing raw materials and global markets.

Weitsman<sup>1</sup> defines multilateralism as collective responses to international challenges through foreign policies that emerged as threats to their economies. Differences in approach were the causes that necessitated formation of the Tripartite Free Trade Area (TFTA)<sup>2</sup> in a regional block trade liberalization and collective approach against the emerging challenges. The said mechanism covers approaches that do not hamper primary objectives of their establishment. In the contemporary world, regional integration covers political, economic and security aspects. Multilateralism addresses global challenges revolving around global economies in a positive spectrum emulated towards probable solutions to some elevated degrees though not absolute.

Most of the formed integration are geographical covering for instance; the East African Community, the Economic Community of East African Society for

1 Patricia A. Weitsman (2010), *The Meaning of Multilateralism: Alliances, Coalition, and Multinational Prosecution of Wars*, Bentley Annex, Ohio University, Athens OH 45701, pp. 2 & 3.

2 The Tripartite Free Trade Area (TFTA) is a proposed African free trade agreement between the Common Market for Eastern and Southern Africa (COMESA), Southern African Development Community (SADC) and East African Community (EAC), tracing roots in decision by Heads of Governments of COMESA, EAC and SADC in its first Tripartite Summit held in Kampala, Uganda in 2008 with the same signed in 2015.

Western Africa (ECOWAS), the Inter-Governmental Authority on Development (IGAD), Common Market of Eastern and Southern African (COMESA), Southern African Development Community (SADC) all in Africa. In Europe, there is the European Union whereas in America, there are the Union of South American Nations (UNASUR), the Southern Common Market (MERCOSUR), the Andean Community of Nations (CAN) and the Bolivarian Alliance for the Peoples of our America (ALBA). In Asia, there is the Regional Comprehensive Economic Partnership (RCEP).

Apart from geographical integration, other integration are on ideologies. They included the Eastern Block, which was based on the then socialism ideology, the Western block which is based on capitalism ideology, and the Non-Aligned Movement which covered States that opted not to form ties with the two blocks, that is, not in alignment with socialism or capitalism. Other integration have been religious affiliated organizations like the OIC, oil production organizations such as the OPEC or for security such as the NATO.

The genesis of the African integration, according to Laporte,<sup>3</sup> is that, since independence, Africa underwent various integration which were part and parcel of liberation strategies from colonial ties. Colonial history and donor dependent economies have impacted dispute resolution among member States. The nature of the current economies such as capitalism, the then socialism or State capitalism have all impacted mechanisms of dispute resolution in the respective sub-regional integration.

Historical background and choice of economy tended to shape dispute resolution mechanisms. In the realm of dispute resolution,

3 Laporte G., *“Regional co-operation and integration in Africa: An agenda for action at the national level” Regional Co-operation and Integration in the World Today: Papers from the first Open Forum*, Maastricht, 20<sup>th</sup> April, 1993 p. 1.

some States prefer local mechanisms with others preferring mechanisms within their respective sub regional blocks. Dispute settlement involving similar economies have been effectual regardless of their geographical locations evidenced under the OPEC, BRICKS and the G8 which share similar policies and economies with strong hold economic projections and focus. The ever formed integration have projected need for alliances nurtured through big rallies and movements towards global political independence.

Significantly, integration embraced crucial positivity resulting into political independence in some African States. These have largely resulted into easy formation of sub regional integration in Africa. After the termed “ceremonial political independence”, Africa like other regional and sub-regional blocks forcibly formed regional integration including those at sub regional level in addressing economic and security issues which States in other blocks managed to address at different levels. Considering the state of brotherhood, such integration faced no significant hard times for their existence though unlike operationalization of the communal integration, the new formed integration were merged into some formal and modern means of integration.

Such mechanisms carry with them Western elements linked with economic interests. Portraying historical background on African integration, Msuya<sup>4</sup> revealed that, African integration are traced through the Pan African Movement Conferences that were held in London in the years 1900, 1919, 1921 and 1923 during the colonial era. According to the author, the experience drawn from the above conferences shaped the current regional integration. In the medieval integration, focus was on freeing Africans from colonial ties with

the current approach focusing at economic liberation. He added that, a remarkable African integration was marshaled through the 6<sup>th</sup> Pan African Movement Conference in 1945 attended by Kwame Nkrumah and Jomo Kenyatta. Msuya<sup>5</sup> clarifies that, African integrations were manifested in 1970s through the Lagos Plan of Action that was signed by members of the then Organization of African Union (OAU) in 1980 requiring Africa to establish sub-regional economic integration ahead of an African Economic Community to enhance both economic and political stability.

The Lagos Plan of Action led into formation of the Southern African Development Community (SADC) ahead of the continental objective set by the African continent for the sake of achieving the 2025 Lagos Plan of Action towards African integration that will find Africa unite through common interests. SADC was formed for the purposes of forming regional links with multilateralism through correlating principles. Formation of integration carries with them disputes necessitating forging of proper and efficient forums in solving disputes in the course of implementing objectives of the said integration. In the like-minded, establishment of the SADC through the SADC Treaty also provides for means of dispute settlement and mechanisms through the SADC Tribunal. The SADC Tribunal settles disputes under article 52(1) of the UN Charter.<sup>6</sup> It aims at subduing emerging disputes in safeguarding the teleology of the established principles under the United Nations Charter in resolving such disputes towards global safety and prosperity.

4 Msuya Waldi Mangachi, “*African Regional Integration: East African Experience*”, Chief Joop Bernhout (OON), 2011, pp. 6 & 7.

5 Ibid.

6 Charter of the United Nations, 1945.

## 1.1. Establishment and composition of the SADC

Establishment of the SADC was geared by some States in the realm of the Sub Saharan region towards a devoted and merged efforts ahead of a political, economic and social stability. The SADC joins other existent regional integration through some established multilateral correlating principles focusing at merging their respective meagre economies mostly existent in developing African countries that, alone, would be incapable of competing against the formed strong and stable global economies. The SADC replaced the Southern African Development Coordination Conference (SADCC) that was established by the then front-line States in 1980 with its capital in Lusaka, Zambia. Such approach had targets in ensuring and maintaining survival.

The SADC facilitates free movement of people and commodities through various transactions. The said free movements have experienced some regular disputes involving individuals, States, organizations or between States and individuals, and organizations depending on the nature of the respective transaction. Like other integration elsewhere, the encountered challenges necessitated SADC to form some mechanisms in addressing and facilitating smooth achievement of the set objectives of the established sub regional integration in Sub Sahara.

The Southern African Development Community (SADC) consists of fifteen member States.<sup>7</sup> The Southern Africa sub regional block was established vide a declaration by Heads of States or Governments of Southern Africa<sup>8</sup> pursuant to a Treaty of the Southern African Development Community with some

<sup>7</sup> SADC members are: Angola, Botswana, the Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

<sup>8</sup> Declaration by Heads of State or Governments of Southern Africa in Windhoek dated 17<sup>th</sup> August, 1992 with the same entering into force on 30<sup>th</sup> September, 1993.

key objectives for economic development. Operationalization of SADC is governed by the Treaty and other aligned instruments which supplement the establishing Treaty that facilitates smooth implementation of the Treaty. The Treaty operates smoothly through functional disputes resolution mechanisms covering the SADC Tribunal. Essentially, formation of the said regional integration was gradually demonstrated in developing countries whereas SADC Heads of States and Governments in the region agreed to redress the situation vide major reforms in 2001 to strengthen their respective economic, political and social goals.

## 1.2. Domestication of international instruments for enforcement purposes

Peaceful settlement of international disputes has been a long term outcry within the international community in the auspices of the UN Charter through establishment of international institutions at regional and global levels in guardianship of the United Nations Charter. Effectiveness and operationalization of dispute settlement mechanisms in the globe generally have been affected by both internal and external factors within and beyond powers of the respective member States. For instance, hindrances impeding global objectives achievement occurs when some States rescinds from undertaking their roles including their abstinence from ratifying the instruments.

Oppong<sup>9</sup> found that, many African States have monist constitutions where before operationalization treaties have to be duly ratified to acquire legal force upon publication in their States through a domestic legislation. There is no enforcement of foreign judgment including decisions by the SADC Tribunal if ratification and domestication are dishonored.

### Municipal reviews of the decisions of the

<sup>9</sup> Rich Frimpong Oppong, "Enforcing Judgments of the SADC Tribunal in the domestic Courts of member States", Trade Law Centre for South Africa, the Konrad-Adenauer-Stiftung, 2011, p. 129.

SADC Tribunal undermine administration of justice which is total disregard of the decisions of the tribunal. Crediting decisions by international bodies in remedial of the evolving tendency by Members, the Permanent Court of International Justice in *Chorzow Factory (1928)* underscored that, a national court decision cannot have power to invalidate a decision by an international body or rather an organ. Another impediment occurs when States deliberately refuse to execute decisions of the said organs.

### 1.3. Establishment of the SADC Tribunal

Dispute resolution mechanisms have been in existence from the primitive ages in the medieval eras. Notably, challenges in dispute resolution have been persistent though varying in degrees. Severity and complexity in dispute resolution depends on the level and advancement of the dispute under scrutiny, parties and subject matter to mention but a few from the long list.

Resolution leading to series of dispute settlement mechanisms was initiated by the UN.<sup>10</sup> A move for such mechanisms guarantees the objectives initially formed in the respective organizations. Guided by the set out principles regarding existence of some mechanisms for disputes settlement, resort was initiated by the SADC by forming a mechanism named as the SADC Tribunal to determine disputes. It was achieved through amendment to the SADC Treaty that was effected in Blantyre.<sup>11</sup> The amendment set mechanisms for dispute settlement through establishment of the SADC Tribunal with the very SADC Tribunal situated in Windhoek, Namibia. The invoked amendment to the Treaty promulgated crucial forum for dispute settlement within the region.

As remarked by Lenz,<sup>12</sup> SADC has a dispute resolution mechanism through the Consolidated Protocol on Trade.<sup>13</sup> After its inception and coming into force of the SADC Treaty, the community embarked on mechanisms in resolving disputes within the community. Disputes have been preferred before the SADC Tribunal through both arbitration and mediation mechanisms despite being ineffective as some States have refused execution of such findings of the Tribunal.

The European donor States expressed their doubts whereas in the end result, the EU donor States proposed to SADC for establishment or formation of effective mechanisms in resolving the emerging disputes. The Consolidated Protocol on Trade focuses at determination of the rights and obligations of the Member States. In the course of implementing the set out goals, regard should always be that, whatever dispute settlement a State or integration resorts into or chooses should ensure compliance/adherence to and should operate without suppressing the associated principles that have been either universally agreed or uniformly set under the United Nations Charter, otherwise, the same will out-rightly be rendered redundant or declared outfit.

Unlike jurisdiction of other dispute resolution mechanisms in other blocks, the SADC Tribunal acquires jurisdiction upon exhaustion of the available local remedies<sup>14</sup> in matters involving member States and between juristic and natural personalities under Protocol to the SADC Treaty.<sup>15</sup> Any decision has to be enforced to render the tedious job by the adjudicative body meaningful and valuable. In other words, objectively, dispute settlement mechanisms should comprise of binding decisions and parties to a dispute

10 United Nations General Assembly No. 2627 (XXV) of 24<sup>th</sup> October, 1970, 2734 (XXV) of 16<sup>th</sup> December, 1970 and 40/9 of 8<sup>th</sup> November, 1985.

11 Amendment to the SADC Treaty, article 32 done in Blantyre, Malawi in August, 2001 with the Tribunal becoming operational in 2005.

12 Lenz, "Spurred Emulation: The EU and Regional Integration in Mercosur and SADC", 35(1) *West European Politics* (2011), p. 155 at p. 166.

13 Consolidated Protocol on Trade, article 32.

14 The SADC Treaty, article 15.

15 The Protocol to the SADC Treaty, article 15(2).

should not arbitrarily recourse to unilaterally obstructed implementation. The established SADC Tribunal has been objectively in line with the SADC Treaty<sup>16</sup> by issuing binding decisions despite facing execution hurdles.

#### 1.4. Adjudication and implementation of decisions by the SADC Tribunal

The immediate question that prompted this study is as to whether or not; the findings met by the SADC Tribunal are practically final and exclusively binding to the respective parties to the dispute and whether the same are executable. The practice shows that, despite its perceived binding force, execution of such orders and decrees has been ineffectual due to lack of “political will” on the part of the member States. Without “political will” from SADC members, compliance with the SADC Treaty in accordance with what has been ratified for in the treaty and other instruments for the sake of economic boost in the SADC region will never be attained.

Adjudication function of the Tribunal was put into test on expropriation of agricultural land in Zimbabwe. Out of a total nineteen decisions that the Tribunal issued before its functions were suspended or caused redundant by implication due to conducts of the Member States, eleven of them were against the Government of Zimbabwe whereas eight of the eleven decisions related to claims over discriminatory expropriation of agricultural land in *Mike Campbell (Pvt) Ltd and Others*.<sup>17</sup> Two of the eleven decisions were on an alleged violation of human rights including *Luke Tembani vs. Republic of Zimbabwe*<sup>18</sup> where the applicant claimed to have been denied fair hearing following seizure of his mortgaged property on land. In *Gondo and Others vs. Republic of Zimbabwe*,<sup>19</sup> the

Government of Zimbabwe refused to effect court orders of Zimbabwean domestic courts for relief to some victims of violence.

The last decision was against the Government of Zimbabwe in exclusion of the United Peoples’ Party of Zimbabwe from the power sharing process in Zimbabwe as resolved by the SADC during an Extraordinary Summit held in March, 2007. For the eight cases, five were on internal employment disputes between SADC and its employees<sup>20</sup> whereas the remaining three decisions were on default judgments against the Democratic Republic of Congo for unlawful seizure of property,<sup>21</sup> denial of jurisdiction involving deportation from Tanzania due to non-exhaustion of local remedies<sup>22</sup> and condonation of a late filing of defense by the Government of Lesotho regarding cancellation and revocation of mineral leases.<sup>23</sup> Resistance in execution of decisions of the SADC Tribunal rendered the Tribunal ineffective and dormant.

An award by a Tribunal or Court has to be executed for the same to materialize. It connotes that, an award without execution amounts to a mere paper decree. It is clear that, many awards by the SADC have faced execution challenges for lack of “political will”. If decisions by such courts and or tribunals are disregarded as happened in decisions given by the SADC Tribunal, the Tribunal will obviously be redundant as the decisions will be useless. Execution hurdles regarding awards by the SADC Tribunal are addressed through manifestation of “political will”.

16 The SADC Treaty, articles 1(g) and 16(1).

17 *Mike Campbell (Pvt) Ltd and Others vs. Republic of Zimbabwe*, Case No. SADCT 02 of 2007.

18 *Luke Tembani vs. Republic of Zimbabwe*, Case No. SADC (T) 07 of 2008.

19 *Gondo and Others vs. Republic of Zimbabwe*, Case No. SADC (T) 05 of 2008.

20 *Angelo Mondlane vs. SADC Secretariat*, Case No. SADC (T) 07 of 2009; *Clement Kanyama vs. SADC Secretariat*, Case No. SADC (T) 05 of 2009; *Bookie Monica Kethusegile-Juru vs. SADC Parliamentary Forum (Judgment)*, Case No. SADC (T) 02 of 2009; *Bookie Monica Kethusegile-Juru vs. SADC Parliamentary Forum (Preliminary Objections)*, Case No. SADC (T) 02 of 2009 and *Ernest Francis Mtingwi vs. SADC Secretariat*, Case No. SADC (T) 01 of 2007.

21 *Bach’s Transport (PTY) LTD vs. Democratic Republic of Congo*, Case No. SADC (T) 14 of 2008.

22 *The United Republic of Tanzania vs. Cimexpan (Mauritius) LTD and Others*, Case No. SADC (T) 1 of 2009.

23 *Swissbrough Diamond Mines and Others vs. The Kingdom of Lesotho*, Case No. SADC (T) 04 of 2009.

An expression of “political will” can be derived from the case of Mike Campbell (Pvt) Limited, a registered Company in Zimbabwe against the Government of Zimbabwe. The case was instituted on 11<sup>th</sup> October, 2007 before the SADC Tribunal under article 28 of the SADC Protocol for interlocutory measures to obstruct the Government of Zimbabwe from evicting Mike Campbell (Pvt) Limited and others over expropriation of agricultural land in Zimbabwe. By that time, the said matter and some others were pending in the Supreme Court of Zimbabwe. The cases were instituted in response to the Amendment Act No. 17 of 2005 to the Constitution where the Government legalized seizure of farms owned by some individuals contrary to SADC Statutes.

The Supreme Court of Zimbabwe emphatically portrayed that, the instigated constitutional amendments allowed the Government to seize land without effecting compensation. The amendment ousted local courts from acting contrary to the Zimbabwean policy on land reforms with article 2(2) by declaring all agricultural land to had been acquired and vested to the State.

On the other hand, there have been crucial examples in abrogation of the existing international principles. For instance, the Supreme Court of Zimbabwe technically challenged the impact of a foreign decision in the case of *Gramara (Private) Ltd (2010)*. It was held that Zimbabwe had not taken any specific internal measures to domesticate the SADC Treaty of the Protocol of the Tribunal in terms of article 32 of the Treaty for enforcement of decisions of the Tribunal. It has been reported that Zimbabwe has been referred to the SADC Summit three times but no action has been taken whatsoever. It is through such technical avoidance of decisions by foreign bodies not within their local jurisdiction or rather not binding in their judicial hierarchy, thus finding member

States not domesticating such instruments in execution of decisions made by the SADC Tribunal. Under such circumstances, since local jurisdictions demand domestication of international instruments, failure to domesticate such sub regional instruments for instance under SADC amounts to non-enforcement of decisions of the Tribunal.

Unlike what has been proclaimed by the Government of Zimbabwe, the SADC Treaty<sup>24</sup> requires member States to act in accordance with Human Rights principles, democracy, rule of law and equity, balance and mutual benefit as well as invocation of peaceful means of dispute settlement within the community and all related relations in manifesting its objectives in their operations. Under the Treaty,<sup>25</sup> both SADC and its member States are required not to discriminate any person on grounds of gender, religion, political views, race, ethnic origin, culture or disability.

The Treaty<sup>26</sup> further caters for primary mandate of the Tribunal to ensure proper interpretation of the SADC Treaty provisions and the respective subsidiary instruments. Besides, adjudication powers are also extended upon such disputes as may be referred to it. Summarily, the SADC Tribunal aims at protecting interests and rights of its SADC Member States and citizens as well as developing jurisprudence of the community with reference to the Treaties in force, general principles and rules of public international law capturing protection of foreign investments and multinational companies. The SADC Treaty<sup>27</sup> notwithstanding is principally clear that, the findings of the SADC Tribunal are final and exclusively binding to the parties to the dispute.

---

24 The SADC Treaty, article 4.

25 The SADC Treaty, article 6(2).

26 The SADC Treaty, article 16(1).

27 The SADC Treaty, article 16(5).

### 1.5. Status and compliance with decisions made by the SADC Tribunal

Compliance with the orders made in decisions by the SADC Tribunal as an entrusted body in resolving disputes has been upsetting through invocation of peaceful means of settlement of international disputes to the extent of hindering status thus endangering survival of the SADC Tribunal and the community. For instance; in *Mike Campbell (Pvt) Ltd and others vs. Republic of Zimbabwe*<sup>28</sup> the Government of Zimbabwe, subsequent to the decision, declined compliance to the decision of the Tribunal. Another case was *William Campbell and another vs. Republic of Zimbabwe*<sup>29</sup> whereas the SADC Tribunal requested the SADC Summit to take measures against the Government of Zimbabwe for its noncompliance as statutorily mandated. As a result, the SADC Tribunal referred the matters to the Summit for appropriate measures. Notably, those references the respective authorities to the Summit yielded nothing meaningful in result.

Among controversies leading to emerged differences in the SADC Tribunal were enforcement of individual rights through the SADC Tribunal challenging Zimbabwe's land grabbing Policy considering that challenging the same in local courts had been impliedly barred by law for according to the constitution of Zimbabwe, land disputes are determined by the Zimbabwe Land Commission<sup>30</sup>. Zimbabwe as a Member State was confronted by her whitish subjects to the SADC Tribunal for redress with about 80% of cases referred to the Tribunal being from individuals against SADC Member States. Obviously, institution of cases in the Tribunal was seriously obstructed by the Zimbabwe's Land Policy that impacted

the Zimbabwean political status especially the ruling regime under Zimbabwe African National Union–Patriotic Front (ZANU–PF). Werner Scholtz and Gerrit Ferreira<sup>31</sup> said that, the conduct of Zimbabwe towards the SADC Tribunal connotes States' focus to find their sovereignty respected at any cost.

Such reluctance in allowing the SADC Tribunal to adjudicate against their respective States in protection of their delightful but misery State sovereignty mainly in protection and manifestation of individuals' interests portrays lack of sense of duty and responsibility among SADC member States when undergoing regional integration processes. Such state of affairs against full-fledged disputes resolution bodies and mechanisms curtails operationalization, effectiveness and sustainability of integration. Among critical battles emerged in *Mike Campbell and Others vs. The Republic of Zimbabwe*(supra) before the SADC Tribunal where the litigants required the Tribunal to address validity of the land reforms by the Government of Zimbabwe whereas under the Constitution of Zimbabwe<sup>32</sup>, all agricultural land could be acquired by the Government for resettlement under Zimbabwean Land Reform Policy. Later on, the SADC Tribunal issued an interim order against the Government of Zimbabwe that it should not take steps or permit be it directly or indirectly with regard to the intended acquisition until determination on merits.

The Government of Zimbabwe bitterly responded to the interlocutory orders of the Tribunal through clear indications of the political encounter signifying lack of "political will" on part of the Zimbabwean Government to comply with such decisions. Moreover, amendment to the Constitution of

28 *Mike Campbell (Pvt) Ltd and others vs. Republic of Zimbabwe*, Case No. (SADC (T) 02 of 2007.

29 *William Campbell and another vs. Republic of Zimbabwe*, Case No. (SADC (T) 03 of 2009.

30 The Constitution of Zimbabwe, article 297.

31 Werner Scholtz and Gerrit Ferreira (2011), "Much Ado about Nothing? The SADC's Tribunal Quest for the Rule of Law Pursuant to Regional Integration", Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, p. 352.

32 The Constitution of Zimbabwe, section 16B of amendment 17 of 2005.

Zimbabwe<sup>33</sup> ousted jurisdiction of the courts in Zimbabwe from determining any preferred challenge concerning land acquisition. The SADC Tribunal has in two other occasions found the Government of Zimbabwe in breach of its Orders previously issued against Zimbabwe.

In a nutshell, studies have revealed that “political will” is crucial in minimizing disputes on one hand and in resolving emerging disputes on the other hand. “Political will” is manifested through “good faith” under the Manila Declaration<sup>34</sup> that extends to vest duty to States to act in good faith by avoiding disputes against States in disrupt of friendly relations. “Good faith” extends to cooperation to States striving for early and equitable settlement of existing disputes with these obligations enshrined in accordance with the Charter of the United Nations and in accordance with the Manila Declaration whereby the General Assembly urged States to observe and promote “good faith” to the Declaration in the peaceful settlement of international disputes. Unless “good faith” is invoked and nourished, no disputes especially between States amongst will be solved.

Another case was that of *Fick & Another vs. Republic of Zimbabwe*<sup>35</sup> and *William Campbell and another vs. Republic of Zimbabwe* (supra) where orders of the SADC Tribunal led the Government of Zimbabwe to formally withdraw from any legal proceedings involving the Tribunal until the Protocol on the Tribunal and the Rules of Procedure of the Tribunal are ratified by at least two-thirds of the SADC Member States. Non-compliance with the Tribunal decisions was made clear vide a letter dated 7<sup>th</sup> August, 2009 which was delivered to the registrar of the Tribunal by the Minister for Legal Affairs of Zimbabwe,

one Patrick Chinamasa, adding that, the Tribunal did not exist, thus any decisions against Zimbabwe, therefore, would be null and void.

The conducts of the Government of Zimbabwe also defeated the teleological Protocol to the SADC Treaty for the same contravened the provisions of the Vienna Convention.<sup>36</sup> The Government of Zimbabwe was in breach of the SADC Treaty and was in contravention of the doctrine of *pacta sunt servanda* provided for under the Vienna Convention<sup>37</sup> which means that agreements, including international or regional treaties or conventions, must be honored in good faith.. Essentially, the position of the said article precluded Zimbabwe from withdrawing from the SADC Tribunal. The available option would be to withdraw from the SADC in accordance with the SADC Treaty.<sup>38</sup> Had there been “political will” on the part of the Government of Zimbabwe, it would have resorted to an alternative that guarantee compliance.

## 1.6. Constitutionality and legality of the SADC Tribunal

After the Campbell decision in August, 2009, the Government of Zimbabwe contended that the Tribunal was not properly constituted. Zimbabwe further remarked on its non-cooperation with the Tribunal arguing that any future decision against Zimbabwe would be null thus inoperative. This was made clear vide the submission that the agreement amending the Southern African Development Community Treaty<sup>39</sup> has not entered into force as it has not been ratified. Notably, the Protocol establishing and regulating operationalization of the Tribunal was not ratified by Zimbabwe, meaning that, the Tribunal was not competent to hear cases against Zimbabwe.

33 The Constitution of Zimbabwe, article 17.

34 Manila Declaration, section 1.

35 *Fick & Another vs. Republic of Zimbabwe*, Case No. SADC (T)

01 of 2010.  
36 The Vienna Convention on the Law of Treaties, 1969, article 18.  
37 The Vienna Convention on the Law of Treaties, 1969, article 26.  
38 The SADC Treaty, article 34.  
39 Available at <http://www.sadc-tribunal.org/docs/AgreementAmendingTreaty> accessed on 3<sup>rd</sup> July, 2015.

33 The Constitution of Zimbabwe, article 17.

34 Manila Declaration, section 1.

35 *Fick & Another vs. Republic of Zimbabwe*, Case No. SADC (T) 01 of 2010.

The afore going argument was based on deformation of the amendment procedure for the SADC Treaty<sup>40</sup> that required ratification by two thirds of the signatory member States before coming into force. The SADC Treaty<sup>41</sup> is clear that, any amendment to the Treaty shall be adopted by a decision of three quarters of the Member States of the Summit in attendance. With this requirement in demand, the amending SADC Treaty<sup>42</sup> made it clear that, for the purposes of enforcement, the same shall enter into force on the date of its adoption by three quarters of the members of the Summit. The Vienna Convention<sup>43</sup> allows expression of consent to be bound by States in any desired mode.

Through such interpretation, the amendments that amended the SADC Treaty would be operative instantaneously after its adoption by the Summit on 14<sup>th</sup> August, 2001. Enforcement of the decisions of the SADC Tribunal would be binding upon expression of “political will” to enforce the decisions. SADC Member States have strived to rescue the SADC Tribunal from collapsing manifested by the fact that before suspension of the SADC Tribunal, a Probe Task Force was formed to inquire on validity of the SADC Tribunal.

The report by the independent body on validity of the SADC Tribunal found the Tribunal to have been properly constituted in accordance with international laws. Despite the finding of the report, suspension of the SADC Tribunal was extended for another year with Ministers of Justice and Attorney Generals of the SADC member States tasked and commissioned to conduct another review. In June, 2012, the responsible Ministers and Attorneys General recommended for the SADC Tribunal to be changed so that it ceases to hear Human

Rights cases until the Human Rights Protocol of the SADC is adopted. As a result, the SADC leaders negotiated a protocol for the purposes of refraining from entertaining rights of individuals in accessing the Tribunal with the same signed in August, 2014 at the SADC Summit by nine SADC leaders. For the sake of operationalization of the Protocol and change of the Tribunal, it was made a requirement for at least ten Member States of the SADC to sign and ratify the Human Rights Protocol of the SADC.

By deferring settlement of the core disputes to regional blocks regardless of the involved parties especially in cases involving individuals might serve both the purpose and cure the persistent anomalies. That will certainly unlock the staleness that has caused matters not to be attended thus creating chaos. The experienced arguable hurdles are clear indications that the SADC Member States lack “political will” in solving disputes emanating from the sub-regional block. Besides, most SADC Member States have regularly proved fragile whenever disputes are channeled through the Tribunal threatening existence of the Tribunal and the community itself at large.

Following misunderstandings between the Government of Zimbabwe and the SADC Tribunal in executing its orders, instead of persuading Zimbabwe to comply, it became strange that the SADC Summit refrained from posing sanctions against Zimbabwe and instead, rewarded Zimbabwe for her reluctance by entering into a resolution for the Tribunal to be suspended that the SADC Treaty can be amended for a forum to handle inter State grievances. Unfortunately, the SADC Treaty<sup>44</sup> does not specify the nature of the sanctions to be adopted by the Summit.

The SADC Treaty ought to have stipulated sanctions in noncompliance with the SADC

40 The SADC Treaty, article 41.

41 The SADC Treaty, article 36(1).

42 The Agreement Amending the Treaty of the Southern African Development Community adopted on 14<sup>th</sup> August, 2001, article 21.

43 The Vienna Convention of the Law of Treaties, article 11.

44 The SADC Treaty, article 33(2).

Tribunal decisions. To the contrary, neither the SADC Treaty nor the amending Protocol to the Treaty that extends the mandate of the Summit to suspend both the functions and duties of the Tribunal. Suspending functions of the SADC Tribunal brings negative impacts towards dispute settlement within the SADC regional block. Although the SADC can refer matters to the Secretary General of the UN for assistance in resolving any dispute arising within SADC sub regional block, such alternative is not meaningful in so far as SADC has her own means of addressing disputes arising within the sub-region.

It will be tedious to address disputes between member States if they are unable to handle them in a friendly sub regional block mechanism. Such weakness marks a step towards disintegration of the SADC. Understandably also is the key factor of “political will” for no sanctions that have been fruitful taking into account the fact that Membership to the SADC Treaty is voluntary and not mandatory. Since disputes are generally inevitable; effective and practicable dispute resolution mechanisms characterized by “political will” are needed.

### **1.7. Comparative analysis between the SADC and EU on adjudication and execution**

The SADC is a sub-regional block resembling the European Union (EU) although there are significant differences suiting its establishment. F. Regarding the EU, the European Commission discharges the following roles: legislative—in making legislative proposals to the Parliament and the Council; implementation—in ensuring policies of EU are effected; legal—in enforcing the purposes of the laws enacted by the EU in collaboration with the Court of Justice and representative—covering the role of representing the EU at international level

and forums.

The SADC Tribunal plays the adjudicative role of the SADC with its decisions lying to the Executive for the purposes of execution through sanctions in case of refusal by the respective defaulting State. This marks a significant difference between the SADC and EU in rendering decisions made by the dispute resolution mechanism effective. The European Commission is commissioned with powers to propose new legislation. Furthermore, it oversees the aspect of implementation of the EU within the Member States. In case of failure to implement decisions made by the European Commission, the European Commission is mandated with powers to initiate some formal procedures before the European Court of Justice for implementation.

Jurisdiction of the European Court of Justice is with regard to reviewing of legality of the acts of legislative personnel, the Council, the Commission and of the European Central Bank other than recommendations, opinions and of acts of the European Parliament and of the European Council intended to produce legal effects vis-a-vis third parties.<sup>45</sup> Also, if there is a complaint against the European Parliament, the European Council, the Council, the Commission or the European Central Bank over infringement of the Treaties and failure to act; the EU Member States and other institutions within the Union will be at liberty to take an action before the Court of Justice of the European Union to have the alleged infringement established. This particular article shall apply under the same conditions, bodies, offices and agencies of the European Union that has failed to act.<sup>46</sup>

Jurisdiction of the Court of Justice of the European Union regarding compensation for damage as provided for in the second and third

45 The Treaty on the Functioning of the European Union, article 263.

46 The Treaty on the Functioning of the European Union, article 265.

paragraphs of the European Union,<sup>47</sup> coverage to disputes between the EU and its servants within the limits and within the conditions laid down in the Staff Regulations of Officials and the Conditions of Employment of other servants of the Union<sup>48</sup> and in respect of judgment pursuant to any arbitration clause contained thereat in contracts concluded by or on behalf of the EU whether those contracts are governed by public or private law.<sup>49</sup>

The European Court of Justice do not adjudicate grievances preferred by some individuals for they are addressed through some standards of procedures at national level. Under the circumstances where there is no remedy under national laws, one is permitted to prefer a matter before the European Court of Justice.<sup>50</sup> This is not the position under the SADC where matters falling within local jurisdiction of the Member States are unnecessarily instituted in the SADC Tribunal. Despite determination of individual disputes by the European Court of Justice, enforcement of the decisions may as well be effected through domestic courts both directly and indirectly or through invocation of the well-known and established doctrine of State responsibility.

## 1.8. Conclusion

Although States may agree on mechanisms for resolving international disputes through pacific means as is the case for instance of the SADC through the SADC Tribunal, commitment and determination should be manifested by the respective States. Unless “political will” is unleashed by States, avoidance of duties and responsibilities will result into States noncompliance and hence international peace and security through pacific means of settling such international disputes will not be realized.

Such an approach will only practical when State Members adhere into their national and international responsibilities and avoid reliance on the captivity and shadow of State sovereignty in inapplicable situations backed by ill motive when individuals are pursuing their rights. What should be refrained from is political influence in the decision making process and enhance “political will” in enforcing decisions of international, regional and sub-regional organs. Otherwise, lack of “political will” will result into disintegration of regional integration, the SADC inclusive. This should be avoided through strengthening of good State relations, international organs and institutions in a diplomatic mode that respects human rights.

---

47 The Treaty on the Functioning of the European Union, article 268.

48 The Treaty on the Functioning of the European Union, article 270.

49 The Treaty on the Functioning of the European Union, article 272.

50 The Treaty on the Functioning of the European Union, article 267.