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ARTICLES

Dispute Recognition and Dispute Settlement in Integration Processes: The COMESA Experience

*P. Kenneth Kiplagat**

I. INTRODUCTION

This article examines the theoretical and practical issues relating to the resolution of trade disputes within regional integration arrangements in developing countries in general, and within the Common Market for Eastern and Southern Africa (COMESA) in particular. This examination will focus mainly on the institutions that exist for the resolution of trade disputes and at whose initiative they can be set in motion. A further examination will deal with what body of laws the various dispute resolution institutions regard as supreme and the remedies that are available.

Because of the relative frailty of regional institutions in the developing world coupled with the relative unsophistication of domestic dispute resolution regimes, a critical analysis of the differentiation between dispute avoidance and dispute resolution will be undertaken. Alternative dispute resolution mechanisms will also be explored.

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II. DISPUTE RESOLUTION: LAW OR POLICY

At a general level, integration arrangements have often spawned technical and ideological investigations into whether dispute resolution should be the preserve of political discourse or whether it should be understood as a purely legal matter with limited political input. It is not perplexing that this is the case. Dispute resolution, at least where an effective system exists and where the system is an external one, requires the approbation of decisions of the dispute resolution organization which, to say the least, nettles the perceived loss of sovereignty that integration always produces. Even states with sophisticated internal legal systems which have had a long history of international relations, such as the United States,¹ surprisingly exhibit the same reluctance.

The debate in its wider context highlights the intimate nexus between politics and integration processes. Both in integration processes of the developed and developing worlds, politics seem to interfere and govern the general direction of practically all policies.² However, developed countries have had some success in delineating the two after an initial political determination has been made.³ The history of integration processes among developing countries shows that it is not possible to dislodge politics from any aspect of the integration process, including dispute resolution, nor is it credible to speak of a distinction between politics and technical matters.⁴ This

¹ William Graham, addressing the issue in the context of the GATT Uruguay talks has stated that:

The United States had at least, until then, always resisted the notion of a dispute resolution. The United States Senate had indicated clearly in the *Nicaragua* case that it was not in the tradition of the United States to accept the surrender of sovereignty where a multilateral body would determine binding rules, interpret them, and say: 'United States, you must do this, or you must do that.' The Europeans were even less willing to accept that.

William Graham, Remarks, *Economic Development in the Third World: What Can be Expected from the GATT Uruguay Round?* 81 AM. SOC'Y INT'L L. PROC. 578, 590-91 (1987).

This attitude is also reflected in the dispute resolution regime of the North American Free Trade Agreement NAFTA process. See art. 2003-2022 of the North American Free Trade Agreement, done December 17, 1992 at Washington/Mexico City/Ottawa.

² It has been stated that "[t]he weakness of any theoretical framework that downplays the role of politics in the integration process has been demonstrated in experiences in Europe and all developing regions." Jeggan C. Senghor, *Theoretical Foundations for Regional Integration in Africa: An Overview*, in REGIONAL INTEGRATION IN AFRICA: UNFINISHED AGENDA 17, 22 (1990).

³ This demarcation is achieved by providing that while the decision to undertake a certain course of action is a political one, the implementation of the decision should be governed by technical institutions and procedures.

⁴ "So-called technical issues cannot be isolated from political issues as they often require the making of choices, which invariably invites politics." Senghor, *supra* note 2, at 22.

political input and interference have been so pervasive that they have been accepted as part and parcel of integration processes.⁵

As an academic enterprise it is permissible to draw attention to this interrelationship but it is unrealistic to justify⁶ this dynamic in the current world political and economic set up. It is submitted that politics should be restricted to the initial decisions of joining an integration process⁷ and should make an exit thereafter. The problem with a thesis that rationalizes and extols the nexus between politics and integration is that it justifies and legitimizes the continued politicization of integration processes and fails to acknowledge that by and large, political chauvinism has been responsible for the collapse of many integration processes, particularly in developing countries. The choice to enter a regional integration process must be a political one, but the implementation of the process must be technical. Transnational trade can only be successful where technical devices facilitate its implementation and in this regard, political interference cannot be said to be an amplifying factor to increased transnational trade. It is, therefore, inexact to state that no sensible and imperative demarcation can be made between the role of politics and the adoption of technical legal devices.⁸

Having stated the above, it would be irresponsible to ignore the realities under which integration processes in developing countries have hitherto had to operate. The political leaders in developing countries are responsible for the implementation of the processes and there is hardly any collective response by the constituent members of these processes. Nor is there any power outside government that can influence the scope and direction of integration. Under this scenario the political influence of the leaders of the constituent entities is greatly exaggerated and it is only through political negotiation that

⁵ To justify this political encroachment it is said that "in societies with low levels of specialization, low pluralism and lack of functionally specific groups, spill over between economic and political areas is unlikely to be too high, in the sense that economic issues are not perceived as technical but political." Senghor, *supra* note 2, at 23.

⁶ See Senghor, *supra* note 2.

⁷ Quite clearly, the decision to bind a sovereign state to an international organization is, strictly speaking, a political decision by the political organs of the particular state.

⁸ The ability to make this distinction is probably a function of age and sophistication of the regional process concerned. With reference to the European Community it is clear that initially lawyers and political scientists had a common agenda and therefore acted in concert. But with time "[t]he rapid growth in the quantity and increased complexity of Community law has overshadowed, even obscured, its systemic significance. The practice and study of Community law has necessitated a breakdown of what was initially an integral discipline into many sub-branches, each calling for specific and profound specialization." Joseph Weiler, *Community, Member States and European Integration: Is the Law Relevant?* 21 J.COMM. MKT. STUD. 39 (1982).

decisions can be made.⁹ In these circumstances, the role of law is immensely circumscribed and even where a theoretical separation is possible, the political and legal outcomes always intersect.¹⁰ To this extent, integration processes in developing countries have suffered from the relegation of dispute settlement to the realms of politics and policy,¹¹ bolstering the view that issues dealing with regional integration are matters of policy, not law.¹²

III. CHOICE OF DISPUTE RESOLUTION SYSTEM AND ITS IMPLICATIONS

Different organizations have adopted different systems of resolving disputes.¹³ This diversity in the way disputes are determined reflects both diversity in the domestic laws¹⁴ of the constituent members and the peculiarity of individual integration processes. Painting with broad strokes, integration processes in developed countries generally

⁹ It is, therefore, accurate to conclude that "where power, not law, defines relations within a political system, negotiation is the paramount mechanism for resolving conflict." STUART A. SCHEINGOLD, *THE RULE OF LAW IN EUROPEAN INTEGRATION*, 8 (1965). This is not to suggest that political power does not influence the integration dynamics of developed countries but the narrow point sought to be made here is that this power-infiltration is more acute in developing countries.

¹⁰ There is a risk of overstating the significance of the distinction between law and politics and forgetting that this distinction is often times an academic exercise as it is, to say the least, arduous to make this distinction in real life. As Weiler cautions: "'law' encompasses a discourse that is much wider than the doctrine and norms and that the very dichotomy of law and politics is questionable." J.H.H. Weiler, *The Transformation of Europe*, 100 *YALE L.J.* 2403, 2409 (1991).

¹¹ See Senghor, *supra* note 2, at 22. The lack of a formal acknowledgement of a legal regime for the settlement of disputes stifles the emergence of a supranational regime. Supranationality in this case being defined as "the governments of the Member States are-in matters specified in the treaty-bound by decisions of the [regional] institutions." See also, SCHEINGOLD, *supra* note 9, at 13. Pierre Pescatore defines supranationality as "the recognition by a group of states of a complex of common interests or, more broadly, a complex of common values; the creation of an effective power placed at the service of these interests or values; finally, the autonomy of this power." PIERRE PESCATORE, *THE LAW OF INTEGRATION: EMERGENCE OF A NEW PHENOMENON IN INTERNATIONAL RELATIONS BASED ON THE EXPERIENCE OF THE EUROPEAN COMMUNITIES* 50 (1974).

¹² Molina Orantes, Colloquium, *Certain Legal Aspects of Inter-American Cooperation*, 5 *GA. J. INT'L & COMP. L.* 141, 160 (1975).

¹³ *E.g.*, the European Community has a court and an elaborate supranational organization; the Canada-U.S. Free Trade Agreement utilizes a binational panel review. For more discussion see generally, Andrew Anderson & Alan Rugman, *The Canada-U.S. Free Trade Agreement: Economic Analysis of the Dispute Settlement Mechanisms*, 6 *J. INT'L ARB.*, Dec. 1989 at 65.

¹⁴ The United States generally is reluctant to cede dispute settlement to an international tribunal and even where this occurs, United States domestic courts overly scrutinize these awards. See *supra* note 1. See also Note, *The United States-Canada Free Trade Agreement and the U.S. Constitution: Does Article III Allow Binational Panel Review of Anti-dumping and Countervailing Duty Determinations?* 13 *B.C. INT'L & COMP. L. REV.* 237 (1990).

tend to utilize fairly autonomous supranational bodies to resolve disputes. On the other hand developing countries, when they provide for dispute settlement at all,¹⁵ rely on more informal mechanisms.¹⁶ Two basic factors generate this dichotomy.

First, regional integration initiatives in developing countries are almost always conceived of as economic ventures and economists routinely are in-charge of their formulation.¹⁷ These economists often are responsible for drawing up the legal framework of integration processes and have a tendency to de-emphasize the role of lawyers and legal regimes.¹⁸ This hostility towards lawyers and legal regimes stems from the conviction held by many of these economists that incorporation of lawyers in negotiations tends to complicate and frustrate the quick conclusion of otherwise simple arrangements.¹⁹

Second, because most integration processes in developing countries are heavily politicized with political heads involved in policy-making and policy-execution, there has been a tendency to concentrate more on integration prototypes that emphasize dispute avoidance rather than dispute resolution.²⁰ The perception is that strict regimes for dispute resolution might be harmful rather than beneficial to integration processes in developing countries.²¹ In the context of the political dynamics in most of these processes, this view has some

¹⁵ Creating a regional process without a dispute settlement regime is not all too uncommon with developing countries. With respect to the ANDEAN process, "although the signatories of the agreement drafted a comprehensive blueprint for the integrated development of the subregion, they neglected to include a body capable of resolving the disputes which the implementation of their program would inevitably entail." Timothy O'Leary, *The ANDEAN Common Market and the Importance of Effective Dispute Resolution Procedures*, 2 INT'L TAX & BUS. LAW., Winter 1984, at 101, 101-02.

¹⁶ This does not say anything at all about the efficacy of either system, as informal disputes settlement regimes have been shown to be equally, or even more, efficient than their elaborate institutionalized counterparts. See *infra* notes 37-43, and accompanying text.

¹⁷ The author was able to meet extremely few legal experts in the numerous workshops, seminars and conferences convened by the PTA and COMESA.

¹⁸ See Note, *The Role of the ANDEAN Court in Consolidating Regional Integration Efforts*, 10 GA. J. INT'L & COMP. L. 351, 352 (1980).

¹⁹ This reliance on economic and financial aspects in integration and the exclusion of lawyers has proven to be utopian. See David Padilla, *The Judicial Resolution of Legal Disputes in the Integration Movements of the Hemisphere*, 11 LAW. AM. 75, 91 (1979).

²⁰ The Canada-U.S. Free Trade Agreement may be seen as an exception in this case because it relied greatly on dispute avoidance unlike most of its sister organizations in the developed world. See *The Canada-U.S. Free Trade Agreement: New Directions in Dispute Settlement*, 83 AM. SOC'Y INT'L L. PROC. 251, 253 (1989).

²¹ As ambassador Valerie T. McCombie of Barbados has stated "[t]he question is whether we should have [dispute settlement] mechanisms at all, that is to say, whether the establishment of dispute settlement mechanisms will induce more disputes." See Colloquium, *supra* note 12, at 158.

cogency.²² So that whenever the subject of dispute settlement crops up in negotiations or is eventually recognized in the integration treaties, it is very noticeable that a consensus approach has been designed into the system.²³ Of course it is a misnomer to speak of dispute avoidance as a specie of dispute resolution because this presupposes that the system has been contrived in such a way that no disputes can ever arise; clearly an unrealistic prospect. The consequence is that when disputes arise, as is natural to happen, the system has no answers and no mechanisms to reconcile these differences. This in turn prompts unilateral responses by individual member countries, producing a domino effect which culminates, eventually, in the disintegration of the process.²⁴ To be more exact, a system that relies on dispute avoidance reduces the arrangement to a mere benevolent association or an international conference, for one of the most important characteristics necessary for an entity to become a formally recognized international organization is its ability to provide for the resolution of disputes.²⁵

²² From a jurisprudential point of view, countries that prefer dispute avoidance to dispute resolution are merely avoiding the creation of "hard" law within their own domestic jurisdictions and on themselves. A functional dispute resolution will, of course, precipitate binding decisions which will infringe on the free exercise of power by these political sovereigns. For a general discussion on "hard" and "soft" law, see A. HIRSCHMAN, *EXIT, VOICE AND LOYALTY — RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES* (1970).

²³ *E.g.*, art. 14 of the Treaty Establishing the Organization of Eastern Caribbean States, July 4, 1981, reproduced in 20 I.L.M. 1166, provides for conciliation. For a further discussion of the workings of this system, see P.K. Menon, *The Organization of Eastern Caribbean States — An Important Milestone in Sub-Regional Integration*, 17 U. MIAMI INTER-AM. L. REV. 297, 309 (1986).

Under the general umbrella of the Treaty of Montevideo, disputes are supposed to be resolved by way of negotiations between the disputants. Protocol for the Settlement of Disputes, signed at Ascuncion, Paraguay, Sept. 2, 1967, Chap. II, art. 4.

Art. 23 of the Agreement on ANDEAN Sub-regional Integration, signed at Bogota, May 26, 1969, provides that:

The Commission shall be empowered to execute any procedures of negotiation, good offices, mediation and conciliation that may be necessary in cases of disputes arising from the interpretation or implementation of the present Agreement, or of the Commission Decisions.

²⁴ Timothy O'Leary concludes that "each responsive act of non-compliance in turn triggers a divisive reaction, acquiring momentum as each country individually responds to the others' violations. These inconsistent implementations not only prevent the attainment of a program's goals, but also signal a program-by-program demise of [the integration process]." O'Leary, *supra* note 15, at 115.

²⁵ For an explanation of the necessary elements for the recognition of an international organization, see generally Michel Virally, *Definition and Classification of International Organizations: A Legal Approach*, in *THE CONCEPT OF INTERNATIONAL ORGANIZATION* 50 (Georges Abi-Saab ed., 1981).

The decision to prefer a particular system of dispute resolution or to have such a system at all also reflects the power dynamics within an integration process. In much the same way that law functions in domestic jurisdictions,²⁶ weaker states within a regional process frequently are the ones that insist on the provision of an elaborate dispute resolution regime.²⁷ This is a true postulate for integration processes in both developed and developing countries.²⁸ Although all integration processes exhibit some inequality — no two or more countries can be at exactly the same level of development — disparities within integration processes in developing countries are excessively magnified. This complicates generally the choice and operation of dispute resolution mechanisms. The more developed members would normally insist on a system that is expeditious and responsive while the less developed members place more preeminence on the ability of the system to withstand manipulation by the stronger members, even if this generates higher legal and economic transaction costs.²⁹ Put another way, poor members are always suspicious of the intentions of their relatively rich counterparts and are generally negative towards innovative procedures which do not have strict safeguards built into them.

Another intricacy that integration processes in developing countries have to deal with, and which is induced by a lack of a formal dispute resolution regime, is result determinism. Where disputants are forced to grope about awkwardly for resolution of their conflict there is a strong likelihood that disputants will intuitively select that process that best furthers their respective interests. The consequence is that each disputant will “resort to a process that increases the likeli-

²⁶ It is a general truism that in the domestic sphere, poor, deprived and generally economically and politically disadvantaged groups look to the law for social equalization and insurance against the imperious use of economic and political power by privileged elites.

²⁷ Within the Canada-U.S. Free Trade Agreement, the Canadians were of the view that it was impossible to import general principles of international trade law into the arrangement without providing for a multilateral body to settle disputes. See *Economic Development in the Third World: What Can be Expected From the GATT Uruguay Round?*, *supra* note 1, at 591. Undoubtedly this position was adopted because Canada was the weaker partner in the arrangement and would have suffered more by having a weak dispute resolution mechanism. For further discussion see *The Canada-U.S. Free Trade Agreement: New Directions in Dispute Settlement*, *supra* note 20, at 262.

²⁸ While negotiating the Canada-United States Free Trade Agreement, Canada insisted that a binding dispute resolution system was a sine qua non for its conclusion of the treaty. See *The Canada-U.S. Free Trade Agreement: New Directions in Dispute Settlement*, *supra* note 20, at 251.

²⁹ This tension is best exemplified by the problems generated by art. 24 of the ANDEAN Investment Code, 11 I.L.M. 576 (1972). In this case Chile, the most developed member of the arrangement, was of the view that the Investment Code was overly restrictive and was thwarting foreign investment.

hood of a decision that is favourable to its interests."³⁰ The proliferation of likely and possible avenues of resolving a dispute generates transaction costs in the sense that a third level mechanism will have to be introduced to reconcile the two, or even more, conflicting decisions. The end result is that a uniform construction of the legal regime within the integration process fails to develop,³¹ a situation that further creates legal and economic uncertainties within the process and discourages investment and reliance on the institutions of the integration process.

The main reason why regional processes in developing countries do not adopt monolithic dispute resolution systems has to do with the precarious nature of the negotiations that produce these systems. Because consensus would be difficult to achieve on the issue of dispute resolution it is frequently considered judicious to concentrate on those areas where agreement is possible and to shelve the more complicated issues for a later date.³² Unfortunately, these so-called "complicated issues" do not go away, so to speak, but continue to impair the operations of the agreed issues to the extent that polarization is injected into previously agreed upon issues. This cancerous potential of "complicated issues" supports the main thesis of this study that for integration processes to work effectively, high level integration systems must be adopted which cater to all elements needed to service the system. A gradual step-by-step option generates dynamics of disintegration in which the unresolved matters eat away at the stability of the settled matters.

IV. DISPUTE RESOLUTION UNDER THE OLD PTA TREATY

The Preferential Trade Agreement (PTA) Treaty³³ in its treatment of dispute resolution fits well into the archetypal group that most integration treaties in developing countries belong. The relevant

³⁰ Colloquy, *Alternative Dispute Resolution in International Trade and Business*, 40 ME. L. REV. 225, 247 (1988).

³¹ Orrego Vicuna, *La Creacion de un Tribunal de Justicia en el Grupo Andino*, 15 DERECHO DE LA INTEGRATION 31, 37 (1974) translated in Scott Horton, *Peru and ANCOM: A Study in the Disintegration of a Common Market*, 17 TEX. INT'L L.J. 39, 52 (1982).

³² In international negotiations, each party, obviously must indulge in result determinism and as the choices are narrowed down during the negotiations, some parties may exhibit reluctance to acquiesce to the formula being fashioned out, which in turn generates a further dispute about the dispute system. For a support of this view see Colloquy, *supra* note 30, at 247.

³³ Treaty for the Establishment of the Preferential Trade Area for Eastern and Southern African States, Dec. 21, 1981, 21 I.L.M. 479 (1982) (hereinafter *PTA*).

provisions are characteristically wide and vague.³⁴ For a start, Article 5 of the Treaty lists the Tribunal as one of the five institutions of the PTA.³⁵ The jurisdictional powers of the Tribunal are provided for under Article 10 of the Treaty.³⁶

The limited jurisdictional powers given to the Tribunal ensured that it could never play any significant role in the resolution of disputes if and when they arose. In fact, the Tribunal and all other treaty mechanisms for dispute resolution under the Treaty were never constituted or used primarily because the tribunal lacked sufficient jurisdiction to be able to be of meaningful use.³⁷ However, this does not suggest that the Treaty³⁸ did not generate disputes or that no attempts were made to resolve those disputes that did arise. A majority of the disputes that arose were resolved informally with no litigation being initiated.³⁹ In many instances, the Secretary-General and members of the secretariat visited member states having trade disputes and negotiated amicable solutions. Such negotiations are, of course, confidential and to protect this confidentiality the example used here will not disclose the identity of the parties involved. One good example of the informal dispute resolution regime within the Treaty arose when country X demanded to be paid in Swiss *Francs* for its exports to another member country, Y.⁴⁰ Y, however, was insisting on effecting payment

³⁴ To be sure, matters of detail regarding the Tribunal have been provided for by the Authority by virtue of powers vested in it by Art. 10(2) of the PTA Treaty. *Id.* A Statute of the Tribunal was adopted in 1982. See PTA Official Gazette (Authority) Vol. 1 No. 1 (Dec. 17, 1982) Legal Notice No. 5 of 1982, 41.

³⁵ *Id.*

³⁶ *Id.* Art. 10(1) provides that:

There is hereby established a judicial organ to be known as the Tribunal of the Preferential Trade Area which shall ensure the proper application or interpretation of the provisions of this Treaty and adjudication upon such disputes as may be referred to it in accordance with Article 40 of this Treaty.

Art. 40 styled "Procedure For The Settlement of Disputes" in turn provides that:

Any dispute that may arise among the Member States regarding the interpretation and application of the provisions of this treaty shall be amicably settled by direct agreement between the parties concerned. In the event of failure to settle such disputes, the matter may be referred to the Tribunal by a party to such dispute and the decision of the Tribunal shall be final.

³⁷ Interview with Steven Karangizi, Legal Officer, the Preferential Trade Area Secretariat, Lusaka, Zambia (Nov. 17, 1993).

³⁸ See PTA, *supra* note 33.

³⁹ Interview with Prega Ramsamy, Director, the PTA Secretariat, in Lusaka, Zambia (Nov. 19, 1993).

⁴⁰ It is not difficult to understand why country X was insisting on payment in Swiss Francs. The issue is one of convertibility. Whereas the Swiss Franc is a convertible currency, and as such, country X could use it to meet international obligations on an immediate basis, the Clearing House mechanism would require that a period of at least two months elapse before settlement could be effectuated.

through the PTA Clearing House.⁴¹ The Secretary-General and his team were able to convince the exporting member country to follow the procedures enumerated in the Treaty and go through the Clearing House, a suggestion country X accepted.⁴² A similar case arose between two member states with the exporting state demanding to be paid in Rands and the importing state insisting on using the Clearing House facility. The problem was similarly resolved.⁴³

The fact that such an informal mechanism was able to function is an indicator of the number of disputes with which the Secretary-General dealt. It is obvious that if there were many disputes, the Secretary-General and his team would not have been able to criss-cross the region settling disputes. The principal reason affecting the number of disputes arising and also necessitating an informal mechanism in the resolution of these disputes is the question of *locus standi*. Article 40 opens with the words "Any dispute that may arise among the Member States . . ."⁴⁴ meaning that disputes are only recognized if they are between Member States.⁴⁵ The structure of the Treaty is based on cooperation among the executives of Member States and private parties have no standing to raise issues or to attempt the enforcement of the provisions of the Treaty, especially insofar as free trade and free competition are concerned. Because disputes were only recognized between political elites there was a need to engage in informal negotiations so as not to prick the "political egos" of the parties concerned.⁴⁶ Similarly, by limiting legal standing to political entities, the number of disputes was correspondingly reduced. The irony of this arrangement was that those who were depended on to bring about the benefits of integration, for instance, large-scale investors, had little real protec-

⁴¹ For a discussion of the PTA Clearing House, see P. Kenneth Kiplagat, *An Institutional and Structural Model for Successful Economic Integration in Developing Countries*, 29 TEX. INT'L L.J. 39, 58 (1994).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See PTA Treaty, *supra* note 33, art. 40, 21 I.L.M., at 495.

⁴⁵ To be sure, the Council could request an advisory opinion from the tribunal under Art. 8 of the Statute of the PTA Tribunal but strictly speaking this could be classified as a dispute resolution function.

⁴⁶ This peculiar situation where political executives want to retain control of virtually all aspects of integration including dispute resolution buttresses the theory that a government that distances itself from dispute resolution also distances itself from the process through which social problems are resolved and such a government either has to accept this exclusion as impotence or seek to control the decisional process itself. See Leon Trakman, *Privatizing Dispute Resolution Under the Free Trade Agreement: Truth or Fancy*, 40 ME. L. REV. 349 (1988).

tion under the Treaty,⁴⁷ while those who wielded authority under the Treaty had limited ability to influence investment and similar decisions. This situation meant that otherwise non-political matters became politicized. A purely contractual dispute between two individuals or entities belonging to two different Member States could only be pursued by engaging political elites of their respective States, and it goes without saying that government litigation necessarily engenders politicization of the issue.

The presence of an almost non-functional dispute resolution system sprung largely from the fact that Member States had not acquired judicial discipline in their respective domestic jurisdictions sufficient to enable them to cede rights to a regional body. Further, the Treaty⁴⁸ was extremely narrow in its competence to the extent that there were few disputes that could be identified which could legitimately be said to be under the umbrella of the Treaty.⁴⁹ This judicial uncertainty of the competence and applicability of the Treaty⁵⁰ provisions and the absence of alternative regional or domestic tribunals able to adjudicate issues of international business transactions, both of which stem from the infertile dispute resolution mechanisms of the treaty, combined to frustrate meaningful expansion of trade within the region. From the foregoing it is apparent that the emphasis on dispute resolution derives from the realization that a comprehensive, all-embracing economic agreement requires equally varied tools for dispute settlement.⁵¹

V. COMESA DISPUTE RESOLUTION REGIME

The Treaty establishing COMESA⁵² evinces a new attitude towards the issue of dispute settlement. There is a clear recognition that previous attempts at integration, particularly that under the PTA Treaty,⁵³ did not succeed partly because these attempts did not place

⁴⁷ This is an imperfection exhibited by many regional processes in developing countries. Addressing this issue in the context of the ANDEAN process, Orrego Vicuna states that "[t]he experience gained from the few years the Accord [of Cartagena] has been functioning has shown that its mechanisms for dispute resolution are ineffectual inasmuch as they fail to provide an answer for the legal needs of the integration process." Vicuna, *supra* note 31, at 52.

⁴⁸ PTA, *supra* note 33.

⁴⁹ See Karangizi, *supra* note 37.

⁵⁰ PTA, *supra* note 33.

⁵¹ For a supporting view see *The Canada-United States Free Trade Agreement: New Directions in Dispute Settlement*, *supra* note 20, at 252.

⁵² Treaty Establishing the Common Market for Eastern and Southern Africa, Nov. 5, 1993, 33 I.L.M. 1067 (1994) [hereinafter *COMESA* or *The Treaty*].

⁵³ PTA, *supra* note 33.

much emphasis on dispute recognition and settlement. An assessment of the Treaty supports the inference that it is, on the whole, a market-oriented Treaty and has responded, to a substantial degree, to the anxieties of the business community. It has also reduced significantly the input and influence of political elites in the day-to-day operations of the integration process.

This new attitude exhibited by the Treaty can certainly be observed from the preoccupation with detail under the new regime. There was a tendency under the PTA Treaty⁵⁴ to leave matters of detail to further negotiation,⁵⁵ to other bodies⁵⁶ or to Member States to resolve. By being as precise as possible, the COMESA Treaty has eliminated the uncertainty that characterized many of the provisions of its predecessor. What follows is an examination of the main elements of the dispute resolution regime in the COMESA Treaty.

A. The COMESA Court of Justice

It would help matters if the place of a regional court in the implementation of integration could be put in its proper perspective. If a domestic analogy were used, integration would closely resemble a federation. The various Member States would, in this analogy, be comparable to the various political entities forming the federation. Just as a federation needs a federal constitution and federal institutions to harmonize the workings of the federation, so too does an integration process need regional institutions to realize the objectives of integration. However, even in the absence of most other federal institutions, a federation cannot function effectively, or at all, without an independent judiciary to guarantee an objective and neutral interpretation of the federal constitution. A federal court compromises the competing interests of the various constituent entities and delimits the precise extent of federal and state power. To this extent, therefore, the constituent states must have full faith in the competence of the federal court and must accord it definite powers in order to have a stable and workable federation.⁵⁷ Similarly, an integration process, in order to attain its goals and to be able to synchronize economic and political

⁵⁴ *Id.*

⁵⁵ *See id.* art. 40, 21 I.L.M. at 495. This section deals with dispute settlement and calls for a negotiated settlement as a first step to the resolution of any dispute that may arise.

⁵⁶ *Id.* art. 10(2) 21 I.L.M. at 487, that "[t]he Statute and other matters relating to the tribunal shall be prescribed by the Authority."

⁵⁷ For a further discussion *see* ANDREW GREEN, POLITICAL INTEGRATION BY JURISPRUDENCE: THE WORK OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES IN EUROPEAN POLITICAL INTEGRATION (1969).

expectations, must possess an institution that can adjudicate these matters in cases of dissention.⁵⁸

Indeed it can be said that real integration is in fact caused by regional courts⁵⁹ because in the absence of a regional court the courts of the constituent entities tend to generate decisions that are at an awkward tangent to the realization of the integration targets.⁶⁰ Hence, unless these divergent judicial holdings are compromised, the whole process is subjected to dynamics of disintegration.⁶¹ Why then have developing countries failed to appreciate this truism? The simple answer is that such a court must be sovereign, overruling national courts, and it is this wide competence that has often times stymied attempts to create regional courts.⁶²

The creation of the COMESA Court of Justice stems from the new realization that a stable and effective integration process needs a sound judicial framework and to this extent is a move away from the structure of previous arrangements.⁶³ A factor that points to this new

⁵⁸ In a similar vein Green adds that:

Once the importance of law in political integration is understood, the importance of the role of a judiciary in political integration hardly need be argued. Undoubtedly, political integration could exist without courts, just as law could exist without courts. However, for the same reason that courts are important in the administration of law, courts are also important in the process of political integration. Just as courts control and assure the administration of law, so courts control and assure the observance of political decisions which lie at the base of political integration.

Id. at 21-22.

⁵⁹ One commentator has concluded that the "court of justice causes political integration in the European Community." *Id.* at 28.

⁶⁰ This tendency can be illustrated clearly by the Colombia Supreme Court invalidation of the ANDEAN Investment Code. 144 *Gaceta Judicial* 10 (1972), 10 *Derecho De La Integración* 155 (1972) translated in 11 *I.L.M.* 576 (1972). In this case, the presence of an ANCOM judiciary would have voided the necessity for the Colombia's Court's construction of the Cartagena Accord. See also Horton, *supra* note 31, at 52.

⁶¹ In fact, in situations where a regional court does not exist, disputes or non-compliance with provisions of the organization frequently means that unilateral measures by the "faithful" members become the only resort which weakens the organization. For a supporting example see O'Leary, *supra* note 15, at 115.

⁶² See JEFFREY HARROP, *THE POLITICAL ECONOMY OF INTEGRATION IN THE EUROPEAN COMMUNITY* 35 (1989).

⁶³ When the author first conceived this study, he did not attach a lot of emphasis to the creation of a PTA court. The lack of emphasis was informed by the experiences in the region of previous attempts at the establishment of a regional court and the lack of commitment by the member states to be infinitely committed to the treaties they were signing. The author was then of the view that the most realistic solution to the problem of dispute resolution was the establishment of an arbitration mechanism and a strong secretariat with a respected tribunal.

The reliance the author placed on arbitration seemed to be justified then because it would have been possible for all member countries to pass legislation compelling the enforcement of arbitral awards without the member states feeling that they were ceding sovereignty. But the author is now convinced that the establishment of a regional court is indispensable because: (i) it will create its own jurisprudence and nurture a sense of judicial discipline which is lacking in

awareness is the elevation of the court's functions, competence and procedural elements from protocols and statutes to the main body of the Treaty.⁶⁴ It is also a manifestation of the role of law and judicial functions within regional integration processes in developing countries.⁶⁵

1. Sources of COMESA Law

The COMESA Treaty does not enumerate the sources⁶⁶ of COMESA law and their hierarchy, in the same fashion that the Statute of the International Court of Justice does.⁶⁷ The Treaty merely implores the COMESA Court to "ensure the adherence to law in the interpretation and application of" the Treaty⁶⁸ without defining the law or its sources. This in itself is not necessarily a failing on the part of the drafters as it gives the different COMESA players an opportunity to develop a relevant COMESA jurisprudence free from limitations in the constitutive documents. Because the PTA regime did not have a system of law as such,⁶⁹ the formulation of law within COMESA will be a robust activity.

The primary sources of COMESA law consist of the COMESA Treaty and its Protocols which together constitute the *fons et origo* of all COMESA law. The workings of Common Market will be impaired unless the constitutive instrument of the process, the COMESA Treaty, is self-executing in all the Member States so that upon ratifica-

almost all the domestic jurisdictions of the member states; (ii) it will enhance the prestige of the organization and cultivate business confidence; and (iii) an elaborate treaty arrangement dealing with complex issues such as tariff arrangements, anti-dumping, investment regulation, anti-trust matters, etc., will be stultified without an equally elaborate judicial arrangement to supervise the implementation of these arrangements and adjudicate disputes that will necessarily be engendered by most of these issues, particularly given the fact that almost all of these issues are novel to these countries and there has been no judicial or practical experience with them even at the domestic level.

⁶⁴ See PTA, *supra* note 33, art. 10, 21 I.L.M. at 487. The only substantive reference to the PTA Tribunal was art. 10 which merely pronounced the establishment of the Tribunal. Issues relating to jurisdiction, procedure, etc., were later fashioned out in a Statute to the Treaty.

⁶⁵ For a discussion of aversion towards lawyers and legal regimes under previous arrangements, see *supra* notes 17-19 and accompanying text.

⁶⁶ The terminology may have different connotations depending on the context. In its historical context "sources of law" refers to the creative components which give rise to the making of the law itself. In this context, sociological, political, etc., factors may be considered as sources of law, though they may not have any authoritative legal content. The more conventional sense attributed to "sources of law" refers to the formal sources which are imbued with legal authority and thus judicially cognizable.

⁶⁷ International Court of Justice Statute, art. 38.

⁶⁸ COMESA, *supra* note 52, art. 19. Similarly art. 6(g) entreats Member States to adhere to the "recognition and observance of the rule of law."

⁶⁹ See B.H. SIMAMBA, AN AFRICAN PREFERENTIAL TRADE AREA 120 (1993).

tion it becomes law automatically within the Member States. In the absence of such a transformation it would not be accurate to make a distinction between primary and secondary sources of law because in the final analysis both would have the same legal competence and none would be superior to the other.

The most prominent secondary sources of COMESA law consist of regulations, directives and decisions. Regulations are binding on all the Member States in their entirety, directives are binding as to the result to be achieved upon each Member State to which it is addressed but not as to the means of achieving it, whereas decisions are binding on those to whom they are addressed.⁷⁰ It is expected that a majority of suits that will be determined by the COMESA Court will involve the legality of these secondary sources *vis-a-vis* the COMESA Treaty provisions. As to the admissibility of general international law⁷¹ as a source of law, it is submitted that the COMESA Court will utilize this body of law to a great extent for the following two reasons.

One, in technical international business transactions among the COMESA Member States there is hardly any "local" experience or standards that have been set and the Court will inevitably drift towards international law to find some guidance. Second, the distinctions and nuances that a number of developing countries have often tried to introduce to the understanding and appreciation of international law do not directly relate to issues of cross border trade but involve inter-state political relations (equality of all states, non-interference in the domestic affairs of other states, sovereignty), which issues are outside the competence of the Court. In the interpretation of the COMESA Treaty it is envisioned that the COMESA Court will apply principles of international law recognized by the Member States as general rules of law. However, in the event of a conflict between an international law rule and the COMESA Treaty the former will prevail as the latter limits the jurisdiction of the COMESA Court to the interpretation and application of the Treaty.⁷²

⁷⁰ COMESA, *supra* note 52, art. 10.

⁷¹ Within the EEC, the role of international law is very limited. Advocate-General Lagrange has stated that:

. . . our [European Court of justice] is not an international tribunal, but is concerned with a community which has been created by six states and which resembles more a federation than an international organization. . . . The Treaty . . . although concluded in the form of international treaties and undoubtedly being one, nevertheless also constitutes, from a substantive point of view, the character of the Community and as a consequence the legal provisions derived from the treaty must be viewed as the internal law of the Community.

Case 8/55 *Fédération Charbonnière de Belgique v. The High Authority of the European Coal and Steel Community*, 1954-56 E.C.R. 292.

⁷² COMESA, *supra* note 52, art. 19.

Because the provisions of the COMESA Treaty are general and because there are no treaty provisions enumerating sources of law within the Common Market, municipal law is bound to play a leading role in the shaping of COMESA law. There is an immense and critical benefit to be derived from a reliance on municipal law. If the Common Market evolves a jurisprudence that is essentially a synthesis of general principles of municipal law of the Member States, such regional law will receive the cooperation of Member States which will enhance its esteem and applicability. Should the emerging regional law be radically different from general legal norms of the Member States, there is a danger that municipal law will regard such a law as alien and unrepresentative of general principles of law. This development could have a negative impact on the overall efficacy of law in the region, particularly when it is considered that municipal courts are pivotal in the operation of the Common Market.⁷³ Municipal law is bound to find certain application as a source of law when it comes to the adjudication of contractual and non-contractual claims under the Treaty which is silent on the applicable law.⁷⁴

Much attention will be focused on judicial legislation by the COMESA Court, that is, the extent to which the Court is willing to be activist as regards formulation of new law and supplementing treaty provisions.⁷⁵ Although there are obvious hazards that an activist court may itself fall prey to, at the initial phase of its tenure the Court must quickly learn to supplement treaty provisions and create a general direction for Common Market law even in situations where no concrete legal basis exists for such an exposition. This attitude is critical if a momentum towards stronger regional cooperation is to be built. If the Court were to seek all answers in the COMESA instruments, it would likely be unable to make affirmative declarations. This will create uncertainty, reduce the Court's authority and stifle regional harmony.⁷⁶ Yet the Court must, at the same time, proceed tentatively to avoid a rebellion from municipal courts which may object to the ultra vires extension of the Courts jurisdiction.⁷⁷ Clearly a

⁷³ See *infra* note 222 and accompanying text.

⁷⁴ See *infra* notes 168-69 and accompanying text.

⁷⁵ It should be noted that this can be a powerful domain for the Court because "decisions of the Court on the interpretation of the provisions of this [COMESA] Treaty shall have precedence over decisions of national courts." COMESA, *supra* note 52, art. 29(2). The Court can therefore appropriate any issue, couch it in interpretative language, and exclude review by municipal courts.

⁷⁶ It is true that less precise laws expand the scope for judicial legislation.

⁷⁷ It is important to note that most municipal courts within the European Community Member States were willing to allow the European Court of Justice to roam outside its competence

delicate balancing act will have to be undertaken and it is hoped that the Court will quickly recognize the competing interests and play a constructive role in equalizing them. The balancing also must be extended to competing municipal law rules which will be articulated before it.⁷⁸ Much will be expected from the Court in reconciling these competing rules and creating a uniform Common Market law.

2. *Jurisdiction of the COMESA Court of Justice*

a. General Jurisdiction

The Court of Justice is listed under Article 7(1)(c) of the COMESA Treaty⁷⁹ as one of the organs of the Common Market, but the substantive provisions relating to the jurisdiction of the Court of Justice and its general competence are provided for under Chapter Five of the Treaty.⁸⁰

At a general level the Court is empowered to “adjudicate upon all matters which may be referred to it pursuant to” the COMESA Treaty.⁸¹ There are several provisions in the Treaty which make reference to the jurisdiction of the Court in more precise terms and perhaps the most important of these is Article 30 of the Treaty which provides that:

1. Where a question is raised before any court or tribunal of a Member State concerning the application or interpretation of this treaty or validity of the regulations, directives and decisions of the Common Market,

for as long as these courts felt that this was for the good of the Community. Professor Simitis expresses this view. Spiro Simitis, *Recent Developments in the EC*, Address before the Forum for the Practice of International Law, Yale Law School (April 7, 1993). However, it is also true that there has been a growing challenge to this expanded jurisdiction as the Community legal system becomes more self-sufficient, relying less and less on the propping up by an activist regional court. *Id.*

⁷⁸ The Member States of COMESA belong to different judicial systems and there is little doubt that there will be competing legal philosophies before the Court.

⁷⁹ COMESA, *supra* note 52, art. 7(c)(1).

⁸⁰ *Supra* note 52, art. 7(c)(1).

⁸¹ COMESA, *supra* note 52, at art. 23. It is worth noting that the general jurisdiction of the COMESA Court of Justice is much wider, and to some extent unexplicit, compared to, say, that of the European Court of Justice. The latter, at art. 164, provides that “[t]he Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed.” Treaty Establishing the European Community, *done at Rome*, March 25, 1957, 298 U.N.T.S. 167 as amended by the Single European Act, *done at the Hague*, February 17 and 28, reproduced in 25 I.L.M. 507 as amended by the Treaty on European Union and Final Act, *done at Maastricht*, February 7, 1992, reproduced in 31 I.L.M. 247 (1992) [hereinafter *Treaty of Rome*]. The European Community version explicitly makes reference to “interpretation” of the Treaty clearly intimating that the general competence of the Court is limited to this area. The COMESA variant would require a further inquiry and cross reference to determine the extent of the general jurisdiction.

such court or tribunal shall if it considers that a ruling on the question is necessary to enable it to give judgement, request the Court to give a preliminary ruling thereon.

2. Where any question as that referred to in paragraph 1 of this Article is raised in a case pending before a court or tribunal of a Member State against whose judgement there is no judicial remedy under the national law of that Member State, that court or tribunal shall refer the matter to the Court.⁸²

This provision is modelled on Article 177 of the Treaty of Rome⁸³ both in wording and substance.⁸⁴ The clear import of the provision is to ensure that a legal monopoly in the application of the COMESA Treaty is created in favor of the Court of Justice. That notwithstanding, it is important to recognize that this jurisdiction is clearly limited to the interpretation, and not application,⁸⁵ of the COMESA Treaty⁸⁶ and other legal instruments created under it. Hence the word "interpretation" becomes the most critical in the whole legal structure of COMESA.⁸⁷

By specifically guaranteeing that this "interpretative" competence is reserved⁸⁸ to the Court of Justice, the COMESA Treaty⁸⁹ has averted the reproduction of heretic decisions such as *Okunda v. Republic*.⁹⁰ Unlike in the past, there will be no parallel judicial systems

⁸² COMESA, *supra* note 52, art 30.

⁸³ See COMESA, *supra* note 52, art. 177.

⁸⁴ For a further discussion see generally Ami Barav, *The Judicial Power of the European Economic Community*, 53 S. CAL. L. REV. 461 (1980).

⁸⁵ COMESA, *supra* note 52, art. 30.

⁸⁶ COMESA, *supra* note 52, art. 30. It may, however, be said that the interpretative regime of the European Court of Justice, and this may be an academic preoccupation, is wider than that of COMESA in as far as the former speaks of "interpretations of acts of the institutions of the Community" whereas the latter only considers the "interpretation" of the Treaty "or validity of the regulations, directives and decisions of the Common Market." In construing these provisions it is possible to argue that under the European Community any factor that flows from the operation of the Community gives the European Court of Justice jurisdiction. This argument can also be advanced for the COMESA Court of Justice.

⁸⁷ The same is true of the European Community's legal regime in that the European Court of Justice's competence extends only to interpretation of the Treaty of Rome, *supra* note 92, and its related instruments. For a discussion of this competence in the European Community context, see Francis Jacobs, *When To Refer to the European Court*, 90 L.Q. REV. 486 (1974). See also Joseph Weilee, *Community, Member States and European Integration: Is the Law Relevant*, 21 J. COMM. MKT. STUD. 39, 55 (1982).

⁸⁸ Indeed art. 34(1) of COMESA creates a monopoly in this regard by providing that "[a]ny dispute concerning the interpretation or application of this Treaty or any of the matters referred to the Court pursuant to this Chapter shall not be subjected to any method of settlement other than those provided for in this Treaty." COMESA, *supra* note 52, art. 34(1).

⁸⁹ *Id.*

⁹⁰ 1970 E. Afr. L. Rep. 453 (Kenya) where the East African Court of Appeals held that the Kenyan Constitution superseded the East African Community Treaty and in cases of inconsistency the former will override the latter.

under the new COMESA legal regime. A unitary system will thus be created in which both national courts and the Court of Justice act jointly in the effectuation of the Treaty provisions.⁹¹ At a technical level direct applicability of COMESA law has been achieved. Nonetheless, Member States must first ensure that national laws, and in particular national constitutions,⁹² recognize this new dynamic by making it impossible to plead a higher national law within a national jurisdiction to defeat a Treaty provision.⁹³ In other words there must be a constitutionalization of the Treaty within all the Member States.⁹⁴ In the absence of such a transformation, cases will still exist where national courts refuse to honor regional agreements because national law does not allow it.⁹⁵ To achieve this synchronization the competence of both national law and regional law must be clearly delimited and each must recognize when to yield to the other.⁹⁶ Returning to

⁹¹ For a discussion of the COMESA Court's jurisdiction with reference to preliminary rulings, see *infra* notes 249-264 and accompanying text.

⁹² When acceding to the European Community, the Danes had to amend their constitution and provide that "[t]he provisions of [the Treaties establishing the Communities, etc.] shall take effect in Denmark to the extent that they are directly applicable in Denmark under Community Law." Den. Const. sec. 3(1). See also Due & Gulmann, *Constitutional Implications of the Danish Accession to the European Communities*, 9 COMM. MKT. L. REV. 256 (1972). Similarly, the Irish amended their constitution to provide that "[n]o provision of the Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the Communities or prevents laws enacted, acts done or measures adopted by the Communities, or institutions thereof, from having the force of law in the State." Ir. Const. art. 29. See also Lang, *Legal and Constitutional Implications for Ireland of Adhesion to the EEC Treaty*, 9 COMM. MKT. L. REV. 167 (1972).

⁹³ It cannot be said that the COMESA arrangement has reached a stage where it is possible to state that "any rule of law inconsistent with directly applicable provisions of the Treaty is impliedly repealed by enactment of the Treaty." JOHN TEMPLE LANG, *THE COMMON MARKET AND COMMON LAW: LEGAL ASPECTS OF FOREIGN INVESTMENT AND ECONOMIC INTEGRATION IN THE EUROPEAN COMMUNITY, WITH IRELAND AS A PROTOTYPE*, 32 (1966).

⁹⁴ Mere incorporation or adoption of the Treaty as part of domestic law will not suffice in this case for such devices do not qualitatively assure the eminence that the Treaty envisages. See generally Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INT'L. L. 1, 10-14 (1981).

⁹⁵ A situation similar to that ensued following the invalidation of the ANDEAN Investment Code by the Colombian Supreme Court. *Derecho De La Inegración*, *supra* note 60. In that case Colombia, notwithstanding the decision of its Supreme Court, was legally bound by its international obligations. The end result is that you have a valid international obligation which is invalid within the domestic arena of the obligant. See also John Pate, *Introductory Note*, 11 I.L.M. 574 (1972). The Vienna Convention on the Law of Treaties regarding the validity of treaties stipulates that the act of state doctrine does not invalidate the legal effect of treaties. Arts. 27 and 46 of the Vienna Convention on the Law of Treaties, 8 I.L.M. 679 (1969).

⁹⁶ With regard to this point and with specific reference to the European Community, Ami Barav concludes that "[n]ational courts should give precedence to community law because of its (Community law) inherent nature . . ." Ami Barav, *supra* note 84, at 501.

the domestic federal analogy used above,⁹⁷ just as the various federal units must be sure how competent each federal institution is and how much residual power has been left to each federal unit, so too must a regional legal system indulge in this categorization.

The conflict between national law and regional law is one that attends all regional arrangements in particular and international law in general. COMESA does not appear to have anticipated the intensity of this conflict. Had COMESA seriously thought of the gravity of the matter, it would have provided for a supremacy clause in the Treaty that would have made conflict between national law and regional law superfluous. Supremacy could have been provided by either declaring that the COMESA Court of Justice have the sole jurisdiction to interpret COMESA, as the COMESA Treaty has done, or more importantly stipulating that in the event that there is a conflict between COMESA law and any national law, COMESA law shall prevail.⁹⁸ The latter option is the most authoritative means of assuring supremacy.⁹⁹ Because of this omission the Court will have to be activist in ordaining its supremacy much in the same vein as the European Court of Justice has done.¹⁰⁰ The danger of adopting such a course of action to guarantee jurisdictional supremacy is that it can only work with the express acquiescence of national courts, which cannot be assured.¹⁰¹

⁹⁷ See *supra* notes 59-60 and accompanying text.

⁹⁸ For those countries that accord a primary position to international law, such as the Netherlands, this supremacy is guaranteed without the need for further statutory amendments to the constitution or other legislation. The Netherlands' constitution provides that courts may not pass on the conformity of treaties to the constitution which means that courts are obliged to apply treaties even if they are inconsistent with the constitution. Neth. Const. art. 60, para. 3. This is also true in France, Belgium and Luxembourg. See Michel Waelbroeck, *The Application of EEC Law by National Courts*, 19 STAN. L. REV. 1248 (1967). In these countries, anterior as well as posterior national laws which are inconsistent with treaty provisions become invalid. See Dennis Thompson & S. Marsh Norman, *The United Kingdom and the Treaty of Rome: Some Preliminary Observations*, 11 INT'L & COMP. L.Q. 73, 74 (1962). A disclaimer, as Thompson & Norman have pointed out, needs to be proffered in that even where a constitution gives international law a primary position, unless national courts have the power of judicial review, this supremacy loses much of its efficacy. France is a good example. Thompson & Norman, *id.* See also Roger Clark, *Legal Principles of Non-Socialist Economic Integration as Exemplified by the European Economic Community*, 8 SYRACUSE J. INT'L L. & COM. 1, 21 (1980).

⁹⁹ See Green, *supra* note 59.

¹⁰⁰ See Barav, *supra* note 84, at 499. Barav states that "in the absence of a supremacy clause in the Treaty, supremacy has been forcefully and persuasively proclaimed by the Court." Barav, *supra* note 84, at 499.

¹⁰¹ Within the European Community, there are increasing signs of irritation at the lack of a formal legal regime guaranteeing supremacy of European Community law. Until now, national courts have extended deference to the European Court of Justice in situations where European Community law was in conflict with national law, hoping that this would subsequently be regu-

Within the general framework of the subject of the place of international law within domestic jurisprudence, a facet that is worth noting is the implication of any concretization, in constitutional form, of superiority of international law over national law. With special reference to developing countries, will such an opening let in such controversial (according to the rhetoric of many developing countries) instruments as the 1948 Universal Declaration of Human Rights¹⁰² and other related international instruments? It will be interesting to see whether Member States of the COMESA arrangement will seek to restrict their constitutional amendments to import the COMESA Treaty specifically and, by the same token, exclude other international instruments.

One area in which the jurisdiction of the Court seems to be circumscribed is in its competence to order compliance of treaty provisions and undertakings. Unlike the Treaty of Rome¹⁰³ which specifically empowers the European Court to require a defaulting Member State "to take the necessary measures to comply with the judgement of the Court of justice"¹⁰⁴ the COMESA Treaty provision on this seems to be permissive rather than mandatory.¹⁰⁵ This seems to be indicative of the reluctance by Member States to submit totally to the jurisdiction of the Court. A similar apprehension was also exhibited during negotiation of Article 25 of the COMESA Treaty. This provision requires that the Secretary-General, in dealing with a Member State which has failed to fulfil an obligation under the Treaty, shall submit his findings to the offending State for its observations on the findings.¹⁰⁶ Should the Member State fail to submit its observations to the Secretary-General within two months or should the observations submitted be unsatisfactory, the Secretary-General shall refer the matter to the "Bureau of the Council which shall decide whether the matter shall be referred by the Secretary-General to the Court imme-

larised by a formal treaty provision. Because this regularization has not been forthcoming, national courts are beginning to express displeasure at this state of affairs and supremacy of European Community law may begin to be challenged. See Simitis, *supra* note 77.

¹⁰² December 10, 1948, U.N.G.A. Res. 217 (III 1948).

¹⁰³ Treaty of Rome, *supra* note 81.

¹⁰⁴ See *supra* note 81, art. 171(1).

¹⁰⁵ See COMESA, *supra* note 52, art 34(3), which provides that "[a] Member State[s], the Authority or the Council shall take, without delay, the measures required to implement a judgement of the Court. Although the word "shall" is used here, the inference to be drawn from the general context of the article seems to suggest that the Court has no powers to order compliance but the defaulting Member States are being asked to honor the decisions of the Court.

¹⁰⁶ COMESA, *supra* note 52, art. 25(1).

diately or be referred to the Council.”¹⁰⁷ The inclusion of this provision was only possible after the meeting of the Ministers of Justice and Attorneys-General of the Member States.¹⁰⁸ The various delegations charged with the drafting of the Treaty were unable to agree on this issue.¹⁰⁹ Notwithstanding the new-found resolve to ensure that comprehensive structures are erected, Member States are still uncertain about the appropriate extent of the Court’s powers.¹¹⁰ As the above negotiations indicate, there are some Member States that feel a grant of compulsive judicial power to the Court will lead to their own loss of power and influence.

Another area in which the jurisdiction of the Court is, at the least, hazy is the competence of the Court to interpret and pass a ruling on the statutes governing other institutions of COMESA. This ambiguity is generated by Article 30 of the COMESA Treaty which refers to the “interpretation of this Treaty or validity of the regulations, directives and decisions of the Common Market. . . .”¹¹¹ A literal construction would exclude the interpretation of instruments governing institutions of the Common Market, for example the Re-insurance Company, the Clearing House, etc.¹¹² This omission is, in the view of the writer, so profound that an urgent amendment to the Treaty is imperative. Although it can be argued that the Treaty recognizes these institutions and therefore the Court has jurisdiction to interpret Charters creating them, the issue of jurisdiction is not one that can be inferred especially

¹⁰⁷ COMESA, *supra* note 52, art. 25(2).

¹⁰⁸ Held in Lusaka, Zambia on Oct. 30, 1993.

¹⁰⁹ See Treaty Establishing the Common Market for Eastern and Southern Africa, Draft Treaty No. 6, 1993, (on file with the PTA Secretariat, Lusaka, Zambia).

¹¹⁰ It is interesting to note that art. 25(2) of Draft Treaty No. 6 of the Treaty provided that “[i]f a Member State concerned does not submit its observations to the Secretary-General within two months, or if the observations submitted are unsatisfactory, the Secretary-General may refer the matter to the Court.” *Id.*

The final Treaty was at pains to block this direct access to the Court in favor of a longer path. This circumlocution was concretized by the addition of art. 25(3), which was introduced in Draft Treaty No. 7 of the Treaty, 1993, which provided that “[w]here a matter has been referred to the Council under the provisions of paragraph 2 of this Article and the Council fails to resolve the matter, the Council shall direct the Secretary-General to refer the matter to the Court.” Member States were uneasy with the idea that Secretary-General on his own motion could bring a defaulting Member State to Court.

¹¹¹ COMESA, *supra* note 52, art. 30(1). Similarly, art. 26 of COMESA empowers legal and natural persons to challenge the “legality of any act, regulation, directive, or decision of the Authority or the Council or of a Member State of which he is a resident. . . .”

¹¹² This construction would seem to be supported by the phrasing of the European Community equivalent of this provision. The Treaty of Rome speaks of the “validity and interpretation of acts of the institutions of the Community” and the “interpretation of the statutes of bodies established by an act of the Council. . . .” Treaty of Rome, *supra* note 81, art. 177(b) and art. 177(c).

where the Articles enunciating this jurisdiction are clear and unambiguous. The rule of construction *expressio unius est exclusio alterius* is conclusive on this issue.¹¹³

Article 174(1) of the COMESA Treaty provides that “[t]he Member States shall recognize the institutions established under the preferential Trade Area for Eastern and Southern African States which shall continue to be regulated by the respective Charters establishing them.”¹¹⁴ Article 174(3) further states that “[u]pon entry into force of this Treaty, the institutions specified in paragraph 2 (which lists all the institutions) of this Article shall be deemed to be institutions of the Common Market and shall be designated as such.” However, “institutions” are not defined in the Treaty and their competence is not provided for.¹¹⁵ The only relevant reference to “institutions” is to be found in Article 175 which provides at paragraph one that “[e]ach institution of the Common Market shall, in the implementation of the provisions of its Charter take into account the objectives, policies, programmes and activities of the Common Market.” Because Article 30 of the COMESA Treaty gives jurisdiction to the Court to investigate the validity of acts done by the Council, Authority and Member States,¹¹⁶ it is relevant to examine the connection between these organs and the institutions. Here again there is no nexus on which the Court can rely to assume jurisdiction over the institutions of the Common Market. The closest link is through Article 9(3) which provides that “[s]ubject to the provisions of this Treaty, the regulations, directives and decisions of the Council taken or given in pursuance of this Treaty shall be binding on the Member States, on all subordinate organs of the Common Market other than the Court. . . .” But even here “subordinate organs” would not include institutions especially when it is considered that the Court in this particular provision is contemplated as a “subordinate organ.” The chapter dealing with the COMESA Authority has a similar provision.¹¹⁷

¹¹³ The rule commands that “mention of one or more things of a particular class may be regarded as silently excluding all other members of the class: *expressum facit cessare tacitum*.” MAXWELL ON THE INTERPRETATION OF STATUTES 293 (12th ed. 1969). The rule has also been interpreted to mean that “express enactment shuts the door to further implication.” *Whiteman v. Sadler* 1910 App. Cas. 514, 527, Lord Dunedin.

¹¹⁴ COMESA, *supra* note 52.

¹¹⁵ It is also instructive that art. 7 of COMESA, *supra* note 52, which lists all the organs of the Common Market, does not include “institutions.”

¹¹⁶ COMESA, *supra* note 52, art. 7.

¹¹⁷ Article 8(3) of COMESA provides that “[s]ubject to the provisions of this Treaty, the directions and decisions of the Authority taken or given in pursuance of the provisions of this Treaty, shall as the case may be, be binding on the Member States and on all other organs of the

Returning to Article 175 there is evidence to support the conclusion that institutions of COMESA are somewhat removed from the strict purview of the COMESA Treaty and are, in actual fact, autonomous entities. In particular, Article 175(2) provides that "[t]he Secretary-General shall maintain such continuous working relations with the institutions of the Common Market as would further the implementation of the provisions of this treaty and shall for this purpose make co-operation arrangements with each institution of the Common Market." The aspect of autonomy is derived from the fact that "co-operation arrangements" would be superfluous in a situation where the institutions are part and parcel of the COMESA Treaty arrangement.

A further indicator that lends credence to the lack of jurisdiction of the Court to interpret Charters of COMESA institutions is found in the former PTA Treaty.¹¹⁸ The PTA Treaty at article 5(1) provides that "[t]he institutions of the Preferential Trade Area shall be- (a) the Authority, (b) the Council of Ministers, (c) the Secretariat, (d) the Tribunal, and (e) the Commission, the Committees and such other technical and specialized bodies as may be established or provided for by this Treaty."¹¹⁹ The PTA regime brought all establishments of the PTA under its umbrella. A look at the COMESA Treaty¹²⁰ will show that it does not utilize the term "institution" but instead prefers to speak of "organs."¹²¹ This nomenclatural variation is not of real consequence¹²² but in terms of effectively bringing COMESA institutions

Common Market other than the Court" COMESA, *supra* note 52, art. 8(3). The only difference between this provision and art. 9(3) is that it speaks of "organs" rather than "subordinate organs." This is confusing because in both provisions the Court is exempted, meaning that the Court is both an "organ" and a "subordinate organ."

¹¹⁸ PTA, *supra* note 33.

¹¹⁹ PTA, *supra* note 33, art. 5(1).

¹²⁰ COMESA, *supra* note 52.

¹²¹ Article 7(1) of COMESA provides that "[t]here shall be established as organs of the Common Market: (a) the Authority, (b) the Council, (c) the Court of Justice, (d) the Committee of Governors of Central Banks, (e) the Intergovernmental Committee, (f) the Technical Committees, (g) the Secretariat, and (h) the Consultative Committee." COMESA, *supra* note 52, art. 7(1).

¹²² This is so because bodies such as the Authority, Council and Secretariat which were termed "institutions" under the PTA regime are reproduced in COMESA but listed this time as "organs." Because there is no qualitative change in the functions of these bodies, it can rightly be assumed that the change of terminology was not intended to import a new dimension or meaning.

However, the COMESA regime imports some confusion because it utilizes both terms. The Authority, Council, Secretariat, etc., are referred to as "organs" but the Clearing House, the Re-insurance Company, the Centre for Commercial Arbitration, etc., are referred to as "institu-

within the strict ambit of the COMESA Treaty in general and the Court's jurisdiction in particular, there are serious misgivings.

This difficulty was apparently detected during the negotiation of the Treaty.¹²³ The solution that was then prescribed was the incorporation of Article 174(3) which provides that “[u]pon entry into force of this Treaty, the institutions specified in paragraph 2 of this Article shall be deemed to be institutions of the Common Market and shall be designated as such.” With all due respect to the drafters of the Treaty, this was no solution. It is as if the drafters were working backwards, so to speak, to give jurisdiction to the Court. First, by declaring these entities “institutions” of the Common Market, the drafters forgot to define institutions and the relationship these institutions had with the organs of the Common Market.¹²⁴ Second, even if this relationship were set out, jurisdiction is not inferred, but is conferred. There seems to have been a misconception¹²⁵ that bringing the institutions of the Common Market within the regime of the COMESA Treaty would automatically include the Charters of these institutions in the COMESA Treaty.

Because Chapter Five of the COMESA Treaty, which sets out the operations of the Court, does not stipulate that the Court has jurisdiction to interpret the Charters of these institutions, the Court cannot infer jurisdiction when its jurisdiction has been expressly stated.¹²⁶ The drafters of the Treaty should have adopted a forward approach by providing that the Court will have jurisdiction to interpret the Treaty together with Charters of institutions of the Common Market. Because COMESA institutions cannot be brought, directly or impliedly, within the ambit of either the COMESA Council or Authority, the Court neither possesses the jurisdictional authority to interpret their

tions.” It is possible that the drafters of COMESA did not attach importance to this issue. COMESA, *supra* note 52, art. 7(1).

¹²³ Interview with Dan Ameyo, Senior State Council at the Attorney-General's Chambers, in Nairobi, Kenya (Feb. 21, 1994). According to Mr. Ameyo, the drafters wanted the Court to have jurisdiction to interpret the Charters of the various COMESA institutions.

¹²⁴ COMESA, *supra* note 52, art. 8(3) and art. 175.

¹²⁵ It is a misconception because a quick perusal of the Treaty of Rome indicates that there is a distinction. Art. 177(a) gives the European Court of Justice jurisdiction in “the interpretation of this Treaty” and paragraph (c) gives the same court jurisdiction in “the interpretation of the statutes of bodies established by an act of Council, where those statutes provide.” Treaty of Rome, *supra* note 81, art. 177(a). The fact that these bodies are created by acts of the Council and which acts are clearly within the scrutiny of the Court does not mean that their statutes are part of the Treaty of Rome.

¹²⁶ See *supra* note 113 and accompanying text.

Charters nor their application.¹²⁷ This is a significant exclusion particularly when it is considered that COMESA institutions have a direct and powerful impact on the integration process. This will be one of the contentious issues with which the Court will have to deal.

b. The Question of Locus Standi

It is possible to argue that the weightiest factor that inhibited the effectiveness of the PTA Treaty¹²⁸ and which has, as a consequence, received serious treatment in the COMESA Treaty is that of *locus standi*. Under the PTA regime only Member States had the right to challenge the interpretation and application of the Treaty,¹²⁹ a situation which in essence made dispute resolution mechanisms under the Treaty unavailable to the most important players in the arrangement.¹³⁰ In its attempts to create a more robust system of dispute settlement, the COMESA Treaty has, however, failed to address adequately the question of *locus standi*. Access to the COMESA Court has been provided for generally but numerous grey areas and inconsistent provisions exist. Unfortunately, because *locus standi* is crucial in the enforcement of Treaty provisions, these ambiguous and incon-

¹²⁷ There would appear to be quirky exception to the foregoing. In art. 27(2) of COMESA, *supra* note 52, the Court is granted "jurisdiction to determine claims by any person against the Common Market or its institutions for acts of their servants or employees in the performance of their duties." The extent of this jurisdiction, whether it includes contractual liabilities or tort-based actions, will be discussed below, *infra* notes 167-168 and accompanying text. Regardless, it is clear that the Court's jurisdiction is only limited to the determination of infringements by the servants or employees of these institutions. These servants or employees are subjected to the scrutiny of their actions which might cause harm to other parties, but the instruments that regulate their conduct are outside the jurisdiction of the Court.

The provision becomes inoperative when it is considered that for "claims" to be legally cognizable the actions giving rise to them must *ipso facto* be infringements of the instruments that govern the operations of these institutions. In other words, the actions must be *ultra vires* these instruments or *exes de pouvoir* under the French empirical classification. See HAMSON, EXECUTIVE DISCRETION AND JUDICIAL CONTROL-AN ASPECT OF THE FRENCH CONSEIL D'ÉTAT (1954) 165. An *ultra vires* determination, *perforce*, flows from the interpretation of instruments. And because the Court has no jurisdiction to interpret these instruments, actions cannot lie against the institutions.

Of course it may be argued that the Court has jurisdiction to interpret the Charters of Common Market institutions only to the extent of recognizing claims brought under art. 27(2) and nothing more. This would, however, import an absurdity to the extent that acts of employees of these institutions may result in claims against the institutions concerned but would otherwise remain legal and binding. In other words a holding by the Court under art. 27(2) would not have a *res judicata* effect in respect to other parties in that a finding by the court that a "wrong" has been committed does not annul the offending provision or act.

¹²⁸ PTA, *supra* note 33.

¹²⁹ PTA, *supra* note 33, at art. 40; 21 I.L.M. at 495.

¹³⁰ Individuals and other non-State players, who were the major trade participants were denied access to the PTA Tribunal.

sistent provisions will be exaggerated. The question of *locus* precedes all litigation and unless the legal regime provides a prima facie touchstone for its determination, many legal controversies will be generated. There are three basic components when considering the issue of *locus* within a regional grouping: the right of Member States to sue legal persons, natural persons and regional institutions.

Within COMESA, Member States do not have to satisfy any particular requirements of standing to sue, at least in the sense that the principle of *locus standi* is understood in administrative law.¹³¹ Article 24(1) of the COMESA Treaty provides that “[a] Member State which considers that another Member State or the Authority or the Council has failed to fulfil an obligation under this Treaty or has infringed a provision of this Treaty, may refer the matter to the Court.”¹³² The same is true in cases of Member States requesting advisory opinions¹³³ or choosing to intervene¹³⁴ in any case which is already before the Court. Indeed Member States within COMESA have a wider access to the Court than European Community Member States have to the European Court of Justice. The latter may not institute a claim before bringing the matter before the Commission.¹³⁵ There are, therefore, no impediments placed on the ability of a Member State to prosecute a case before the Court¹³⁶ with the exception

¹³¹ Under English administrative law, the “[l]aw starts from the position that remedies are correlative with rights, and that only those whose own rights are at stake are eligible to be awarded remedies.” H.W.R. WADE, *ADMINISTRATIVE LAW* 688 (1988). See also P. VAN DIJK, *JUDICIAL REVIEW OF GOVERNMENTAL ACTION AND THE REQUIREMENT OF INTEREST TO SUE* (1980).

In French administrative law the “plaintiff must be able to show that the decision attacked is one injurious (*faisant grief*) to his interests.” NEVILLE BROWN & JOHN F. GARNER, *FRENCH ADMINISTRATIVE LAW* 81 (1967).

¹³² COMESA, *supra* note 52, art. 24(1).

¹³³ Art. 32(1) of COMESA, provides that “The Authority, the Council or a Member State may request the Court to give an advisory opinion regarding questions of law arising from the provisions of this Treaty affecting the Common Market, and the Member State shall in the case of every such request have the right to be represented and take part in the proceedings.” COMESA, *supra* note 52, art. 32(1).

¹³⁴ Under art. 36 of COMESA, “[a] Member State, the Secretary-General or a resident of a Member State who is not a party to a case before the Court may with leave of the Court, intervene in that case. . . .” COMESA, *supra* note 52, art. 36.

¹³⁵ Treaty of Rome, *supra* note 81, art. 170. The provision states that “[b]efore a Member State brings an action against another Member State for an alleged infringement of an obligation under this Treaty, it shall bring the matter before the Commission.” Member States may, however, proceed to execute their claims before the Court if the Commission does not deliver an opinion within three months of being seized of the matter. Treaty of Rome, *supra* note 81, art. 170.

¹³⁶ This is similar to the European Community legal regime. See Treaty of Rome, *supra* note 81, art. 173.

that the claim must be based upon a recognized ground in the Treaty.¹³⁷

Access to the Court by legal and natural persons is limited, and rather confused, as compared to that of Member States.¹³⁸ For legal and natural persons, the understanding of *locus standi* still does not approximate its understanding under administrative law generally.¹³⁹ The Treaty provision that can be said to represent the general extent of the standing legal and natural persons have within COMESA is Article 26 of the COMESA Treaty which declares that “[a]ny person who is resident in a Member State may refer for determination by the Court the legality of any act, regulation, directive, or decision of the Authority or the Council or a Member State of which he is a resident. . . .”¹⁴⁰ However, before such person can activate this clause, a proviso has been included which mandates that that person must have first exhausted local remedies.¹⁴¹ This is where confusion arises. If such a person were to take the matter first to a national tribunal or court for determination, such tribunal or court, if the matter touches on the interpretation of the COMESA Treaty (and it must certainly be on interpretation of the Treaty because COMESA Court’s jurisdiction only extends to this) must refer the matter to the Court under Article 30 of the Treaty.¹⁴² It follows that a legal person has no standing to bring a claim to the Court and that Article 26 is an embarrassing case of bad drafting.¹⁴³ In any case, even if legal persons can be said to have access to the Court by virtue of Article 26 what would be the nature of the claim? If local remedies must first be pursued is the suggestion here that if a legal person is dissatisfied with the ruling of a local court or tribunal such person can appeal to the COMESA

¹³⁷ Grounds of review are provided in art. 24(2). See *infra* notes 170-199 and accompanying text.

¹³⁸ Throughout the COMESA Treaty, *supra* note 52, and this is true also with regard to the Treaty of Rome, *supra* note 81, it is presumed that the term “natural and legal person” necessarily refers to individuals, enterprises and associations. However, it is a fact that Member States and COMESA are legal persons. For a similar view, see D.G. VALENTINE, *THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES* VOL. 1,299 (1965).

¹³⁹ See *supra* note 131.

¹⁴⁰ COMESA, *supra* note 52.

¹⁴¹ The proviso states that “[p]rovided that where the matter for determination relates to any act, regulation, directive or decision by such a Member State, such person shall not refer the matter for determination under this Article unless he has first exhausted local remedies in the national courts of the Member State.” COMESA, *supra* note 52, art. 26.

¹⁴² COMESA, *supra* note 52, art. 26.

¹⁴³ The simple point to be made here is that there can be no local remedy for an infringement of COMESA law. Once any of the breaches contemplated by art. 26 of COMESA crystallizes, the only organ that can competently adjudicate the issues and provide a remedy is the COMESA Court. COMESA, *supra* note 52, art. 26.

Court? If the drafters of the Treaty intended such a consequence it would clearly conflict with the overall competence of the Court. As stated earlier, the COMESA Court was intended to have a monopoly in the interpretation and application of the COMESA Treaty.¹⁴⁴ An appeal from a local court or tribunal presupposes that such local court or tribunal has the competence to interpret the Treaty, a possibility that the Treaty does not recognize.¹⁴⁵ The logical position is that within COMESA legal persons have no access to the COMESA Court notwithstanding a contrary indication in the Treaty.

The Treaty of Rome¹⁴⁶ guarantees legal persons access to the European Court of Justice "against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former."¹⁴⁷ It can be seen that as far as the issue of *locus standi* in respect of legal persons is concerned, the European Community adopts a rigid¹⁴⁸ stance and the concept is applied in a fashion similar to that in administrative law.¹⁴⁹ Access by legal persons is limited to reduce the pool of potential litigants to a manageable size. Within COMESA, and if Article 26 of the COMESA Treaty were assumed to have any legal effect, all residents of COMESA Member States potentially have access to the Court on any issue touching on the interpretation of the COMESA Treaty,¹⁵⁰ a prospect that must surely be frightening for the COMESA Court. There is an urgent need for COMESA to reformulate the issue of *locus standi* to ensure that legal persons have access and that this access is exercised within reasonable and workable parameters.

Staying with the issue of legal persons and their competence to sue before the COMESA Court, an interesting issue is the extent, if

¹⁴⁴ *Supra* note 88 and accompanying text.

¹⁴⁵ By way of an example, might a private litigant who complains that the COMESA Council in pronouncing a regulation has acted *ultra vires* or has committed an abuse of power, have the possibility of receiving a local remedy against the COMESA Council? It is not conceivable that COMESA contemplated such a consequence.

¹⁴⁶ Treaty of Rome, *supra* note 81.

¹⁴⁷ See Treaty of Rome, *supra* note 81, art. 173. In *Plaumann & Co. v. EEC Commission* [1964] C.M.L.R. 29, at 47, the European Court of Justice stated that:

Persons other than those to whom the decision was addressed can justifiably claim to be concerned individually only if the decision affects them because of certain characteristics which are peculiar to them or by reason of factual situation which is, as compared with all other persons, peculiarly relevant to them, and by reference to which they may be individually described in a way similar to that of the addressee of the decision.

¹⁴⁸ See, e.g., *Plaumann & Co. v. Commission* [1964] C.M.L.R. *Alfred Toepfer KG & Ge-treide-Importgesellschaft mbH v. Commission* [1966] C.M.L.R. 111.

¹⁴⁹ See *supra* note 131.

¹⁵⁰ COMESA, *supra* note 52.

any, to which tort claims instituted by third parties against the Common Market and its institutions can be entertained by the Court. Under Article 27(2) of the COMESA Treaty the Court has "jurisdiction to determine claims by any person against the Common Market or its institutions for acts of their servants or employees in the performance of their duties."¹⁵¹ This provision raises four pertinent issues.

One, does "any person" mean that individuals can have direct access to the Court or must such persons still have to qualify under Article 26 which mandates the exhaustion of local remedies? It would appear that since all legal and natural persons have to exhaust local remedies before instituting their claims before the Court (to establish *locus standi*), this requirement would still have to be satisfied by those wishing to file claims under article 27(2). However, this would result in an absurd situation in which national courts and tribunals will be required to interpret the COMESA Treaty and instruments creating COMESA institutions, identify the violation and award damages. Quite clearly, national courts and tribunals cannot have this competence.¹⁵² Even if a claim were to be initiated through local courts or tribunals this is not a matter of interpretation which is contemplated by Article 30 of the COMESA Treaty. Rather it is a substantive case in which the Court acts as a court of first instance, takes evidence and makes an award.¹⁵³ It is, therefore, more realistic to infer that under Article 27(2) the drafters envisaged a direct access to the Court without the necessity of going through local courts or tribunals.¹⁵⁴ Be-

¹⁵¹ COMESA, *supra* note 52.

¹⁵² COMESA, *supra* note 52.

¹⁵³ The European Court of Justice has had a long history of dealing with matters of first instance and a recent revision of the Treaty of Rome, *supra* note 81 art. 168a, has created a Court of First Instance by providing that:

The Court of First Instance shall be attached to the Court of Justice with the jurisdiction to hear and determine at first instance, subject to a right of appeal to the Court of Justice on points of law only and in accordance with the conditions laid down by the Statute, certain classes of action or proceeding defined in accordance with the conditions laid down in paragraph 2.

For a discussion of the operations of the Court see TIMOTHY MILLET, *THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES* (1990).

¹⁵⁴ To be sure, it is possible for a claimant to pursue a local remedy for breach of a Treaty provision by his or her government. In this case the claimant can claim that his or her government has misapplied a Treaty provision which has resulted in some damage to the claimant. The same set of facts can, simultaneously, be sufficient to prosecute a claim against the Common Market. Whether an individual can challenge his Member State's act will depend on national law, and in particular, whether the Treaty is superior to other laws. See Walter van Gerven, *The Legal Protection of Private Parties in the Law of the European Economic Community*, in *EUROPEAN LAW AND THE INDIVIDUAL* 1, 3 (1976).

cause of the above complication it is better to infer that the intention was to provide the COMESA Court with sole jurisdiction for actions brought under this section.¹⁵⁵ The requirement of the exhaustion of local remedies¹⁵⁶ would, therefore, seem to be restricted to the nullification of acts of the Authority, Council or Member State in which a claim in damages is not being pursued.

Two, what is the legal extent of "claims" under this provision? In the absence of further elaboration and applying a literal interpretation, "claims" would undoubtedly include both contractual and non-contractual (tortious) claims. A further question that arises is if tort claims can be sustained what is the nature of the tort law that the Court is supposed to apply.¹⁵⁷ The Treaty is unhelpful in this regard and it is debatable whether the Court can entertain a tort-based claim in the absence of a provision that lays down the law to be applied.¹⁵⁸ It becomes clear that the COMESA Treaty is underdeveloped in its formulation and execution of causes of action and because of this deficiency, the Court will have to model fresh jurisprudence to enable the effectuation of claims or dismiss these claims as non-justiciable under the present provisions of the Treaty.

Three, uncertainty exists as to the import of the phrase "acts of their servants or employees in the performance of their duties."¹⁵⁹ In order to understand this uncertainty, knowledge of the distinction known to French law as that between *faute de service* and *faute personnelle* is essential. In French law, a *faute de service* refers to the

¹⁵⁵ The Treaty of Rome, *supra* note 81, art. 178, provides that "The Court of Justice shall have jurisdiction in disputes relating to compensation for damage provided for in the second paragraph of Article 215." This has been interpreted as giving the Court of Justice sole jurisdiction. See van Gerven, *supra* note 154, at 10.

¹⁵⁶ COMESA, *supra* note 52, art. 26.

¹⁵⁷ The same can be said of contractual liability that may be prosecuted under this head. Although in respect of contractual liability the dilemma is not as big because usually the law to be applied will be the law governing the contract. Ordinarily, conflict of law rules are fairly elaborate in this regard. Nonetheless, it would have been helpful for the drafters of the Treaty to have made an express provision for the applicable law. The Treaty of Rome stipulates at art. 215 that the European Court of Justice "shall be governed by the law applicable to the contract in question." Treaty of Rome, *supra* note 81, art. 215.

¹⁵⁸ Compare this position with that obtaining in the European Community where the Treaty of Rome provides that in determining tort-based claims the European Court of Justice shall be guided by "the general principles common to the law of the Member States. . . ." Treaty of Rome, *supra* note 81. It would also be interesting to note that within the European Community an individual may institute a tort-based action in respect to a normative act, a normative act being described as that "which implies the existence of certain alternatives as regards economic policy." Case 5/71 *Atkien-Zuckerfabrik Schoppenstedt v. Council of the European Communities*, 1971 E.C.R. 975.

¹⁵⁹ COMESA, *supra* note 52, art. 27(2).

occurrence where damage results from the malfunction of an institution or the institution's servants¹⁶⁰ whereas *faute personnelle* refers to that situation in which damage is caused by some personal wrongdoing on the part an institution's servant which is in no way connected with that servant's official position.¹⁶¹ In a *faute de service* instance, the institution is liable, whereas the individual servant is personally liable in the case of *faute personnelle*.¹⁶² The European Community adopts this classification in adjudicating tort-based claims.¹⁶³ English law does recognize this distinction, albeit in a cruder fashion, by acknowledging the distinction between a servant acting in the course of his employment and one who is on a frolic of his own.¹⁶⁴ In the former case the master/employer is liable, whilst in the latter, the servant assumes sole responsibility. Reverting to Article 27(2) of the COMESA Treaty¹⁶⁵ the complication arises because of a strange omission in the provision. Because the provision states that liability shall attach on the Common Market or its institutions "for acts of their servants or employees in the performance of their duties" a question arises as to the liability of the Common Market or its institutions in respect to collective acts of the Common Market, its institutions or organs/bodies of the Common Market. Would a decision of the board of the Re-insurance Company, an institution of the Common Market, be an act of the "servants or employees" of the Common Market or its institutions or would such an act be categorized as an act of that collective body? The same can be asked of a decision or act of the COMESA Authority or Council; would such decision or act be one by "servants or employees" of the Common Market?

It seems that under the COMESA Treaty, liability will attach only if the wrong is committed by servants or employees in individual capacities. No liability will attach if an act has been ordained by a collectivity of the Common Market or any of its institutions. It is useful to note in this regard that the European Community equivalent of this provision provides that liability will accrue for "damage caused by its (Community's) institutions or by its servants in the performance of their duties."¹⁶⁶ In the European Community version, collective acts

¹⁶⁰ See L. BROWN & JOHN GARNER, FRENCH ADMINISTRATIVE LAW 99 *et seq.* (1973).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ See *e.g.*, Joined Cases 5, 7 & 13-24/66, *Kampffmeyer v. EEC Commission* 1967 E.C.R. 245.

¹⁶⁴ See W.V.H. ROGERS, WINFIELD & JOLOWICZ ON TORT 205 *et seq.* (1994).

¹⁶⁵ COMESA, *supra* note 52, art. 27(2).

¹⁶⁶ Treaty of Rome, *supra* note 81, art. 215.

or decisions of organs of the Community can be cited for purposes of obtaining a remedy for a *faute de service* infringement.

Four, in order to sustain a "claim" must a litigant first establish a breach of a duty of care,¹⁶⁷ in the case of tort-based, and privity of contract,¹⁶⁸ in contractual claims? It would seem obvious that a claimant must, perforce, establish that he or she has suffered damage which damage was occasioned by "servants or employees" of the Common Market in the execution of their duties. But in the absence of an affirmative declaration to that effect, a claimant may be able to sue for a breach which does not result in direct injury to the particular claimant. It would also appear that under Article 27(2) of the COMESA Treaty all that a claimant need prove is the existence of a breach on the part of the servants or employees of the Common Market. That personal injury¹⁶⁹ then becomes an issue in the calculation of damages. The Treaty does not provide anywhere for individuals to prove that the offending provision is directed at them personally or is of a direct and individual concern to them and it can, therefore, be concluded that normative acts can form the basis of claims under Article 27(2) of the Treaty.

c. Grounds of Review

As a general proposition the constitution of every international organization sets limits on the powers of that organization.¹⁷⁰ In addition, the various organs and institutions of the organization must have their powers defined and limited.¹⁷¹ In setting the limits for the exercise of power and providing for grounds of review¹⁷² whenever these limits are alleged to have been exceeded, the COMESA Treaty makes a distinction between references by Member States and references by legal and natural persons. In as far as Member States are concerned

¹⁶⁷ For a common law exposition of breach of duty see *Donoghue v. Stevenson* [1932] App. Cas. 562.

¹⁶⁸ See *Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd.* [1915] App. Cas. 79.

¹⁶⁹ Resulting from breach of a duty of care or breach of a contractual obligation.

¹⁷⁰ It is also customary for the interpretation of these limits to be left to the executive organs of the organization. See L.J. BRINKHORST & H.G. SCHEMERS, *JUDICIAL REMEDIES IN THE EUROPEAN COMMUNITIES* (1977).

¹⁷¹ COMESA provides at art. 7(4) that the "organs of the Common Market shall perform their functions and act within the limits of the powers conferred upon them by or under this Treaty." COMESA, *supra* note 52, art. 7(4). The Treaty of Rome has a similar provision in art. 4(1). Treaty of Rome, *supra* note 81, art. 4(1).

¹⁷² Some scholars prefer not to utilize the heading "grounds of review" but instead refer to "grounds of illegality." See as an example of such categorization, GERHARD BEBR, *JUDICIAL CONTROL OF THE EUROPEAN COMMUNITIES*, 79 (1962).

an action may lie in case of (i) ultra vires or unlawful acts, (ii) infringement of the provisions of the Treaty or any rule of law relating to its application, (iii) or in a case of misuse or abuse of power.¹⁷³ For legal and natural persons, a challenge can only originate from an unlawful act or an infringement of a provision of the Treaty.¹⁷⁴ A casual glance at the provisions for review within the Treaty indicates that they are modelled on Common Law administrative law concepts and understandings.¹⁷⁵

First, ultra vires or unlawful act, provides a good example of the reliance on the Anglo-Saxon system by COMESA. The Treaty of Rome¹⁷⁶ utilizes a different concept; that is, incompetence¹⁷⁷ which concept is fashioned from the French empirical classification known as *excès de pouvoir*.¹⁷⁸ There is some appreciable difference between the two concepts with the French version having a wider scope and exhibiting more finesse.¹⁷⁹ It is somehow odd that the COMESA Treaty¹⁸⁰ at Article 26 omits the term "ultra vires" but chooses to retain the term "unlawful" when referring to reference by legal and natural persons whereas both terms have been employed in Article 24(2) which deals with reference by Member States.¹⁸¹ The relatively limited scope of ultra vires need not be viewed as a impediment to the COMESA Court's jurisdiction, for much will depend on the interpretation that the Court will give to this ground of review and the jurisprudence that will develop around it.

Second, infringement of the provisions of the Treaty or any rule of law relating to its application as a ground of review imports some uncertainties. Would such a violation refer to substantive law or would it also encompass procedural aspects? The question arises chiefly because in all systems of administrative law, a distinction is made between procedural law and substantive law which receive dif-

¹⁷³ COMESA, *supra* note 52, art. 24(2).

¹⁷⁴ COMESA, *supra* note 52, art. 26.

¹⁷⁵ *See infra* note 179.

¹⁷⁶ Treaty of Rome, *supra* note 81.

¹⁷⁷ *See* Treaty of Rome, *supra* note 81, art. 173.

¹⁷⁸ Translated into English it means a "plea of ultra vires." CHARLES FREEDMAN, *THE CONSEIL D'ETAT IN MODERN FRANCE*, 133-138 (1961). The translation is clumsy and fails to communicate the many subtleties of the French term.

¹⁷⁹ For a comparison of the two concepts *see* BERNARD SCHWARTZ, *FRENCH ADMINISTRATIVE LAW AND THE COMMON-LAW WORLD*, 200-02 (1954).

¹⁸⁰ COMESA, *supra* note 52.

¹⁸¹ The only sensible inference that can be drawn here is that the drafters did not make a distinction between the two, but rather considered the terms synonymous and, therefore, interchangeable. The terms are, however, not synonymous as unlawful definitely has a wider and more nebulous connotation than ultra vires.

ferent treatment when it comes to interpretation and application. The COMESA Treaty does not make such a distinction and this will certainly generate disputes in its interpretation and application.¹⁸² The main dispute will revolve around the significance of the infringement. Would a relatively minor and inconsequential infraction suffice to allow the Court to strike down the offending act, regulation, directive or decision of the Authority or Council?¹⁸³ The COMESA Court of Justice, if it were to adopt a plain-meaning interpretation of the Treaty, does not have an option but to pronounce an annulment in such a case. There is, therefore, no distinction being drawn between the outer boundary of a COMESA organ's authority to treat or act on a matter and those requirements by which a decision must be taken, a predicament that necessitates a stiff interpretation and application of COMESA law.¹⁸⁴ COMESA players will be frustrated when numerous COMESA operations are held to be invalid as a result of minor and inconsequential infractions.¹⁸⁵

The other tenet of this ground of review speaks to the normative acts of COMESA Council and which acts would be scrutinized under "any rule of law relating to its application." Under Article 51(6) of the COMESA Treaty, for example, it is provided that "proceedings initiated pursuant to the provisions of this Article (on dumping) shall be carried out in accordance with anti-dumping regulations made by Council."¹⁸⁶ Regulations promulgated by Council under this provision would be open to scrutiny by the COMESA Court. Similarly, Article 11 of the Treaty provides, *inter alia*, that "regulations, directives and decisions of the Council shall state the reasons on which they are based"¹⁸⁷ which grants the COMESA Court jurisdiction to review

¹⁸² It is noteworthy that the equivalent provision in the Treaty of Rome, *supra* note 81, provides that an act may be challenged for "lack of competence, infringement of an *essential* procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers." *Supra* note 81, art. 173.

¹⁸³ Art. 173 of the Treaty of Rome speaks of an "infringement of an essential procedural requirement. . . ." which the European Court of Justice has interpreted to mean a major violation of procedure. Treaty of Rome, *supra* note 81, art. 173. *Also see, e.g.,* Beus GmbH v. Hauptzollamt Munchen-Landesbergerstrasse, 145 C.M.L.R. (1968).

¹⁸⁴ This inability to distinguish substance from procedure approximates the status of the American doctrine of "due process" which seems to have, with time, grown to encompass both substantive matters of law and procedural considerations.

¹⁸⁵ It is worth noting that all administrative law systems incorporate the distinction between procedural aspects of law and substantive elements and in the same vein provide a wide discretion to adjudicative bodies to determine the character and importance of any procedural violation and whether such violation is sufficient to cause an annulment.

¹⁸⁶ COMESA, *supra* note 52.

¹⁸⁷ COMESA, *supra* note 52.

such regulations, directives or decisions to see whether they are based on the wrong reasons or are unsupported by the relevant facts. Such a consequence may, for instance, be the result of illegal or improper motives. The Court may also make reference to the objectives of the COMESA Treaty to determine the legality of any action taken by the COMESA Council. The consideration of motive and objective makes this the widest ground of review and gives the Court its biggest scope. No matter how distinct and precise the objectives of the COMESA Treaty may be articulated and notwithstanding the *bona fides* of the COMESA Council, the pronouncement of qualifications and limits under which the various COMESA organs may exercise the powers for attaining them would still necessitate an element of discretion.

Third, misuse or abuse of power¹⁸⁸ appertains to those situations where an act is undertaken for the attainment of a purpose outside the scope of the COMESA Treaty. Even if the felonious purpose is not accomplished, the unlawful intention will result in the annulment of the act.¹⁸⁹ Although this ground may potentially become the most powerful ground of review within COMESA, it must be borne in mind that just like other principles and doctrines in law that require proof of bad faith, the evidentiary requirements that will prompt the COMESA Court to conclude that a wrong or improper reason motivated a Common Market act are steeped against the plaintiff.¹⁹⁰

As noted above¹⁹¹ legal and natural persons have a rather limited access to the COMESA Court when it comes to judicial review. The *locus standi* of these entities and the uncertainties of prosecuting a claim have been discussed¹⁹² and perhaps the only noteworthy aspect to investigate as regards judicial review is the requirement that in order to challenge an act of a Member State such a legal or natural per-

¹⁸⁸ Better known as *détournement de pouvoir* under French law and is the term often used in the European Economic Community. In fact there is no corresponding ground known to Anglo-American law and the closest literal translation would be "misuse of discretion" whereas the term "misuse of power" gives a vague connotation. A *détournement de pouvoir* infringement occurs when an act "though within the legal competence of the agent, is in reality done for another purpose than that which the law authorises it had in mind." John F. Garner, *French Administrative Law*, 33 YALE L.J. 597, 609 (1924).

¹⁸⁹ Wall states that this ground "directs attention to the end or object for which the power is (allegedly wrongly) used, rather than to the intrinsic nature of the power itself." EDWARD WALL, *THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES*, 96 (1966).

¹⁹⁰ Suffice it to say here that within the European Economic Community this ground has rarely succeeded despite numerous attempts. See CLARENCE MANN, *THE FUNCTION OF JUDICIAL DECISION IN EUROPEAN ECONOMIC INTEGRATION*, 57 (1972).

¹⁹¹ *Supra* note 119 and accompanying text.

¹⁹² *Supra* notes 139-145 and accompanying text.

son must be a resident of that Member State.¹⁹³ Viewed from the standpoint that COMESA is about regional economic integration in which cross-border trade and movement of capital is incrementally unregulated, the requirement of residence becomes a misnomer in this wider outlook. Regional trade, perforce, assumes that the wider COMESA market will be available to all players in the Common Market. An entrepreneur resident in one country who engages in cross-border trade with another country cannot sue the latter country for breach of treaty obligations under Article 26 of the COMESA Treaty¹⁹⁴ because he does not reside there. This provision, *inter alia*, encourages Member States to discriminate against non-residents because they know they will be immune from suits.¹⁹⁵ The residency requirement is out of sync with the *raison d'être* for the Common Market.

d. Failure to Act

Not only may an affirmative act be annulled for illegality but failure of the Common Market or its organs to act may similarly constitute an illegality which is a ground for action before the Court. A motion based on inaction is, therefore, the compliment of the motion for annulment as it compels the organs of the Common Market to act in circumstances where inaction violates the COMESA Treaty.¹⁹⁶ The COMESA Treaty does not elaborately provide for the procedure for challenging inaction and the only reference can be drawn from Article 17(7)(h) which empowers the Secretary-General, subject to the provisions of the Treaty, to "submit references to the Court concerning the alleged breach of any obligation under this Treaty in relation to the Common Market or as to any action or *omission* affecting the Com-

¹⁹³ The European Economic Community avoids this potentially hazardous requirement by merely requiring that a natural or legal person may "institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former." Treaty of Rome, *supra* note 81, art. 173.

¹⁹⁴ COMESA, *supra* note 52.

¹⁹⁵ Of course the aggrieved person may implore his Member State to take up the matter on his behalf and bring the offending Member State to Court under art. 24(1) of the COMESA Treaty or the Secretary-General may initiate action under art. 25.

The pursuit of any of the above courses of action defeats one of the primary advantages of the new Treaty which was to depoliticize the process of integration. COMESA, *supra* note 52.

¹⁹⁶ The basis of such violation caused by inaction is derived from the affirmative imploration of art. 10(1) of the COMESA Treaty, which stipulates that "[t]he Council may, in accordance with the provisions of this Treaty, make regulations, issue directives, take decisions, make recommendations or deliver opinions." COMESA, *supra* note 52, art. 10.

mon Market.”¹⁹⁷ Within COMESA an appeal for inaction can only be initiated by the Secretary-General operating under powers which are very circumscribed.¹⁹⁸ From a practical point of view Member States have an indirect power to institute an appeal for inaction as they are able, when constituted as the COMESA Council, to direct the Secretary-General to refer a matter to the COMESA Court.¹⁹⁹

A disturbing anomaly, however, exists as to the competence of the Secretary-General to initiate action in respect of inaction by other COMESA organs. The wording of Article 17(7)(h) of the COMESA Treaty²⁰⁰ leaves no doubt as to the competence of the Secretary-General to refer any breach by any party to the COMESA process to the COMESA Court. Nonetheless, Article 25 of the COMESA Treaty²⁰¹ which governs references by the Secretary-General to the Court only envisages the Secretary-General bringing an action against a Member State. The issue that then arises is whether Article 25 of the Treaty negates the powers of the Secretary-General provided under Article 17(7)(h) to the extent of any inconsistencies. It is submitted that the former Treaty provision supersedes the latter as the former stipulates jurisdiction whilst the latter merely enumerates functions and responsibilities.

Even supposing that the Secretary-General were not incapacitated by Article 25 of the Treaty, he is in a difficult position with re-

¹⁹⁷ The basic provision of the Treaty which the Secretary-General must comply with is Article 25 which states that:

1. Where the Secretary-General considers that a Member State has failed to fulfil an obligation under this Treaty, or has infringed a provision of this Treaty he shall submit his findings to the Member State concerned to enable that Member State to submit its observations on the findings.
2. If the Member State concerned does not submit its observations to the Secretary-General within two months, or if the observations submitted are unsatisfactory, the Secretary-General shall refer the matter to the Bureau of the Council which shall decide whether the matter shall be referred by the Secretary-General to the Court immediately or be referred to the Council.
3. Where a matter has been referred to the Council under the provisions of paragraph 2 of this Article and the Council fails to resolve the matter, the Council shall direct the Secretary-General to refer the matter to the Court.

The institutionalization of negotiation between an offending Member State and the Council reflects a certain conspicuous restraint in dealing with Member States. COMESA, *supra* note 52.

¹⁹⁸ COMESA, *supra* note 52.

¹⁹⁹ COMESA, *supra* note 52.

²⁰⁰ COMESA, *supra* note 52.

²⁰¹ COMESA, *supra* note 52. The heading of the article reads “Reference by the Secretary-General” and seems to encompass the whole jurisdiction and competence of his office as regards standing before the Court. The article is in fact placed in the middle of articles dealing with reference by other parties to the Court and it is, therefore, plainly meant to establish the entire competence of the Secretary-General to bring action before the Court.

gard to initiating an appeal for inaction against the COMESA Authority or Council as he acts as the Secretary to both organs.²⁰² Other than against a Member State, the Secretary-General can only institute an appeal for inaction against other institutions²⁰³ of COMESA with the exception of the Authority and the Council. An action against a Member State for inaction under this provision would in most instances succeed because of the procedural rigors²⁰⁴ that would have already been fulfilled before the matter gets to the COMESA Court. When an action is initiated there will be evidence showing that the Secretary-General did issue a notice to the offending Member State concerning the nature of inaction and the Member State had time to comply but did not.²⁰⁵ Giving notice to the offending Member State acts as a condition precedent to instituting a claim for inaction. Natural and legal persons do not have the right to institute proceedings for inaction within COMESA.²⁰⁶

It does appear that the drafters of the COMESA Treaty²⁰⁷ did not pay sufficient attention to inaction as a cause of action and that Article 17(7)(h) of the Treaty²⁰⁸ was never intended to confer such a power. This conclusion can be drawn from the absurd outcomes that are precipitated by assuming that an action for inaction is tenable under COMESA. Limiting the Secretary-General to institute proceedings for inaction and, indeed, making the Secretary-General the only competent party to institute such action renders the ground a nullity. It would have been preferable to expose all COMESA players that have been assigned positive obligations to proceedings for inaction to ensure compliance with Treaty provisions. The fact that the Council,²⁰⁹ the Authority and COMESA institutions are outside the

²⁰² COMESA, *supra* note 52, art. 17(7)(e).

²⁰³ A complicated position bearing in mind that the COMESA Court does not apparently have jurisdiction to interpret the constitutive instruments of these institutions. *See infra* notes 110-126 and accompanying text.

²⁰⁴ COMESA, *supra* note 52.

²⁰⁵ Compare with art. 175 of the Treaty of Rome which, *inter alia*, provides with respect to inaction that:

The action shall be admissible only if the institution concerned has been called upon to act. If, within two months of being so called upon, the institution concerned has not defined its position, the action may be brought within a further period of two months.

Treaty of Rome, *supra* note 81, art. 175.

²⁰⁶ With reference to the European Economic Community, natural and legal persons have the power to prosecute an appeal based on inaction under art. 175 of the Treaty of Rome. *Id.*

²⁰⁷ COMESA, *supra* note 52.

²⁰⁸ COMESA, *supra* note 52.

²⁰⁹ The Council, in particular, is charged with the execution of virtually all the critical aspects of COMESA and should have been the organ that faced suits for inaction.

challenge of this particular ground removes a very effective supervisory tool from the COMESA process.

e. Preliminary Rulings

The provision for preliminary rulings by the COMESA Court is meant to insure that there is uniformity in the interpretation and application of COMESA law by judicial authorities in the Member States.²¹⁰ To realize this objective, it is anticipated that national courts²¹¹ will collaborate with the COMESA Court in mutual regard of their respective competences.²¹²

The COMESA Court's jurisdiction with regard to preliminary rulings is, in a sense, not self-operating but is bestowed upon it by national courts. If national courts show reluctance in utilizing this jurisdiction, the COMESA Court cannot call on any compelling prerogative to be seized of jurisdiction.²¹³ According to Article 30 of the COMESA Treaty whenever issues touching on the interpretation of the COMESA Treaty are raised in a national court such court shall, "if it considers that a ruling on the question is necessary,"²¹⁴ refer the matter to the COMESA Court.²¹⁵ National courts of last instance²¹⁶

²¹⁰ This uniform and unitary purpose strives to secure a judicial philosophy in which national courts and the COMESA Court are viewed as belonging to one regime and not separate regimes. See JURGEN SCHWARZE, *THE ROLE OF THE EUROPEAN COURT OF JUSTICE IN THE INTERPRETATION OF UNIFORM LAW AMONG THE MEMBER STATES OF THE EUROPEAN COMMUNITIES*, 21 (1988).

²¹¹ Under art. 30 of COMESA, the competence to refer matters is vested in "any court or tribunal of a Member State." COMESA, *supra* note 52, art. 30. It is submitted that such a judicial body must be one that is a public body competent to make legal findings. A private arbitrator determining a private contractual dispute may not be competent to refer a matter to the COMESA Court. This is a common sense interpretation of the Treaty for a contrary reading of the Treaty would create a flood of references from all manner of quasi-judicial organs that will, as a necessity, have to interact with COMESA.

²¹² Advocate-General Lagrange, speaking with regard to the European Economic Community position, states that "[a]ppplied judiciously-one is tempted to say loyally-the provisions of Article 177 lead to a real and fruitful collaboration between the municipal courts and the Court of Justice of the Communities. . . ." ROBER BOSCH v. KLEDING-VERKOOPBEDRIJG, [1962] CMLR 1, 6.

²¹³ The power of national courts to snub this jurisdiction may be gauged from the EEC experience where in the early phases of the Community, national courts, and in particular, highest courts, were reluctant to seek preliminary rulings fearing that their absolute authority to interpret national law could be subordinated to the European Court's exclusive competence to interpret Community law. See Gerhard Bebr, *Article 177 of the EEC Treaty in the Practice of National Courts*, 26 INT'L & COMP. L.Q. 241 (1977).

²¹⁴ COMESA, *supra* note 52.

²¹⁵ As to references stemming from interlocutory proceedings it appears that the most sensible course to adopt is to curtail references unless a lack of interpretation makes it impossible to dispose of the interlocutory proceedings. Often times interlocutory proceedings are brought under certificates of urgency in which time is of the essence and a reference would negate the

do not enjoy the liberal and permissive benefit of discretion that lower courts have, but must²¹⁷ refer the matter to the COMESA Court.²¹⁸

A critical, and rather peculiar, aspect of Article 30 is that it encompasses both interpretation and application of the COMESA Treaty. A reference based on interpretation seems to be the natural *raison d'être* for having preliminary rulings. However, to suggest that application of treaty provisions can form a proper ground for seeking a preliminary ruling would be a misapplication of the mechanism.²¹⁹ There are two issues that raise troubling queries. One, in order for the COMESA Court to issue a ruling on the application of a treaty provision it would have to be furnished with the facts of the matter for it to make a determination about the applicability of the relevant treaty provision to the facts. Two, what would be the propriety of supplying the COMESA Court with facts for its determination and then sending the case back to a national court for final disposition? A determination of facts in relation to a treaty provision conclusively disposes of the case. Stated differently, a determination of facts dis-

purpose of seeking interlocutory orders. Similarly, granting a stay whilst a reference is sought, may inflict enormous harm on one of the parties. For a discussion of how English courts have dealt with this issue in the ambit of the EEC regime, see *Bulmer v. Bollinger*, 3 WEEKLY L. REP. 202 (1974). Note, *Art. 177 of the EEC Treaty and English Interlocutory Proceedings*, 23 INT'L & COMP. L.Q. 840 (1974).

The decision in *Bulmer v. Bollinger*, is contrary to the intentions of the Treaty of Rome as it seeks to lay down conditions for subordinate courts in deciding when to refer a matter to the European Court of Justice. Under the Treaty the exercise of this discretion must be unfettered. For a supporting view, see FRANCIS JACOBS & ANDRE DURAND, REFERENCES TO THE EUROPEAN COURT: PRACTICE AND PROCEDURE, 159 (1975).

²¹⁶ A critical study of the phraseology leaves no doubt that a court of last instance does not necessarily connote the highest court in a particular Member Country. This is so because the relevant criteria is a court or tribunal "whose judgement is there is no judicial remedy under" national law. There are many instances in national law where lower courts determine issues from which no appeal can be allowed or where a subordinate appellate court has the final say on an issue. An example can be found in the Kenyan law that stipulates that constitutional matters are to be dealt with exclusively by a specially constituted High Court constitutional bench and from which no appeal can be entertained by the Kenyan Court of Appeal. Kenya Const. sec. 67.

²¹⁷ The obligation is not as compulsive as it may first appear. A court of last instance may argue that the issue before it is clear, an appeal to the *acte clair* doctrine-where a point is so clear a national judge need not refer the matter for interpretation and no interpretation of the Treaty is required or that the issue has already been determined by the COMESA Court in a previous ruling. See KURT LIPSTEIN, LAW OF THE EUROPEAN ECONOMIC COMMUNITY, 329-330 (1974). The intransigence of a final court can work to frustrate this avenue to the COMESA Court as no appeal can be lodged to the COMESA Court arising from the refusal of a national court to refer a matter to the COMESA Court. This merely emphasizes that the exercise of this jurisdiction depends on the attitude and practice of national courts.

²¹⁸ COMESA, *supra* note 52, art. 30.

²¹⁹ The proper course of action would be to proceed by way of annulment utilizing the various grounds of review.

charges the preliminary aspect of the reference as there will be nothing to send back for determination.²²⁰ Indeed, the jurisdiction of the COMESA Court to determine the application of treaty provisions is going to put it in a collision course with national courts who will feel, quite legitimately, that the Court is encroaching on an area that should ordinarily be left to national courts.²²¹ It must be noted once again that the COMESA Court, in exercising its jurisdiction under this head, is not competent to interpret the instruments creating COMESA institutions.²²²

In the overall framework of the Common Market it is important to note that it is in the giving of preliminary rulings that the COMESA Court is brought into direct relationship with courts and tribunals of Member States. How this relationship develops will impact on the overall direction the Common Market will take. If no judicial and jurisdictional symbiosis is attained, tensions and suspicions will be generated which will in turn work against the attainment of the goals of the Common Market. An indicator of the relationship that develops will be gauged from the precedential value that national courts will accord preliminary rulings delivered by the COMESA Court. As a matter of law, a preliminary ruling can only be binding with respect to the case before a domestic court in which the need for it arose. However, good practice demands that such a ruling should be followed in other cases before national courts of the same or any other Member State where the same question at issue in the preliminary ruling arises again. Such comity will be possible only where the relationship between the COMESA Court and national courts and tribunals is amicable.

The decision to refer a matter to the COMESA Court by a lower court of first instance does provide a new feature to the hierarchical relationship of municipal courts *inter se*. In a majority of COMESA Member States it will be the first time that subordinate courts will have an unchallengeable recourse to an international tribunal without needing to go through superior courts and, in the same vein, have a

²²⁰ This is not to say that the Court has no jurisdiction in the matter for art. 23 of COMESA, which gives the Court wide jurisdiction with respect to the operations of the Common Market by providing that "[t]he Court shall have jurisdiction to adjudicate upon all matters which may be referred to it pursuant to this Treaty." COMESA, *supra* note 52, art 23.

²²¹ The European Court of Justice has been able to gain the confidence of national courts, which were hitherto reluctant to refer matters to the court for preliminary rulings, partly by refraining from applying the provisions of Community law to the concrete case before it. *See* Bebr, *supra* note 213, at 249.

²²² *See supra* note 113.

rare opportunity to consider the interpretation and application of an international instrument. It remains to be seen how superior courts will adapt to this “*erosion*” of their supervisory jurisdiction over lower courts.

f. Advisory Opinions

Given the extensive nature of the COMESA Treaty and the relative inexperience of those charged with the realization of treaty obligations, it was foreseen that in many instances, these players would be unsure of their treaty obligations and functions with respect to certain desired actions. To resolve such uncertainties, the Treaty provides for these players to seek the guidance of the COMESA Court as to the compatibility of any action they might wish to take with treaty provisions.²²³ This mechanism is bound to be exceptionally useful in the operation of the Common Market partly because it will eliminate the need to institute adversarial judicial proceedings and the attendant negative effects that such proceedings necessarily engender, particularly if the contending parties are Member States.

The jurisdiction of the COMESA Court to issue an advisory opinion is extensive and covers “all questions of law arising from the provisions of” the COMESA Treaty²²⁴ which, in actual fact, means practically all aspects of COMESA application as it is difficult to envision what aspects fall outside the ambit of law.²²⁵ There are two ways to explain this wide jurisdiction. One, because uncertainty about the legality of an intended course of action can arise from any facet of COMESA it is necessary to give the Court a wide jurisdiction to sort out any anxieties about the efficacy of such intended action. This creates a supervisory jurisdiction by the Court over the general operations of COMESA. Two, Member States had no problem ceding such wide powers to the Court because no positive rights are concerned.

²²³ Art. 32(1) of the Treaty provides that:

The Authority, the Council or a Member State may request the Court to give an advisory opinion regarding questions of law arising from the provisions of this Treaty affecting the Common market, and Member States shall in the case of every such request have the right to be represented and take part in the proceedings.

COMESA, *supra* note 52, art. 32(1).

²²⁴ COMESA, *supra* note 52, art. 32(1).

²²⁵ It is still submitted that instruments creating institutions of COMESA quite legitimately fall under this extensive jurisdiction. The permissive provision here is questions “affecting the Common Market.” Clearly institutions of COMESA will have an effect on the operations of the Common Market. It is strange that the COMESA Court has jurisdiction to interpret instruments creating COMESA institutions in a situation where such jurisdiction does not confer positive rights or remedies and lacks jurisdiction where it can confer such rights or remedies. See *supra* notes 107-127 and accompanying text.

The Court was merely allowed to issue opinions which, in the general nature of advisory opinions, have no binding effect.²²⁶

There is, however, a restriction that has been placed on the exercise of this jurisdiction; only the Authority, the Council or a Member State may seek such an opinion. This is a sensible restriction to limit jurisdiction to parties who will ordinarily be in charge of formulating and executing COMESA policies. Without this limitation and assuming that legal and natural persons were eligible to plead this jurisdiction, the Court would be swamped with suits that do not determine substantive rights but which merely seek the Court's articulation of certain COMESA legal points. There would in any case be a duplication of jurisdiction if legal and natural persons had a right to seek an advisory opinion. Such persons, instead of proceeding for an annulment, would prefer to seek the Court's opinion first.²²⁷ If the Court's opinion is favorable they would then institute a substantive motion for annulment and the Court would then have to determine the issue *de novo* based on the same facts guaranteeing the same result. In any case it is doubtful what use an advisory opinion would be to a legal or natural person if it is noted that they cannot utilize such an opinion to formulate or reshape COMESA policies.

A special feature of this mechanism is that Member States have a right to submit written or oral information regarding a request for an advisory opinion²²⁸ in a procedure equivalent to "interested parties" in municipal law. This is of great help to the Court as it brings to the fore the concerns and fears of other Member Countries regarding the consequence of holding one way or the other on the matter referred to it. The Court is, therefore, in a better position to compromise the competing interests within the Common Market.²²⁹

²²⁶ Suffice it to say here that though advisory opinions have no binding effect, it is foolhardy to act contrary to such opinions. Foolhardy because a party that acts contrary to an advisory opinion will be faced with a substantive action before the same court in which the party is sure to lose, the Court already having established its stand in the advisory opinion.

²²⁷ See the qualification of the competence of legal and natural persons to prosecute a claim for annulment, *supra* notes 191-195 and accompanying text.

²²⁸ COMESA, *supra* note 52, art. 32(3).

²²⁹ It is worthwhile to note that the European Economic Community has no equivalent provision. An advisory opinion can be sought only in the case of the Community concluding a treaty with one or more states or international organizations in which case the Council, the Commission or a Member State may obtain the opinion of the European Court of Justice as to whether such intended treaty is compatible with the provisions of the Treaty. Treaty of Rome, *supra* note 81, art. 228(6).

g. Disputes Concerning Relationships Between the Community and its Servants

The COMESA Court is the obvious choice for adjudicating disputes arising from employment contracts of Common Market employees. Obvious in the sense that Common Market employees and contracts they execute do not fall within the jurisdiction of any of the Member States; they are contracts governed by public, not private, law.²³⁰ Article 27 of the COMESA Treaty gives exclusive jurisdiction to the COMESA Court to determine disputes between the Common Market and its employees and to interpret rules and regulations governing the terms and conditions of employment of the employees of the Common Market.²³¹

h. Reference by virtue of a "Clause Compromissoire"

Jurisdiction is conferred by the COMESA Treaty²³² on the COMESA Court to determine issues arising under a contract if a clause conferring jurisdiction (clause compromissoire) is contained in the contract and that contract is made by or on behalf of the Common Market or any of its institutions. The qualification here relates to those contracts in which at least one party is either the Common Market or its institution. Given this restrictive jurisdiction, it is unlikely that the COMESA Court will be active in this area. For example, it is unlikely that third parties, be they private individuals or other legal persons, who enter into contractual arrangements with the Common Market or any of its institutions will provide that disputes be referred to the COMESA Court. A party to a contract who chooses arbitration will normally ensure that the arbiter not only is going to be impartial but that an appearance of impartiality can be guaranteed. Because of the nexus between the Court and the Common Market,

²³⁰ By virtue of art. 5(2)(a) of COMESA, the Common Market has legal personality of public law considering the powers and functions of the Common Market. COMESA, *supra* note 52, art. 5(2)(a). Because of this status, employment contracts of Common Market employees are concluded by a person of public law, making such contracts public law instruments.

²³¹ Art. 27(1) of the Treaty provides that:

The Court shall have jurisdiction to hear disputes between the Common Market and its employees that arise out of the application and interpretation of the Staff Rules and Regulations of the Secretariat of the terms and conditions of employment of the employees of the Common Market.

COMESA, *supra* note 52, art. 27(1).

²³² Art. 28(a) provides that "[t]he Court shall have jurisdiction to hear and determine any matter arising from an arbitration clause contained in a contract which confers such jurisdiction to which the Common Market or any of its institutions is a party." COMESA, *supra* note 52, art. 28(a).

third parties will naturally be apprehensive of its impartiality when the Common Market is a party before it in an arbitration.²³³

The COMESA Treaty is, as was noted earlier,²³⁴ silent on the issue of what law applies to the interpretation of contracts. It does not state whether there exists a Common Market law which will be applicable in such instances. The applicable law is exceedingly important when analyzing this provision because, as stated, one of the parties to the contract must be the Common Market or any of its institutions. Because of the absence of a provision stipulating the applicable law the COMESA Court will be compelled to apply principles of private international law for the purpose of identifying the proper law of the contract which will often times lead to the application of the law of a Member State, or even a non-Member State.

i. Reference by virtue of a Special Agreement

This jurisdiction is bestowed upon the COMESA Court by Article 28(b) of the COMESA Treaty which provides that the "Court shall have jurisdiction to hear and determine any matter arising from a dispute between the Member States regarding this treaty if the dispute is submitted to it under a special agreement between the member States concerned."²³⁵ It is to be noted that this opening is restricted to Member States.

A useful inquiry relates to the competence of a Member State to initiate a claim or seek redress outside the established procedures of the Common Market and in particular to bring a claim against another Member State in an international tribunal other than the COMESA Court. The COMESA Treaty is, strictly speaking, an ordinary treaty among several states and is, therefore, governed by traditional rules of international law. Generally such a treaty would entitle any of its signatories, *ceteris paribus*, to sue another signatory before, for example, the Court of Justice at the Hague.

The object of Article 28(b) of the Treaty would appear to be the internalization of disputes within the COMESA process and the elimination of the need or option to seek redress on issues generated by the Common Market outside the COMESA process. However, this ob-

²³³ This perhaps explains why the European Court of Justice has never been called upon to arbitrate a contractual dispute under art. 181 of the Treaty of Rome, which is similar to the COMESA provision. In fact, all the arbitrations that the European Court of Justice has dealt with involved employment contracts of Community employees.

²³⁴ See *supra* note 157 and accompanying text.

²³⁵ COMESA, *supra* note 52, art. 28(b).

jective is not realized when the wording of Article 28(b) is analyzed critically. The provision merely gives jurisdiction but does not compel reference when a dispute arises. Neither is there an undertaking anywhere else in the COMESA Treaty which obliges Member States to use the COMESA Court to resolve disputes arising from the Treaty. To the extent that the Treaty does not mandate the use of COMESA mechanisms for dispute settlement, Member States are free to utilize other fora with competent jurisdiction for dispute settlement.²³⁶ It is certainly unhelpful for the process of integration if Member States are permitted to engage in forum shopping with a view to guaranteeing a certain result. The COMESA Treaty needs to bring all COMESA players under the exclusive jurisdiction of the COMESA Court and to oust all jurisdiction of other tribunals over disputes between Member States of COMESA to ensure a uniform and dependable integration system.

j. COMESA Court's Competences and Residual National Court's Competences

Lest it appears that the COMESA Court is going to overwhelm national courts and create legal tremors in municipal law, it must be pointed out that the COMESA Court's competence extends only to those aspects specifically provided for by the Treaty and all other residual competences, and it must be emphasized that they are numerous, are reserved to national courts. As a general principle the COMESA Court has no exclusive jurisdiction over the Common Market. None of the Common Market operations is immune from the jurisdiction of national courts. Stated differently, the Common Market is subject to the jurisdiction of national courts except where it is expressly or impliedly excluded in favor of that of the COMESA Court by the COMESA Treaty.

This position represents the true import of Article 29(1) of the Treaty²³⁷ which provides that "[e]xcept where the jurisdiction is conferred on the Court by or under this Treaty, disputes to which the Common Market is a party shall not on that ground alone be excluded from the jurisdiction of national courts." National courts are, there-

²³⁶ The European Economic Community has managed to avoid this multiplicity of dispute resolution options by providing that "Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for herein." Treaty of Rome, *supra* note 81, art. 219.

²³⁷ COMESA, *supra* note 52, art. 29(1).

fore, the key players in the resolution of disputes arising out of the operations of the Common Market.

A particularly difficult jurisdictional problem arises from the competence to delimit the jurisdictions of national courts from that of the COMESA Court. If it is accepted that national courts retain jurisdiction in all matters that have not been expressly bestowed on the COMESA Court, a complication arises as to who may determine the extent of these two jurisdictions in case of a conflict. Undoubtedly, the COMESA Court will insist that it has been given exclusive jurisdiction to interpret the COMESA Treaty and will go ahead and attempt to limit the exercise of its jurisdiction.²³⁸ National courts, in exercising general jurisdiction, will also define their jurisdiction. That the two interpretations of the extent and nature of their respective jurisdictions will be different is indisputable. It is, therefore, foreseeable that the power to delimit the exclusive jurisdiction of the COMESA Court from the general jurisdiction of national courts may unfortunately be shared by the COMESA Court and national courts. Because there will be jurisdictional conflicts, there is need to provide for a special tribunal to determine these conflicts or alternatively for the inclusion of a general provision in the Treaty to govern such conflicts.

2. *Staffing and Procedure of the COMESA Court*

The COMESA Court is composed of seven²³⁹ judges who are appointed by the Authority.²⁴⁰ However, no two or more judges shall at any time be nationals of the same Member State.²⁴¹ They are chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurists of recognized com-

²³⁸ This is a powerful argument as COMESA reserves the interpretation of the Treaty to the COMESA Court. A conflict of jurisdiction does undoubtedly imply a treaty interpretation.

However, under art. 30, it is only courts of final appellate jurisdiction that are obliged to refer a matter of interpretation to the COMESA Court. It is conceivable that a lower court may refuse to refer the matter and go ahead and delimit its jurisdiction.

An errant national court need not necessarily frustrate the jurisdiction of the COMESA Court. For example, the Member State concerned may be in breach of the Treaty, and therefore subject to an appeal before the COMESA Court, if it should let such a decision stand. COMESA, *supra* note 52, art. 30.

²³⁹ Which, of course, means that not all Member States are represented. It would be fallacious to provide representation by all Member Countries as not only would the Court's work become cumbersome and labyrinthine but it is doubtful whether the Common Market can afford to pay salaries for an expanded bench.

²⁴⁰ COMESA, *supra* note 52, art. 20(1).

²⁴¹ COMESA, *supra* note 52, art. 20(2).

petence.²⁴² Other than the proviso barring two or more judges being appointed from the same Member State there is no requirement of nationality, so that, a judge of the COMESA Court can be drawn from persons of a nationality other than that of one of the Member States.²⁴³ Although the COMESA Treaty provides for the appointment of seven judges this number can be increased by the Authority if the Court makes a request for additional judges²⁴⁴ and if need should arise out of some unforeseen circumstances or emergency, the Authority may appoint a temporary judge.²⁴⁵ Judges hold office for a period of five years and shall be eligible for reappointment for a further period of five years.²⁴⁶

A judge may not by reason of his nationality alone recuse himself from hearing a matter nor can the nationality of any judge be invoked in order to ask for a change in composition of the Court. The point to be emphasized here is that judges appointed to the Court are not representatives of their Member States. The only ground upon which a judge may ask to be excused from hearing a matter is when such judge is directly or indirectly interested²⁴⁷ in a case before the Court and the President of the Court has certified the interest is prejudicial.²⁴⁸ Given the feeble nature of COMESA integration it would not be surprising if nationality of judges were to produce conflicts within the process. In developing countries, there is a tendency to liken regional integration with equality of Member States involved so that each Member State expects to have as much say and involvement in the process as the other Members. A lot will therefore depend on how Member States who are not represented on the Court will react, particularly when such Members States appear before the Court as par-

²⁴² COMESA, *supra* note 52, art. 20(2).

²⁴³ There would be a difficulty in appointing a judge from a non-Member State in that such a third state would not be in a position to grant such a judge immunities that other judges from Member States would ordinarily be entitled.

²⁴⁴ COMESA, *supra* note 52, art. 20(3).

²⁴⁵ COMESA, *supra* note 52, art. 22(3).

²⁴⁶ COMESA, *supra* note 52, art. 21(1).

²⁴⁷ It is submitted that as the only qualification placed on a judge, it is insufficient. It is very likely that the Court will not be active in its early days and that judges will have plenty of time on their hands in which they will be tempted to engage in other activities, e.g., arbitration. These "other activities" have the potential of disrupting the working of the Court and it would have been preferable to provide that Judges may not hold any other office nor engage in any other occupation or profession whether paid or unpaid without the express permission of the Authority or the President of the Court.

²⁴⁸ COMESA, *supra* note 52, art. 22(4).

ties involved in a matter against Member States who are represented on the Court.²⁴⁹

The President of the Court is also appointed by the Authority from among the judges of the Court.²⁵⁰ The Treaty does not set out the precise duties of the President of the Court and it is understandable that such matters will be left to be stipulated by the Statute of the Court.²⁵¹

The day-to-day administration of the business of the Court falls on the Registrar of the Court.²⁵² The Registrar is appointed by the Council from among nationals of Member States qualified to hold high judicial office²⁵³ and the terms and conditions of service are to be determined by the Council on the recommendation of the Court.²⁵⁴ The other staff of the Court is similarly appointed by the Council.

In order to ensure that once they are appointed the judges shall not be prevented from acting with entire impartiality, the COMESA Treaty²⁵⁵ endows them with immunity. Judges are immune from legal action for any act or omission committed in the discharge of their functions under the Treaty.²⁵⁶ An interesting comment relates to the determination of "functions under this Treaty" and who is to make this determination. A COMESA judge facing legal action in a matter not related to his functions under the Treaty may require any municipal court to refer the matter to the COMESA Court for an interpretation of the Treaty to determine whether the act or omission alleged was committed in the discharge of his function under the Treaty or not. This is the logical conclusion arising from the provision of the Treaty which reserves the competence to interpret the Treaty to the COMESA Court.

The COMESA Court renders its judgment as a collegiate body. The Court delivers one judgment and dissenting opinions may be re-

²⁴⁹ Compare with Andean Group: Treaty Creating The Court of Justice of the Caragena Agreement, May 28, 1979 18 I.L.M. 1203. Art. 7(1) of the Treaty provides for the election of five justices from each of the five Member States. This is not a really good comparison as the limited membership of the grouping, five members, allows it to tap a justice from each of the Member State without overstaffing the Court.

²⁵⁰ COMESA, *supra* note 52, art. 20(1).

²⁵¹ At the time of writing this work the Court had yet to formulate its rules which it has the power to do under art. 38 of the Treaty which stipulates that the "Court shall make Rules of Court which shall, subject to the provisions of this Treaty, regulate the detailed conduct of business of the Court." COMESA, *supra* note 52, art. 38.

²⁵² COMESA, *supra* note 52, art. 41.

²⁵³ COMESA, *supra* note 52, art. 41.

²⁵⁴ COMESA, *supra* note 52, art. 41.

²⁵⁵ COMESA, *supra* note 52, art. 39.

²⁵⁶ COMESA, *supra* note 52, art. 39.

corded but may not be delivered in open court.²⁵⁷ Although dissenting opinions are useful in the development of law, they can also be destructive, particularly in the early phases of a judicial system.²⁵⁸

It would have been more enterprising if the COMESA Treaty had provided for the formation of chambers when the contesting parties make such a request or in certain specified matters. Chambers are more flexible and by reducing the number of judges the process can be made to proceed at a faster pace.²⁵⁹

B. Arbitration Under COMESA

The COMESA Court, as was noted above,²⁶⁰ has an arbitration jurisdiction which is limited, however, to those instances where the Common Market is a party to a contract that provides for such an arbitration. Private parties do not, therefore, qualify to bring arbitration matters before the COMESA Court. This is a serious limitation on the part of the COMESA Court and without an alternative, legal and natural persons engaged in business within the COMESA would be highly disadvantaged. Fortunately, an arbitral process exists within the COMESA process which is charged with the responsibility of dealing with private international commercial disputes—*Centre de Service Arbitrage*²⁶¹ in Djibouti. The Centre existed before it was brought into the regional process under the PTA. Soon after the establishment of the PTA there was a growing realization that the PTA Tribunal was not the proper and most efficient forum for resolving international commercial disputes that did not involve state agencies. Consequently the PTA decided to establish a centre to deal with private international commercial arbitration.²⁶² The PTA did not establish its own arbitral centre but decided to enter into a designation agreement with the Djibouti Centre in which the latter undertook to

²⁵⁷ COMESA, *supra* note 52, art. 31.

²⁵⁸ Within the European Economic Community there are no dissenting opinions at all and Bebr has stated with regard to this situation that at "an early stage in the development of the Community law this may be wise for it avoids judgements whose validity may be seriously weakened by separate dissenting opinions of individual judges. A certainty of judgement at this stage of development may count for more than a fragile soundness arrived at and impaired by individual opinions." Bebr, *supra* note 172, at 24. However, Bebr is quick to point out that there are drawbacks to this system including the tendency for judges to reach compromises to accommodate each other which process weakens the forcefulness of the Court's judgements. *Id.*

²⁵⁹ See art. 165 of the Treaty of Rome, *supra* note 81, for the operations of chambers within the European Economic Community.

²⁶⁰ See *supra* notes 232-233 and accompanying text.

²⁶¹ Hereinafter *Centre*.

²⁶² This was decided upon in November, 1988. See Report of the 5th Meeting of General Assembly of PTA/FCI, Appendices to Annex 1.

act as the PTA's arbitration centre.²⁶³ A Statute governing the administration of the Centre was also adopted.²⁶⁴ The COMESA Treaty has adopted the Centre as one of its institutions performing the same functions as before.²⁶⁵

The Centre follows the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules as modified by the COMESA Centre Arbitration and Conciliation Rules.²⁶⁶ The Centre has had, however, an inconsequential impact on dispute resolution in the region. This is attributable mainly to three factors.

One, there has been little intra-regional trade generated by the COMESA process and its predecessor, the PTA. In real terms, therefore, disputes can only arise where there is an active body of participants engaged in international commercial trade and because the volume of such trade is minimal disputes are also rare.

Two, arbitration as a mechanism for resolving disputes is relatively new in the region and there is still a heavy reliance placed on traditional and conventional court systems. Even in those instances where arbitration is preferred the enforcement regime is still undeveloped and unreliable.²⁶⁷ This position is beginning to change as the limitations of domestic courts become more apparent to cross-border traders. The establishment of the COMESA Court will also impact on this development.

Third, it is true that a majority of those involved in regional trade within COMESA are foreign multi-national corporations or affiliates of such corporations. There is a tendency among these players to eschew local systems and procedures in favor of overseas institutions. This attitude is informed by the perceived bias of local institutions against multi-national corporations particularly in disputes with local entities. Although there may be no empirical evidence of such bias, nonetheless the perception is strong enough to cause these corporations to prefer overseas arbitrations.

A critical element in the development of arbitration as an alternative dispute resolution mechanism must surely lie with the enforce-

²⁶³ *Id.*

²⁶⁴ *Id.*, Appendix II note 1.

²⁶⁵ COMESA, *supra* note 52, art. 174(2)(h).

²⁶⁶ Report of the 5th Meeting, *supra* note 262, art. 2. This provision states, *inter alia*, that one of the objectives of the Centre shall be "to provide administrative and technical assistance in the conduct of arbitrations and conciliations particularly those held under the UNCITRAL Arbitration and Conciliation Rules as modified by the PTA [read COMESA] Arbitration and Conciliation Rules."

²⁶⁷ *See infra* note 271.

ment of arbitral awards.²⁶⁸ If awards are incapable of enforcement within municipal jurisdictions there will be no incentive to pursue arbitration in the first place. With this realization, the PTA Council of Ministers in November, 1988 recommended that all Member States accede to the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards.²⁶⁹ Although this was an important step in strengthening arbitration within the region, it must be noted that acceding to the Convention does not of itself guarantee enforcement of arbitral awards.²⁷⁰ There is need to provide within municipal jurisdictions stipulations that protect arbitral awards from intrusive municipal enquiries which might water down the efficacy of arbitration.²⁷¹

VI. CONCLUSION

If the failure of regional integration in developing countries so far can be attributed to one factor, that factor must be the lack of an elaborate and well thought-out dispute resolution regime. This defect has become magnified by the changing political and economic dynamics at the world stage. Whereas states and state agencies were the dominant economic and political players both within the domestic as well regional spheres in developing countries, at least for the last half-century, in the so-called New World Order the dynamics at play have been rearranged and the emphasis is now squarely on private capital and individualism. Whereas inter-state and largely politically oriented dispute resolution mechanisms sufficed for the former state of affairs, in the current environment robust and non-political dispute resolution regimes are imperative. There has been a qualitative change in the character of disputants from basically state-sponsored litigants to pri-

²⁶⁸ For a discussion of attitudes of African countries towards international commercial arbitration see Samuel K.B. Asante, *The Perspectives of African Countries on International Commercial Arbitration*, 6 LEIDEN J. INT'L L. 331 (1993).

²⁶⁹ Convention on the Recognition and Enforcement of Arbitral Awards, June 10, 1958, 27 LTS 157, 330 U.N.T.S. 3.

²⁷⁰ Compare the EEC provision which provides that "Member States shall, as far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals . . . the simplification of formalities governing the reciprocal recognition and enforcement of judgements of courts or tribunals and of arbitral awards." Treaty of Rome, *supra* note 81, art. 220.

²⁷¹ Many a time municipal courts tend to regard arbitral awards as an intrusion into their domain and begin to second guess decisions by arbitrators. Without a clear system which lays down the circumstances under which an arbitral award may be challenged in a municipal court, some judges may continue to frustrate the efficacy of arbitration.

vate sector litigants necessitating an equally qualitative change in the regimes governing dispute resolution.

The COMESA Court and other COMESA dispute resolution mechanisms fall into this new appreciation. The ideas are bold and the foresight admirable. The political resolve seems to be there and the era of political gimmicks has seemingly been replaced with a sober attitude towards economic integration. Developments in other regions of the world, particularly in North America and the Pacific rim, have added more urgency to the formulation of durable and pragmatic paradigms for regional integration among developing countries. All these factors operate in favor of the new COMESA framework.

Yet, as this article has shown, there remain areas whose vagueness could easily topple these achievements. A number of these weaknesses are the result of poor drafting of the COMESA Treaty. This need not be a handicap, and it may end up being an advantage if in the processes of rectifying these mistakes a pragmatic and acceptable system emerges. Municipal courts are going to be major players in the new system but their past record is not enviable in this regard. COMESA players seem to be exhibiting a preference for non-COMESA dispute resolution systems and unless these players begin to show more confidence in regional mechanisms, success will be limited.

It is axiomatic that, within any regional economic organization, the strength of its judicial tools determines the success of the process. These legal structures are, in fact, the infrastructure that supports the rest of the regional process.