Looking at the Southern Africa Development Community Tribunal through the eye(s) of the WTO's Dispute Settlement Mechanism

By:

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Introduction

A rules-based system without an avenue for dispute resolution would be ineffective because the rules underpinning it would not be enforced. Whether a particular regional or multilateral trade arrangement is rule-based depends entirely on the jurisdictional powers of the court or tribunal established as part of such a trade regime[2]. It is within this spirit and tenor that the Southern African Development Community ("SADC") established the SADC Tribunal ("the Tribunal")[3].

This article sheds light on the new jurisdiction of the Tribunal and looks at the implications this has on the settlement of disputes within the SADC region. The

article particularly looks at the extent to which the removal of private access from the Tribunal's jurisdiction affects the settlement of trade disputes within SADC; the relevance of the new Tribunal within the framework of Annex VI of the SADC Protocol on Trade[4] ("the Protocol on Trade"), and whether the new Tribunal is reconcilable with World Trade Organization ("WTO") 's dispute settlement mechanism, which is regarded as being one of the salient features of the international trading regime[5].

To fulfil its aim, the article explores and reviews the legal instruments pertaining to the trade arrangement within SADC and searches for regional case law to guide the study. Further, a comparative gaze at the dispute settlement framework of the WTO for the purpose of extracting lessons for replication is undertaken. For these reasons, the methodology employed herein is a doctrinal analysis of legal instruments, case law and academic works.

The Tribunal and Trade Disputes

An independent and efficient dispute settlement body is integral to international economic integration. It provides an avenue for enforcing the rules underpinning a particular trade regime and its jurisprudential development[6]. Whether a particular regional or multilateral trade arrangement is rule-based depends entirely on the jurisdictional powers of the court or tribunal established as part of such a trade regime[7].

The primary function of the Tribunal is to ensure the proper interpretation of the provisions of the SADC Treaty and all instruments ancillary thereto and to adjudicate all matters referred to it[8]. This notwithstanding, the 32nd Summit of Heads of State of SADC resolved that the Tribunal's operations are indefinitely halted, and a new Protocol to the Tribunal is negotiated[9]. As a result of that decision, a new Protocol for the Tribunal was signed in 2014[10]. The new Protocol limits the jurisdiction of the Tribunal to disputes between Member-States[11]. This decision has the effect that the Tribunal no longer has the competence to hear disputes of private parties.

The SADC Summit of Heads of State's decision to confine the Tribunal's jurisdiction to disputes between the Members States has received a plethora of criticism, particularly insofar as its implications on human rights, the rule of law and regional integration within SADC[12]. This decision was triggered by the

finding of the Tribunal in the matter of *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe[13]*, wherein the Tribunal held that the program of the Zimbabwean government to expropriate land without compensation violated Articles 4 and 6 of the SADC Treaty.

Albeit the restriction of private access to the Tribunal disregards the rule of law, human rights and regional integration[14], limited literature exists on the effects the Summit's decision has on trade-dispute resolution in the region, hence the relevance of this article. This notwithstanding, however, it is common cause that private individuals have no standing before international dispute settlement bodies[15]. In other words, it is not unusual that dispute-settlement proceedings in a multilateral and/or regional trade arrangement are confined to States Parties acting on behalf of private interests[16]. In the same vein, a survey of the case law reveals that the Tribunal has not had occasion to adjudicate upon a trade dispute during its existence, as none of the 18 cases heard thereby were trade-centred[17]. It could be argued that this is due to the forum shopping, which gives Members-States options on which body they wish to hear a dispute, and parties utilizing non-legal means of resolving disputes[18].

The new Tribunal *vis-à-vis* the dispute settlement mechanism of the WTO

The DSM of the WTO is characterized by the panel process and a concomitant appeal avenue in the event of a losing state not being satisfied with the legal findings of a panel[19]. Annex VI of the Protocol on Trade is the primary instrument for settling trade disputes within SADC[20]. However, the regime is not complete until an appellate mechanism is formalized in the form of the new Tribunal[21]. This is especially true when one considers the fact that Annex VI is modelled on the WTO's DSM[22]. As a matter of fact, it has been noted that one of the first regional dispute settlement systems to import the WTO rules and procedures in Africa is the SADC Protocol on Trade by virtue of its Annex VI[23].

The Tribunal has not yet become operational owing to insufficient Member States' ratification[24]. One may argue that this is partly because of Article 50 of the Protocol to the new Tribunal, which makes the current jurisdiction optional in that member states can elect to withdraw from the jurisdiction of

the Tribunal[25]. It is, therefore, argued that until the jurisdiction of the Tribunal is made mandatory through amending Article 50 of the new Protocol and the new Tribunal made fully operational, indirectly activating its appellate jurisdiction, SADC will be outside the WTO dispute settlement framework. Furthermore, member-state will persist with alternative fora to settle trade disputes. This will not only adversely affect the jurisprudential development expected of any dispute-settlement regime and undercut the effectiveness of the SADC free trade area but will also hinder regional integration.

A question may be posed as to why there is a need to ensure that the Tribunal is consonant with an unAfrican or euro-centric model such as that of the WTO? This concern can be neutralized as follows: SADC was established due to the recommendations of the United Nations Economic Commission for Africa ("UNECA")[26], i.e. the creation of sub-regional systems composed of single economies for economic integration and empowerment[27]. In other words, sub-regional bodies are seen as vehicles through which globalization can be achieved. Accordingly, the application of the WTO model within SADC should be viewed as being aimed at familiarizing SADC member states with the multilateral regime of the WTO, most of whom double as members thereof. Mancuso[28] postulates that the Global South is often lagging behind in development due to external debt and dependency on foreign loans and the unreliability and *unpredictability of legal and judicial systems[29]*. Accordingly, a uniform and predictable legal framework are necessary for SADC and Africa to maintain sustained levels of investment and trade[30].

The converse is that the DSM of the WTO is far from perfect. As it stands, the WTO's Appellate Body ("AB") is currently dysfunctional in that the requisite number of constituent members have not been appointed[31]. This has been attributed to the United States of America (USA)'s blockage of the appointments citing, among others, issues of judicial activism by the AB and its advisory opinions being insufficient in resolving disputes[32]. However, the general consensus is that these issues are only of concern to major trade powers like the USA and other rich countries[33] and that an active AB is desirable, as, without it, the WTO DSM will lose its predictability[34].

Conclusion

The SADC free trade area is a rules-based regime that requires an operational and effective dispute-settlement body to function optimally. It has been found that the current state of the Tribunal renders it incomplete, particularly when regard is had to the fact that Annex VI of the Protocol on Trade is a replication of the WTO DSM model. This replication has been found to be for the familiarization of Member States with the universally accepted and preferred mode of settling trade disputes and the creation of uniformity and certainty for purposes of securing investments and furthering regional integration.

It is hereby posited that one of the steps to ensure compatibility with the DSM of the WTO, the jurisdiction of the Tribunal should be made mandatory through amending Article 50 of the new Protocol and that a sufficient number of ratifications to the new Protocol are deposited to operationalize the Tribunal and activate its appellate jurisdiction. Accordingly, SADC Member States are hereby invited to take necessary steps to ensure that the aforementioned amendment and ratifications are effected.

References

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[2] See, e.g., Erasmus, G. 2015. The New Protocol for the SADC Tribunal: Jurisdictional Changes and Implications for SADC Community Law. Stellenbosch: tralac, 6.

[3] See, art. 9 read with the Preamble of the SADC Treaty

[4] See, Protocol on Trade in the Sothern African Development Community (SADC) Region. Available at: http://www.sadc.int/documents-publications/show/Protocol_on_Trade1996.pdf.

[5] See, e.g. Shraideh, S.A. “Reflections on Developing Countries’ Initiation of Disputes in WTO Dispute Settlement System” In Global Trade and Customs Journal, Vol 16, Issue 3 (2021). Available at: https://kluwerlawonline.com/Journals/Global+Trade+and+Customs+Journal/679. Accessed on 30 August 2021

[6] See, e.g. Akinkugbe, O.D. 2020. “Dispute Settlement under the African Continental Free Trade Area Agreement: A Preliminary Assessment” 28 Supp Afr J Intl Comp L 138, p. Available at: https://ssrn.com/abstract=3403745. Accessed on 21 June 2021.

[7] See, Erasmus, supra

[8] See, art. 16 of the SADC Treaty

[9] See, Final Communiqué of the 32nd Summit of SADC Heads of State and Government, Maputo, Mozambique on 18 August, 2012. At paragraph 32. Available at: http://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/Communique_32nd_Summit_of_Heads_of_States.pdf

[10] See, the Communiqué of the 34th Summit of the SADC Heads of State and Government, Victoria Falls, Zimbabwe, August 17-18, 2014, paragraphs 18 and 23. Available at: http://www.tralac.org/news/article/6073-34th-sadc-summit-communique.html.

[11] Id, art. 33 of the new Protocol,

[12] Zaire, D. U and Schneider, K. 2013. “The SADC Tribunal: Exclusive access?” In Namibia Law Journal, 5(1). Windhoek: Namibia Law Journal Trust, p77.

[13] See Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe (2/2007) [2008] SADCT 2 (28 November 2008)

[14] See, e.g., De Wet, E. The Rise and fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa, 28 ICSID Review: Foreign Investment Law Journal 45-63 (2013), Available at http://icsidreview.oxfordjournals.org/content. Accessed on 29 May 2021.

[15] Erasmus, G. 2021. “Import Restrictions: Namibian Court clarifies Right of Private Parties”. Tralac Working Paper No. G21WP07/2021. Stellenbosch: tralac, p.3

[16] See, e.g., Ng'ong'ola, C. Replication of WTO dispute settlement process in SADC, 1 SADC Law Journal. 35-62 (2011).

[17] See, e.g. Akinkugbe, supra; Also see Zaire & Schneider, supra

[18] See, e.g. Akinkugbe, supra

[19] See Understanding the WTO: Settling Disputes, available at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm. Although other dispute settlement methods such as consultations and mediation also feature within the structure of the DSM, and which are strongly encouraged, these are preliminary. Accordingly, this article focuses on the subsequent stages in the event of the preliminary procedures failing to resolve a dispute, i.e. the panel and appeal processes.

[20] See Article 32 of the Protocol on Trade which states that:" The rules and procedures of Annex VI shall apply to the settlement of disputes between Member States concerning their rights and obligations under this protocol."

[21] Id.

[22] See, e.g., Ng'ong'ola, supra

[23] See, e.g. Akinkugbe, supra; Also see, Ng'ong'ola, supra

[24] Point 27 read with point 38(g) of the Summit's communique highlights that the new Protocol to the Tribunal still had insufficient signatures and ratification instruments. See Communique of the 36th Summit of SADC Heads of State and Government, Mbabane, Swaziland, on 30-31 August, 2016. Available at: https://www.sadc.int/files/4914/7274/8383/Communique_of_the_36th_SADC_Summit_Swazi Accessed on 11 July 2021.

[25] See, art. 50 of the 2014 Protocol

[26] The UNECA's primary mandate is to promote the economic and social development of its member states, foster intra-regional integration, and promote international cooperation for Africa's development. The ECA is one of the constituents of the UN tasked with materialising both Agenda 2030 and Agenda 2063. See https://www.uneca.org/about.

[27] See Ruppel, O.C.2009. The Southern African Development Community (SADC) and its Tribunal: Reflexions on a Regional Economic Communities' Potential Impact on Human Rights Protection. Versfassung und Recht in Ubersee /Law and Politics in Africa, Asia and Latin America, 42(2):173-186. Available at http://www.jstor.org.stable/43239909; Accessed on 16 July 2021.

[28] Mancuso, Salvatore, (2012), "China in Africa and the Law", Annual Survey of International & Comparative Law: Vol.18:Iss.1, Article 10. Available at: http//digitalcommons.law.ggu.edu/annlsurvey/vol18/iss1/10. Accessed on 17 July 2021, at p 15-16.

[29] Id.

[30] Id.

[31] See Zhou, W. "WTO Dispute Settlement Mechanism Without the Appellate Body: Some Observations on the US-CHINA Trade Deal" In Journal of International Trade and Arbitration Law 2 [2020] University of New South Wales Law Research Series (WNSWLRS). Available at: http://ssrn.com/link/UNSW-LEG.html. Accessed on 1 September 2021

[32] Id.

[33] See Fiorini, M, Hoekom, B.M, Mavroidis, P.C, Saluste, M, & Wolfe, R. "WTO Dispute Settlement and the Appellate Body Crisis: Insider Perceptions and Members' Revealed Preferences", In EUROPEAN UNIVERSITY INSTITUTE, ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES, GLOBAL GOVERNANCE PROGRAM WORKING PAPER No. RSCAS 2019/95 (2019). Available at: https://scholarship.law.columbia.edu/fuculty_scholarship/2753

[34] Id

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