THE SADC TRIBUNAL AND THE JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES

by

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TABLE OF CONTENTS

DECLARATION

I declare that *"The SADC Tribunal and the Judicial Settlement of International Disputes"* is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references, and that all direct quotations from such sources have been clearly and correctly indicated.

……..

Free Zenda

Windhoek, Namibia, September 2010

ABBREVIATIONS/ACRONYMS

The following abbreviations/acronyms are used in the text unless the context in which the particular abbreviations indicates otherwise;

AEC	African Economic Community
AJIL	American Journal of International Law
AU	African Union
BYIL	British Yearbook of International Law
CFI	Court of First Instance attached to the ECJ
CJ	Court of Justice of the AU
CMLR	Common Market Law Reports
EC	European Community
ECJ	Court of Justice of the European Union
ECR	European Court Reports
EC Treaty	Treaty establishing the European Community as amended
EP	European Parliament
EU	European Union
EU Treaties	collectively refers to all the treaties which make up the EU namely, the original TFEU, ECSC Treaty Euratom Treaty, and all subsequent amending treaties such as the Merger Treaty 1965, the Single European Act 1986, the Treaty on the EU 1992 as emended, the Treaty of Amsterdam 1999, the Treaty of Nice 2003 and the Lisbon Treaty 2007 as well as all the treaties of accession entered into between the EU and new member states
GA	General Assembly of the UN
ICJ	International Court of Justice
ILR	International Law Reports
Lisbon Treaty	The EU Reform Treaty of 2007

Protocol	The SADC Protocol on the Tribunal and the Rules of Procedure thereof
REC	regional economic community
SA	South Africa
SADC	Southern African Development Community
SAJIL	Southern African Journal of International Law
SAYIL	South African Yearbook of International Law
SC	Security Council of the UN
Summit	The Summit of the Heads of State or Government of SADC states
SWA	South West Africa (now Namibia)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
Trade Protocol	SADC Protocol on Trade
Treaties	The Treaty of EU and the Treaty on the Functioning of the EU as amended by the Lisbon Treaty
Treaty	Treaty Establishing the Southern African Development Community
Tribunal	SADC Tribunal
UN	United Nations Organisation
UN Charter	Charter of the United Nations signed at San Francisco on 26 June 1945

SUMMARY OF THESIS

THE SADC TRIBUNAL AND THE JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES

The Southern African Development Community (SADC) is a regional economic community established by Treaty in 1992 and comprising fifteen southern African countries. The Tribunal, SADC's judicial organ, is situated in Windhoek, Namibia and became operational in 2005. The Tribunal enjoys a wide mandate to hear and determine disputes between states, states and SADC, and between natural and legal persons and states or SADC. It is mandated to develop its own jurisprudence having regard to applicable treaties, general rules and principles of public international law, and principles and rules of law of member states. Being new in the field, the Tribunal has not as yet developed a significant jurisprudence although it has delivered a number of judgments some of which are referred to in the study. The Tribunal is expected to develop its own jurisprudence having regard to the jurisprudence developed by other international courts involved in the judicial settlement of disputes. The study offers a comparative review and analysis of the jurisprudence of two selected courts: the International Court of Justice (ICJ) and the Court of Justice of the European Union (ECJ). The focus is on four selected areas considered crucial to the functioning of the Tribunal and the selected courts. The study discusses the parties with access to the Tribunal and compares this with access to the ICJ and ECJ. The jurisdiction of the Tribunal is contrasted with that of the two selected courts. The sources of law available to the Tribunal are discussed and contrasted to those of the two courts. Lastly, the enforcement of law in SADC is contrasted to what applies in relation to the selected courts. In each selected area, similarities and differences between the Tribunal and the two courts are noted and critically evaluated. Further, rules and principles developed by the two selected courts are explored in depth with a view to identifying those which could be of use to the Tribunal. Recommendations are made on

rules and principles which could be of use to the Tribunal and on possible improvements to the SADC treaty regime.

Key Words

Settlement of disputes by judicial means, access to the SADC Tribunal, jurisdiction of the Tribunal, sources of law for Tribunal, enforcement of judgments of Tribunal, access to the International Court of Justice (ICJ), jurisdiction of the ICJ, sources of law for the ICJ, enforcement of ICJ judgments, access the Court of Justice of the EU (ECJ), jurisdiction of the ECJ, sources of law for the ECJ**,** and the enforcement of EU law.

CHAPTER 1

1 INTRODUCTION

1.1 Preliminary

The Southern Africa Development Community (SADC)[1], the successor to the Southern African Development Coordination Conference (SADCC)[2], is an international regional organisation whose main purpose is the economic, social, cultural and political integration of its fifteen member states[3] which are geographically located on the southern tip of the African continent[4]. SADC was established in terms of a treaty and declaration known as the Treaty of the Southern African Development Community (Treaty) which were signed by the heads of state or government of the respective member states in 1992[5].

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[1] For a detailed discussion of the historical background of SADC, the key institutions of SADC and their powers and competences, the legal and constitutional status of SADC and the relationship between SADC and the AU see Moyo "Towards a Supranational Order for Southern Africa" 'A Discussion of the Key Institutions of the Southern African Development Community (SADC)' LLM Thesis, University of Oslo (2008) accessible http://de.scientificcommons.org/khulekani (visited 28/12/09). See also Ndulo "African Integration Schemes: A Case Study of the Southern African Development Community (SADC)" (1999) 7 *African Yearbook of International Law* 3-30. This article gives a detailed overview of the SADC legal order and also provides some insight into SADC's approach to regional integration in comparison to the EU.

[2] The Southern African Development Co-ordination Conference, SADCC, the forerunner of the SADC was established in April 1980 by Governments of nine Southern African countries of Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe.

[3] SADC comprises the following member states: Angola, Botswana, Democratic Republic of Congo, Lesotho., Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Seychelles, Swaziland, Tanzania, Zambia and Zimbabwe. Seychelles left SADC but rejoined it in 2008 and Madagascar was suspended from SADC over an unconstitutional change of government in March 2009.

[4] Of the SADC states, Tanzania is not strictly speaking geographically located in southern Africa but became part of SADC due to historical and political reasons dating back to the 1960s and 70s when most southern African states were fighting for independence. Tanzania was supporting the liberation movements and by default became part of southern Africa though geographically it is located in East Africa. Rwanda a country located in central Africa applied for SADC membership and the application was turned down in 2005. Both Rwanda and Tanzania are members of the East African Community another African regional organization.

[5] The Treaty of the Southern African Development Community signed at Windhoek, Namibia on 17 August 1992 and amended at Blantyre, Malawi in August 2001. The Treaty entered into force on 30 September 1993.

The Treaty constitutes the legal framework of SADC and sets out the status[6], principles and objectives of SADC[7], obligations of member states[8], membership[9], the institutions[10], procedural matters, areas of cooperation among member states[11], cooperation with other international organisations[12], funding,[13] financial matters[14], settlement of disputes,[15] and sanctions, withdrawal and dissolution[16]. The Treaty is cast in broad form leaving the detailed matters to be filled in by subsequent subsidiary legal instruments such as protocols and acts of the various institutions of SADC. To date SADC has produced twenty-three protocols and other legal instruments which are listed together with their dates of signature and entry into force, if available, in the Appendix[17].

SADC is an intergovernmental organisation structured on the basis of other intergovernmental organisations such as the United Nations (UN)[18] in that its membership consists of states represented by their governments. However, it differs from the UN in that it is not a universal organisation but consists of states which are geographically situated in the southern region of the African continent hence it is referred to as a regional organisation. In this respect it can be likened to similar regional bodies such as the Economic Community for West African States (ECOWAS)[19] and the East

[6] Article 14 Treaty. A consolidated version of the Treaty incorporating all amendments up to 2003 is published by the SADC Secretariat and can also be accessed on the SADC website http://www.sadc.int/. (Visited 01/12/10).
[7] Chapter 3 Article 4 and 5 Treaty.
[8] Article 6 Treaty.
[9] Chapter 4 Articles 7 and 8 Treaty.
[10] Chapter 5 Articles 9 to 16A Treaty.
[11] Article 21 Treaty.
[12] Article 24 Treaty.
[13] Chapter 9 Articles 25 to 27 Treaty.
[14] Chapter 10 Article 28 to 30 Treaty.
[15] Article 32 Treaty.
[16] Chapter 13 Articles 33 to 35 Treaty.
[17] Source SADC website http://www.sadc.int/ (visited 01/02/10).
[18] The United Nations Organisation is an international organization to which most states of the world belongs and currently it consists of 192 member states. It was established by the Charter of the United Nations which was signed at San Francisco, USA on 26 June 1945 in the aftermath of World War 2. The Charter is a UN publication which can be accessed on the UN website http://www.un.org/. (visited 04/10/10).
[19] Fifteen West African countries signed the Treaty for an Economic Community of West African States (Treaty of Lagos) on 28 May 1975. The protocols launching ECOWAS were signed in Lomé, Togo on 5

African Community (EAC)[20] both of which are located on the African continent. It can also be likened to other regional integration bodies such as the African Union (AU)[21] and the European Union (EU)[22] albeit these operate at a continental level.

One common feature which these integration bodies share is that they all aim at integration of the member states in specified areas, most notably the economic and political. SADC has the specific object of fostering the economic, social and political integration of the southern African region which objectives are spelt out in Article 5 of the Treaty.

The SADC Treaty sets out the various institutions of SADC which include, the Summit of Heads of State or Government (Summit), Council of Ministers (Council), a Standing Committee of Officials, the Secretariat, the Tribunal and national committees[23]. These institutions have been in place and functional since 1993 when the Treaty came into force except for the Tribunal which was officially inaugurated at its seat in Windhoek, Namibia on 18 November 2005. The subject matter of this study is the Tribunal and its potential role in ensuring the realization of the aims and objectives of SADC.

November 1976. In July 1993, a revised ECOWAS Treaty designed to accelerate economic integration and to increase political co-operation, was signed.

[20] The EAC was established by the Treaty Establishing the East African Community signed at Arusha, Tanzania on 30 November 1999 and it came into force on 7 July 2000. It comprises five states namely Burundi, Kenya, Tanzania, Rwanda, and Uganda. It can be accessed on the EAC website www.eac.int/ (visited 05/02/10).

[21] The AU is a supranational union of 53 African countries (excluding Morocco) established in 2001 as successor to the amalgamated African Economic Community and the Organisation of the African Unity. Three countries, Madagascar, Niger and Guinea are currently suspended while Eritrea withdrew its ambassador in 2009. It was established by the Constitutive Act of the African Union signed at Lome, Togo on 11 July 2000 and can be accessed on the AU website www.africa-union.org. (visited 04/10/10).

[22] The EU is the subject of this study and is discussed in Chap 4. It is a creature of several treaties the main ones being the Treaty Establishing the European Community signed at Rome on 25 March 1957 and the Treaty on European Union signed at Maastricht on 2 February 1992 which are published by the Office for Official Publications of the European Union. The EU has recently undergone some major changes with the entering into force of the Treaty of Lisbon which was signed in December 2007 and came into force on 1 December 2009. The Treaty of Lisbon made extensive amendments to the EC Treaty and the TEU the main change being the creation of a single legal entity, the EU and renamed the Treaty Establishing the European Communities (EC Treaty) to be the Treaty on the Functioning of the European Union (TFEU). It can be accessed on the EU website www.europa.eu. (visited 05/02/10).

[23] These institutions are established by article 9 of the Treaty and they are fully discussed in Chap 2.

In terms of the Treaty, the Tribunal, which is charged with the responsibility of adjudicating over disputes and the interpretation of the Treaty and subsidiary instruments, is constituted and with its powers, composition and functions to be prescribed in a protocol[24]. The SADC Protocol on the Tribunal (Protocol) has been adopted by the SADC Summit and ratified by more than a majority of member states[25]. The Tribunal itself became operational on 18 November 2005 when judges were officially appointed. Unlike other subsidiary legal instruments of SADC, the Protocol forms an integral part of the Treaty meaning that a state party to the Treaty cannot avoid being party to the Protocol[26].

The Tribunal is mandated by both the Treaty and Protocol to ensure adherence to and the proper interpretation of the Treaty and subsidiary instruments and to adjudicate disputes referred to it in terms of the Treaty and other subsidiary legal instruments[27]. In the process it is required and expected to develop its own jurisprudence[28]. This is not unusual since the Tribunal is a new entity which, unfortunately, cannot rely on the jurisprudence and wisdom of a predecessor. In the absence of established rules and principles of how the Tribunal will perform its task, there is no doubt that it is facing a mammoth task.

The Tribunal is directed to apply various sources of law which include treaty law and principles of both national and international law in carrying out its task[29]. For all intents, these sources of law include the Treaty, protocols and other subsidiary legal instruments adopted by the SADC under the Treaty, and these constitute "enactments" or "legislation" of SADC[30]. However, for purposes of this study these enactments or legislation together with any potential jurisprudence to be developed by the Tribunal will be referred to collectively as "SADC law" unless the context clearly indicates otherwise.

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[24] Article 16 Treaty.
[25] The Protocol on the Tribunal was signed on 7 August 2000 and it entered into force upon the adoption of the Agreement Amending the Treaty of SADC at Blantyre on the 14 August 2001. Thus there will be no further requirement for individual SADC member states to ratify the Protocol.
[26] Article 16(2) Treaty.
[27] Article 16 Treaty and Article 14 Protocol.
[28] Article 21(b) Protocol.
[29] Article 21 Protocol.
[30] The Summit, Council or other organs of SADC acting under delegated powers are empowered to adopt legal instruments including protocols under Articles 10 and 22 Treaty.

In the resolution of disputes there is, of course, a wealth of jurisprudence which has been developed over the years by both national and international tribunals and courts. It can safely be assumed that in its infancy, the Tribunal will have to rely heavily on the jurisprudence developed by comparable regional and international tribunals until such time that it has developed its own jurisprudence. In essence, this is how most tribunals, be they national or international, get onto their feet.

It is an accepted principle of most legal systems that, because of their analytical expertise, academic writers are in a position to provide the academic framework to which practitioners of the law may turn for guiding principles. In most legal systems, the opinions of renowned academics and other jurists constitute a formal source of law thus it is not surprising that the international community included the writings of jurists as a source of law which the International Court of Justice (ICJ) might apply[31]. In fact, where a new tribunal comes into existence and there is wealth of principles, concepts and rules which have been developed and expanded by comparable tribunals and academic writers, the new tribunal would inevitably have regard to this material in developing its own jurisprudence.

In case of the SADC Tribunal, unfortunately, there is not much of that literature which could serve as a reference point now that it has become functional. This study attempts to fill this void by critically reviewing and analyzing available literature on certain areas of the Tribunal's operational set up and, based on the experience of comparable tribunals, providing guidelines on how the Tribunal might go about its tasks.

The study is not intended to be a comprehensive discourse availing the Tribunal with all the answers to its problems. It simply provides some material which the Tribunal may consider when performing its tasks or which practitioners who will appear before it may consider when formulating their pleadings. Students of public international law, and in

[31] See Brownlie *Principles of Public International Law* (1998) 3 and Article 38(1) of the Statute of the International Court of Justice which is annexed to the Charter of the UN. The Charter together with the Statute was signed on 26 June 1945 and came into force on 24 October 1945. See also Article 20.1 of the Protocol on the Court of Justice of the AU which spells out the sources of law for the AU Court and includes the writings of the most highly qualified publicists of various nations.

particular those who have an interest in the settlement of disputes by adjudicative means might also find useful information in this study.

Bearing this in mind, the purpose of this study is to give a comparative and critical analysis of certain key provisions of the judicial dispute settlement mechanism within the SADC system on the one hand and, on the other hand, within two selected systems, namely, the International Court of Justice (ICJ) which is the principal judicial organ of the UN, and the Court of Justice of the European Union (ECJ) which is the main judicial organ of the EU. The former system exemplifies international adjudication in general and the latter a regional dispute settlement system.

It is conceded that these two courts do not serve exactly the same purposes as those of the Tribunal, and an effort has consequently been made to concentrate mainly in those areas which appear to be common to all three courts. Where divergences in both content and purpose of the two courts and of the Tribunal occur, they are noted. It is felt that the experience gained by these two judicial systems over the decades will enhance the quality of this study.

Where appropriate, reference will be made to dispute settlement mechanisms other than adjudication, and the jurisprudence of relevant institutions will be considered.

1.2 Selected areas of study

A comparative evaluation of all the features of the three selected court systems is not feasible. Therefore it has been decided to cover certain features which are felt to be important from both an academic and a practical point of view. The selected areas are access to the court (parties), jurisdiction, sources of law (applicable law) and enforcement methods. These will be discussed in the subsections that follow.

1.2.1 Access to the Court or Tribunal (parties with standing)

Under this head the study discusses the various parties who have access to the three selected courts. The Protocol envisages that the Tribunal will deal with a wide range of disputes brought by or against either states, institutions of SADC, and "individuals or legal persons"[32] whom I shall collectively refer to herein as private persons[33]. The Tribunal will also give advisory opinions to some institutions of SADC[34]. The Protocol specifically provides that the Tribunal shall deal with disputes between States and between natural or legal persons and states[35]. In addition, the Tribunal has exclusive jurisdiction over disputes between states and SADC, between natural and legal persons and SADC and disputes between SADC and its staff[36]. In terms of these provisions, therefore, the potential parties before the Tribunal are states, SADC institutions, and private persons.

Parties to contentious proceedings before the ICJ are states only, and in certain cases institutions of the UN when the ICJ is acting in an advisory capacity[37]. On the face of it, it appears that the experience of the ICJ under this head may not be of much significance to the functioning of the Tribunal. However, in the case of jurisdiction over natural and legal persons, the ICJ's experience on the application of the principle of exhaustion of local remedies may be useful. In addition, the ICJ's experience in the exercise of its advisory jurisdiction will also be assessed in relation to the Tribunal's equivalent jurisdiction.

The experience of the ECJ on the question of access to the court will certainly be valuable to the Tribunal since the parties who have access to the ECJ are virtually the same as those who have access to the Tribunal.

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[32] Article 15 Protocol.
[33] For purposes of this study the expression "private person" is used, unless the context indicates otherwise, in a broad sense to include both natural persons (individuals, including SADC staff) and legal persons (legal entities) in contra-distinction to states or institutions.
[34] Article 16.4 Treaty and Article 20 Protocol.
[35] Article 15 Protocol.
[36] Articles 17, 18 and 19 Protocol.
[37] The ICJ is empowered to give advisory opinions to institutions of the UN under Article 96 UN Charter read with Articles 65 to 68 Statute of the ICJ.

1.2.2 Jurisdiction

The Tribunal has jurisdiction on matters relating to the interpretation and application of the Treaty, the interpretation, application or validity of subsidiary legal instruments of SADC and acts of SADC institutions, and matters specifically agreed on by the states conferring jurisdiction on the Tribunal[38]. In the former categories the experience of the ICJ may again not be of much assistance since the ICJ has jurisdiction over all disputes referred to it by states over any matter governed by international law and not only disputes falling within the ambit of the Charter of the UN[39]. However, in the latter category the experience of the ICJ in the interpretation of matters referred to it in terms of special agreement could be very useful.

As for the ECJ, once again its experience in this area is very useful as that court enjoys virtually identical jurisdiction to that enjoyed by the Tribunal. The ECJ has developed a considerable body of principles and concepts which could be used by the Tribunal as guidelines.

1.2.3 Applicable law

In performing its functions the Tribunal is required by Article 21 of the Protocol to apply the Treaty and other subsidiary legal instruments, and to develop its own jurisprudence having regard to applicable treaties, general principles and rules of public international law and principles of the law of states. These are essentially sources of law for the Tribunal and as they are common to both the ICJ and the ECJ, the experience of both courts will be assessed with a view to offering guidelines to the Tribunal.

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[38] Article 14 Protocol.

[39] The jurisdiction of the ICJ is set out in Articles 34 to 38 of the Statute of the ICJ which is annexed to the UN Charter but forms an integral part of the UN Charter. The Charter was signed on 26 June 1945 and came into force on 24 October 1945.

In the first part of the article, the Tribunal is directed to apply the Treaty and subsidiary legal instruments as a source of substantive law of SADC[40]. The ICJ, in contrast, is directed to apply "treaties" in general as a source of law. Despite this distinction it is contented that, being an international court, the Tribunal is expected to apply principles of public international law -and in particular the law of treaties -when applying this source of law. In this respect the jurisprudence of the ICJ becomes pertinent and is discussed.

In the case of the ECJ, an examination of the substantive law of the EU becomes vital, since the overall objectives of both SADC and the EU are similar in that they both aim to achieve regional economic, social and political integration. These objectives are sought to be achieved through the passing of laws to ensure compliance by member states. While it is appreciated that SADC has not as yet developed a notable body of law comparable to that of the EU, it is submitted that if its objectives are to be attained it will in future have to enact concrete laws along the lines of the EU law.

In fact, this power to make binding laws is implicit in the Treaty provisions. Article 10 of the Treaty which empowers the Summit and other SADC institutions to adopt legal instruments goes further to provide that decisions of Summit shall be binding, unless otherwise provided in the Treaty. In addition, Article 22 provides that SADC protocols shall be binding only on member states that are party to them.

It is clear from these provisions that SADC law, which comprises the Treaty itself, protocols and subsidiary legal instruments of SADC as well as jurisprudence developed by the Tribunal, is binding on SADC member states. Whether SADC law is also binding on SADC citizens comprising private persons is a more complex question which is fully canvassed in Chapter 2. The Tribunal will no doubt be required to interpret SADC laws with due regard to the aims and objectives of SADC, an activity which has actively occupied the ECJ since its establishment. It is therefore necessary to explore the substantive law of the EU, and in particular that relating to those areas which SADC law

[40] Article 21(a) Protocol.

also covers bearing in mind that a study as limited as this one cannot possibly cover all aspects of EU law.

The study therefore addresses one core area of EU substantive law namely, the provisions relating to the free movement of goods for the purposes of creating a common or internal market. These substantive provisions are contrasted to similar provisions in the SADC Treaty and relevant protocol, which is the Protocol on Trade (Trade Protocol)[41]. It must be pointed out that the ECJ has played a crucial role in the interpretation and application of the Treaty on the Functioning of the European Union (TFEU) (former EC Treaty) provisions in this core area and its jurisprudence in this regard is without doubt pertinent to the evolving jurisprudence of the Tribunal.

In addition to listing the Treaty, the Protocol, other protocols, and subsidiary legal instruments as sources of law for the Tribunal, Article 21 also directs the Tribunal to "develop its own jurisprudence having regard to applicable treaties, general principles and rules of public international law and any rules and principles of the law of States[42]." The latter part of the provision essentially gives the Tribunal *carte blanche* to have regard to various sources of law. The experience of both the ICJ and the ECJ in this area is pertinent. The ICJ is directed to apply customary international law, general principles of law applicable to civilized nations, and judicial decisions and writings of renowned publicists as sources of law[43]. On the other hand, the ECJ has no specific directive to apply general principles of law[44]. However, on its own initiative the ECJ has developed its own concept of "general principles of law" which has introduced flexibility to its approach to interpreting and applying EU law. It has developed two related doctrines in

[41] The Trade Protocol was signed at Maseru, Lesotho on 24 August 1996 and entered into force on 25 January 2000.
[42] Article 21(b) Protocol.
[43] Article 38(1) Statute of the ICJ.
[44] There is some reference in Article 340 (former 288 EC Treaty) of the TFEU which governs the liability of EU institutions for unlawful acts to liability being determined 'in accordance with the general principles common to the laws of member states' and other references in the Treaty are simply to 'infringement of the Treaties and any rule of law relating to their application' Article 263 (former 230 EC Treaty) of the TFEU and 'the law is observed' in Article 19 (former 220 EC Treaty) of the TEU. This topic is fully discussed in Chap 4.

the process namely, the doctrine of supremacy of EU law, and the doctrine of direct and indirect effects of EU legislation. These doctrines are discussed fully in Chapter 4.

In its turn, the ICJ has also developed essential features of customary international law, and discussed the essence of both general principles of law and judicial decisions in international adjudication. It is submitted that the concept of "general principles of public international law and the law of states" mentioned in the Protocol[45] are wide enough to encompass the fields covered by both the ICJ and ECJ. This renders the jurisprudence of these courts relevant to the Tribunal in its handling of the areas identified above.

1.2.4 Enforcement mechanisms

Enforcement in this context refers to the mechanism of enforcing the law in the broader sense, and the procedures for enforcing specific judgments of a judicial body. In so far as the former is concerned, it is only states themselves which can enforce the law in the ICJ: there is no supranational body charged with the duty of enforcing international law save for the complementary role played by the political organs of the UN. The ICJ cannot enforce its own judgments and relies on the political organs of the UN to do this[46]. In this area, therefore, lessons for the Tribunal are limited to the negative aspects involved where states have refused to comply with judgments or orders of the ICJ.

On the other hand, the enforcement of law in both the EU and in SADC is broadly similar. The Protocol envisages enforcement of SADC law before the Tribunal by the member states, institutions of SADC, and individuals and legal persons. This can be inferred from the fact that all these subjects are given capacity to bring cases before the Tribunal so enabling them to enforce their rights or defend themselves before that Tribunal[47]. In this broader sense, enforcement of the law is used to connote the capacity to enforce or defend a person's rights before the court.

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[45] Article 23 Protocol.
[46] Article 94 of UN Charter obliges member states to comply with judgments of the ICJ failing which the other party may refer the matter to the UN Security Council for enforcement.
[47] Article 15 Protocol.

In addition, the preliminary rulings procedure introduced by the Protocol envisages the enforcement of SADC law by the national courts of member states as the Tribunal could give a preliminary ruling on a question referred to it without exercising original jurisdiction in the matter[48]. All these methods of enforcing the law are very similar to those applicable in the EU. The only distinction is that the TFEU provisions are more elaborate on the procedures to be used in enforcing the law and that while all EU institutions can be parties to proceedings before the ECJ, it is the Commission of the EU which has the main responsibility for enforcement of EU law[49]. The wealth of experience gained by the ECJ in this area, and in particular the preliminary rulings procedure, should prove valuable to the operations of the Tribunal.

With regard to the enforcement of judgments, the Protocol invokes the law of the member states by giving such judgments the force of national law in all member states[50]. In the event of failure by a member state to comply with a judgment the matter is referred to the Summit – the supreme organ of SADC - for further action[51].

This approach can be contrasted to the UN system wherein ultimate enforcement action lies with the political organs of the UN - the Security Council in this case[52]. The TFEU provisions in respect of enforcement in members states are not as specific as those of SADC, leaving this up to the law of each members state. However, through its case law the ECJ has developed the principle of effective judicial protection whereby member states of the EU are obliged to ensure that effective judicial remedies are available for enforcement of EU law in each member state[53]. In addition, enforcement action against a

[48] Article 16 Protocol.
[49] Article 17 (former 211 EC Treaty) of the TEU sets out the general functions of the Commission while Article 258 (former 226 EC Treaty) of the TFEU gives the Commission specific powers to take enforcement action in the ECJ against member states failing to fulfill their Treaty obligations.
[50] Article 32.1 Protocol.
[51] Article 32.5 Protocol.
[52] Under Article 94(2) of the UN Charter if a state fails to comply with a judgment of the ICJ the matter is referred to the Security Council for enforcement action.
[53] The principle of effective judicial remedy is now one of the many general principles of law developed by the ECJ through its case law and these principles are discussed in Chap 4. The principle is now enshrined in

recalcitrant member state is now specifically dealt with in the TFEU and provision is made for financial penalties[54].

The research is based on a review of the available literature and material on the topic, followed by a critical assessment of that literature and material. Conclusions will be drawn in the form of recommendations on how the Tribunal might in future, approach certain issues which might arise before it. As stated earlier, the recommendations will be based on the experiences drawn mainly from the two selected institutions and where appropriate, other institutions. The relationship between the Tribunal and the Court of Justice of the AU, a similar institution, albeit intended to operate at continental level is considered in Chapter 2 with a view to offering some guidelines on how the two courts may interact[55]. The Tribunal has also registered and determined its first case, *Mike Campbell (Pvt) Limited v Republic of Zimbabwe*[56]. This case is considered in the next sections dealing with the possible effect of Treaty provisions on rights and obligations of those subject to it.

In addition, recommendations based on existing legal principles applicable in the SADC region, are made on possible interpretations to be given to some provisions of the Treaty and protocols. It must be accepted that no legal system in the world is perfect and that the need for change will always exist. In this regard, where it is felt that changes to the current SADC legal regime on dispute settlement are necessary, proposals for amendment will be made.

Article 19.1 second paragraph of the TEU which requires member states to provide sufficient remedies to ensure effective legal protection in areas covered by EU law.

[54] Lump sum or periodic penalty payments can now be imposed against recalcitrant member states under Article 260 (former 228 EC Treaty) of the TFEU.

[55] The Court of Justice of the AU was established by the Article of the Constitutive Act of the African Union and detailed matters relating to its organization and powers are set out in the Protocol of the Court of Justice made pursuant to the Act.

[56] Case SADC T: 02/07. An unpublished ruling on the case was delivered by the Tribunal in Windhoek, Namibia in December 2007. The final judgment in the main case was given on 28 November 2008.

Before launching into the complex matters which call for comment in this study, it is necessary at this stage to give a summary of the contents of the study which follow in the next sections.

1.3 Summary of contents

In order to ensure a systematic and an orderly presentation of material, the study is divided into five chapters. This chapter serves as an introduction while the following section embodies an overview of dispute settlement in general, but with particular emphasis on the international settlement of disputes. The various modes of resolving disputes at the international level are discussed in outline only since the focus of this research is resolution of disputes by judicial means.

Chapter 2 discusses the SADC legal system with a view to setting out the scope of the ensuing comparative analysis of the selected aspects of the Tribunal as against the selected courts, namely the ICJ and the ECJ. The chapter discusses the SADC legal order and the relevant SADC institutions which are charged with the responsibility of policy formulation and law-making. The SADC Tribunal is discussed in greater detail -in particular the provisions of the Treaty and Protocol which are relevant to the selected areas of study namely, those dealing with access to the Tribunal, jurisdiction, sources of law, and enforcement. The areas of potential dispute are identified with a view to later contrasting them with the experiences of the other two courts. The discussion on this topic lays the foundation for the discussions on the ICJ and the ECJ in the ensuing chapters.

The chapter also contains a section on the relationship between SADC and its Tribunal on the one hand, and the AU and its Court of Justice on the other. While it is acknowledged that the CJ is not yet in place and therefore cannot offer lessons for the Tribunal, the structures of the AU itself and its Court deserve mention. Regional economic communities (RECS) such as SADC are considered to be the building blocks or pillars of the African Economic Community (AEC) and the AU and the constitutive documents of

these continental entities make reference to this relationship[57]. It is therefore necessary to give an overview of the AU and its CJ contrasted to SADC and the Tribunal.

Chapter 3 is a detailed discussion of the ICJ with particular attention being paid to the selected areas of study. The chapter gives an overview of the UN institutions and their respective roles in international dispute settlement. The comparable provisions of the UN Charter and the Statute of the ICJ which govern the selected areas of study are discussed with a view to identifying those areas on which the ICJ has resolved disputes. In particular, special attention is paid to the value of the sources of law enumerated in the Statute of that court, as well as the nature and value of the court's advisory opinions jurisdiction and problems of enforcement. The chapter also considers the ICJ's contribution to the principles governing exhaustion of local remedies with a view to giving guidelines to the Tribunal when it considers the principle in relation to Article of the 15.2 of the Protocol.

Chapter 4 discusses the EU and its Court of Justice. I must note here that since 1 December 2009 the EU has undergone some fundamental constitutional changes. This follows the coming into force of the Reform Treaty or Treaty of Lisbon of 2007 (Lisbon Treaty) which came into force on that date. The Lisbon Treaty made extensive amendments to the original Treaty establishing the European Communities (EC Treaty) of 1957 and the Treaty on the European Union (TEU) of 1992. The EC Treaty was renamed the Treaty on the Functioning of the European Union (TFEU) and throughout this study I shall refer to the treaty as such as well as to the relevant provisions of the renumbered consolidated TEU and TFEU together with the old numbering referring to the original TEU and the EC Treaty[58]. Since the main comparative focus of this study falls on the EU and its Court of Justice, this chapter explores in detail the principal features of the European legal order and the various institutions charged with the responsibility of achieving the multiple aims and objectives of the EU. Particular

[57] The Treaty establishing the AEC acknowledges the existence of regional economic communities and seeks to strengthen them. See Articles 4, 6 and 88 of the AEC Treaty. See also Chap 2 section on the AU and its Court of Justice.

[58] Consolidated versions of the TEU and the TFEU can be accessed at the EU website www.europa.eu/Lisbon-treaty. (visited 05/02/10).

attention is paid to the role and activities of the ECJ in relation to the former European Community (EC) which was but one of the pillars of the EU[59].

The chapter begins by giving an historical overview of the EU and explaining its nature and purpose. This is followed by an account of the institutional structure of the EU with emphasis on the Council, the Commission, the Parliament, and the Court of Justice of the European Union (ECJ) which comprises the Court of Justice, the General Court (formerly the Court of First Instance (CFI))[60] and specialized courts[61]. The roles of these institutions are discussed as well as the relevant EU Treaty provisions and case law which govern their activities. The legislative process and competences of the EU institutions are also addressed, but in outline only.

The study then focuses on the organisational structures of the ECJ and its general role and function in the EU legal system, as well as its methods of interpretation of EU law. This is followed by a detailed analysis of the court's position in relation to the selected areas of study. The question of access to the court is explored in light of the case law of the ECJ, and in particular the fact that the ECJ has, through its case law, enhanced the capacity of the European Parliament (EP) and individuals to bring actions in the community courts[62]. The jurisdiction of the ECJ is also discussed against the background of case law. Of particular importance in this regard is the role of national courts in the enforcement of EU law through the preliminary rulings procedure incorporated into the TFEU [63].

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[59] The EC together with the European Atomic Energy Community (Euratom) were regarded as the first pillar while intergovernmental cooperation in foreign affairs and security and cooperation in criminal matters were regarded as the second and third pillars respectively of the EU. See Wyatt and Dashwood *European Union Law* (2006) Chap 1 and also Fairhurst *Law of the European Union* (2006) Chap 1.

[60] Renamed the General Court by the Lisbon Treaty. The General Court (former CFI) was initially created as an attachment to the ECJ by the Single European Act an amendment to the EC Treaty. The provisions on the General Court are now contained in Article 19 of the TEU and Articles 254 and 256 (former 224 and 225 EC Treaty) of the TFEU which provide for the establishment of the General Court as a component part of the Court of Justice of the EU and also set out the jurisdictional aspects of the General Court.

[61] The ECJ was originally called the Court of Justice of the European Communities until recently when it was renamed the Court of Justice of the European Union by the Treaty of Lisbon. See Article 19.1 TEU.

[62] Community courts here refers to the ECJ and national courts of the EU member states when dealing with matters of EU law.

[63] Article 267 (former 234 EC Treaty) TFEU.

The study then focuses on the sources of law which are applied by the ECJ and other institutions of the EU. Of particular relevance in this regard, is the development of the concept of "general principles of law" by the ECJ. Here, the study discusses how the ECJ has managed, through creative interpretation of EU law, to incorporate an "unwritten bill of fundamental rights" into the EU Treaties. The other major sources of EU law, such as the treaties, secondary legislation made under the treaties, and other international agreements are also discussed.

Having outlined the main sources of EU law, the chapter then goes on to discuss the more important areas of EU law which have been the subject of extensive consideration by the ECJ. In this regard three critical principles of law have been developed by the ECJ through case law. These are the principle of supremacy of EU law over national law, the principle of direct and indirect effect of EU law in the legal systems of member states, and the principle of state liability for member states which fail to fulfill their obligations under EU law. It should be noted that the ECJ has used its creative techniques of interpretation to broaden the scope of EU law to the extent that the court itself has been the subject of criticism for going beyond its competences[64].

The discussion on the sources of EU law is concluded by a closer examination of how the ECJ has interpreted and applied the law in one specific area of EU substantive law. The area selected for discussion are the free movement of goods provisions of the Treaty on the Functioning of the European Union (TFEU) which was formerly known as the EC Treaty[65]. This area has been selected because within SADC, the focus of our study, one of the priority areas in the regional integration process is the creation of a free trade area, a customs union[66], and ultimately a common market as in the EU. All these objectives should be achieved through the implementation of the Trade Protocol and the protocol on free movement of workers and persons in general, if it ever comes into being. The TFEU provisions as supplemented by secondary legislation on the free movement of goods, are

[64] See Wyatt and Dashwood op cit Chap 12.
[65] Articles 28 to 36 TFEU.
[66] In the southern African region there is one customs union called the Southern African Customs Union (SACU) which was established on 9 June 1910 by agreement between Botswana, Lesotho, South Africa (which included South West Africa now Namibia) and Swaziland. SACU is discussed in Chap 2.

broadly similar to those contained in the Trade Protocol hence an examination of how the ECJ has interpreted these provisions can be of use to the future work of the Tribunal.

Chapter 4 concludes by giving a synopsis of the methods by which EU law is enforced in the sense of who may enforce it in either the ECJ or national courts of the EU member states. The question of ensuring compliance by means of financial penalties through action in the ECJ is also considered together with the role of the ECJ in that regard.

Chapter 5, the concluding chapter, focuses on the main lessons to be drawn by the Tribunal from the experiences of the two international courts discussed in the previous two chapters. Focus is on the selected areas of study and some recommendations on how SADC can address some of the defects identified in its legal system. The chapter also summaries the various suggestions on how the Tribunal can incorporate the concepts and principles developed by the two courts under consideration namely, the ICJ and the ECJ when performing its functions under the Treaty and the Protocol.

1.4 Overview of international settlement of disputes

We have noted that the Tribunal is required by the Treaty and the Protocol to resolve disputes between the various parties. It is therefore necessary, before proceeding with the inquiry, to determine what is actually embodied in the concept "dispute" [67].

A dispute has been defined as a "specific disagreement concerning a matter of fact, law or policy in which a claim or assertion of one party is met with refusal, counterclaim or denial by another"[68]. A dispute has also been described by the Permanent Court of International Justice[69] as "a disagreement over a point of law or fact, a conflict of legal views or interests between two persons"[70]. Disputes can arise between governments,

[67] See Merrills *International Dispute Settlement* (1998) and Shaw *International law* (2003) generally Chap 18.
[68] Merrills op cit Chap 1. See also Shaw op cit Chap 16.
[69] The Permanent Court of International Justice is the predecessor to the ICJ.
[70] *Mavrommatis Palestine Concessions* (Jurisdiction) case PCIJ Series A No. 2, 1924 11. This statement was quoted with approval by the ICJ in the *South West Africa Cases (Preliminary Objections)* ICJ Reports

institutions or individuals and they have existed since the beginning of time as they are inevitable in the interrelations between states, bodies of people, or individuals. Disputes may arise in the national legal context or within the international context. A dispute becomes an international one when it involves governments, institutions, juristic persons or private individuals usually over a matter governed by international law.

In whatever context a dispute arises, humanity has from the earliest times attempted to find some means to settle differences[71]. In the national context, national governments have set up various means of settling disputes ranging from the voluntary to the non-voluntary, while in the international arena various mechanisms have been devised for the resolution of disputes. Since this study is concerned with resolution of disputes within the international arena focus is now on the international settlement of disputes.

In the international arena, disputes can be resolved at a universal or regional level. However, when resolving international disputes states are obliged to take into account the provisions of international law which oblige them to settle disputes peacefully. Article 2(3) of the UN Charter provides that all members "shall settle their international disputes by peaceful means in such manner that international peace and security, and justice, are not endangered." This principle of pacific settlement of disputes, which is the corollary to the principle which prohibits the use of force in the resolution of international disputes, appears to be part of customary international law with the status of *jus cogens*[72].

The issue of international custom as a source of international law is discussed in Chapter 3 where the International Court of Justice is examined. At universal level, disputes may involve any state whether a member of a regional body or not. At the regional level,

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1962 319 328 where the Court after citing the PCIJ statement continued: "In other words it is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its nonexistence. Nor is it adequate to show that the interests of the two parties to such a case are in conflict. It must be shown that the claim of one party is positively opposed by the other."

[71] See Eyffinger *The International Court of Justice* 1946-1996 (1996) Chap 2.

[72] *Military and Paramilitary Activities in and against Nicaragua (Merits)(Nicaragua v USA)* ICJ Reports 1986 14 paras 140 and 290 and *Legality of the Use of Force Case (Provisional Measures) Yugoslavia v Belgium* ICJ Reports 1999 124 140 para 48. The concept of *jus cogens* is discussed in Chap 3 section on general principles of law as a source of law for the ICJ.

disputes may involve member states of a specific regional organisation such as SADC, the EU or AU. Irrespective of the nature of the international dispute, it is imperative that the resolution of any dispute within the international law context be achieved peacefully.

There are various mechanisms which have been devised to resolve or facilitate resolution of international disputes. Article 33 of the UN Charter lists some of them as follows:

> "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means."

However, despite the fact that the article in question refers to disputes which if continued are likely to endanger international peace and security, the methods described therein reflect traditional means of settlement of disputes in respect of all other disputes since the listed methods are derived from state practice developed over the ages[73]. These methods can be broadly classed into diplomatic and adjudicative methods and are discussed in turn[74].

1.4.1 Diplomatic methods

Diplomatic settlement of disputes generally involves procedures invoked by the disputing parties themselves with or without the involvement of third parties with a view to finding an amicable solution which is usually is not legally binding unless otherwise agreed by the parties[75]. The methods enumerated in Article 33 of the UN Charter noted above can be regarded as diplomatic methods: negotiation, inquiry, mediation, conciliation and resort to regional agencies or other peaceful means. None of these methods can be said to be superior or preferable to the others hence a word should be said about each of them

[73] Eyffinger op cit Chap 2.
[74] Shaw op cit 914 and Eyffinger op cit Chap 2.
[75] See Shaw op cit Chap 18.

except for regional arrangements[76]. Adjudicative means of settling disputes are considered later in this section.

1.4.1.1 Negotiation

Negotiation is the simplest and most often used method of resolving disputes. It consists of discussions between the interested parties with a view to reconciling divergent opinions or at least understanding the different positions maintained[77]. It does not involve a third party at this stage. Negotiations are usually a prelude to other methods of settlement and they are the most satisfactory as the disputing parties are directly involved.

Sometimes, because of treaty obligations, states are obliged to enter into negotiations whereafter the dispute, if not resolved, must be referred to third parties. If the dispute is likely to endanger international peace and security, Article 33 of the Charter provides that negotiations should be pursued first then inquiry and mediation follow.

1.4.1.2 Good offices and mediation[78]

This process involves the use of a third party, be it an individual- or individuals, a state or states, or an international organisation to encourage the parties to reach a settlement. The process aims at persuading the parties to the dispute to come to a settlement. Good offices are involved where a third party attempts to get the parties to enter into negotiations, whereas in mediation the third party actively participates in the negotiations.

1.4.1.3 Inquiry[79]

Where a dispute involves different opinions on factual matters, a logical solution would be to institute a commission of inquiry composed of experts to ascertain the facts in

[76] Regional agencies basically employ any of the diplomatic methods listed in Article 33 hence it is not necessary to discuss them separately.
[77] Merrills op cit Chap 1 and Shaw op cit 918.
[78] Merrills op cit Chap 2 and Shaw op cit 921.
[79] Merrills op cit Chap 3 and Shaw op cit 923.

contention. The parties to the dispute will agree to refer the matter to an impartial commission whose task is to produce an unbiased finding of facts. The parties can then negotiate a settlement on the basis of the factual findings. Provisions for such inquiries were elaborated in the Conventions adopted during the 1899 and 1907 Hague Conferences as a possible alternative to arbitration[80]. The most successful case of international inquiry is the Dogger Bank incident of 1904. Russian naval ships fired on British fishing boats in the belief that they were hostile Japanese torpedo craft. The provisions of the 1899 Convention were used and the report of the international inquiry commission contributed to the peaceful settlement of the issue[81]. Various other international commissions of inquiry have been set up by states and in most cases the findings have been helpful in the peaceful settlement of the relevant disputes[82].

1.4.1.4 Conciliation[83]

This process involves a third party investigating the basis of the dispute and submitting a report containing suggestions for settlement. It involves both inquiry and mediation but unlike arbitration awards, the suggestions are not binding on the parties. In modern times conciliation can be found in treaties such as the 1969 Vienna Convention on Law of Treaties[84] and the 1982 Convention on the Law of the Sea[85]. The main advantage of the process is that it is flexible and by clarifying the facts and discussing proposals, the parties to the dispute may be encouraged to settle the matter amicably.

1.4.2 Adjudicative means

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[80] Eyffinger op cit Chap 2.
[81] It found no justification for the Russian attack and both sides accepted the report and the sum of 65 000 pounds was paid by Russia to the UK. Shaw op cit 924.
[82] For example, The Red Crusader inquiry of 1962 involved an incident between a British trawler and a Danish fisheries protection vessel and another British frigate. The commission set up found that the firing at the trawler by the Danish vessel exceeded legitimate use of armed force.
[83] Merrills op cit Chap 4, Shaw op cit 925 and Eyffinger op cit Chap 2.
[84] Article 66 of the Convention on the Law of Treaties 1969 allows member states to a dispute under the Convention to invoke the conciliation procedure set out in Annex I to the Convention. The Convention entered into force in January 1980.
[85] The Convention on the Law of the Sea was adopted under the auspices of the UN in 1982 and came into force in November 1994. Article 279 of the Convention provides for peaceful means of settlement of disputes which are contained in Article 33 UN Charter and these means include conciliation.

Resolution of disputes by adjudicative means, as opposed to diplomatic means, involves the reference of the dispute to a third party who has power to determine the dispute applying legal rules and to make decisions which are legally binding on the disputing parties[86]. There are two main methods used in the international settlement of disputes and these are arbitration and judicial settlement which are considered next.

1.4.2.1 Arbitration[87]

This is a procedure for the settlement of disputes between states by a binding award on the basis of law and as a result of an undertaking voluntarily given. Like other means of peaceful settlement, arbitration is voluntary in that it is based on the consent of the parties. The arbitrator is a third party who is chosen by the parties unlike in disputes submitted to international courts such as the ECJ[88]. International arbitration is used to settle legal disputes concerning the rights and obligations of the parties under international law during which the law is applied to the facts. Arbitral awards are legally binding on the parties and must be adhered to[89].

The law to be applied in international arbitration is international law, but the parties may agree that certain principles of law may be taken into account by the tribunal, and these can be specified in the agreement to arbitrate[90].

The importance of arbitration in resolving dispute lies in the fact that it is flexible, cheap and can be used where technical expertise is needed. It may be used between states and international institutions or individuals because the latter have no *locus standii* in the ICJ.

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[86] See generally Merrills op cit Chaps 5 and 6 and Shaw op cit Chap 19.
[87] Merrills op cit Chap 5, Shaw op cit 951 and Eyffinger op cit Chap 2.
[88] Article 18 of the Statute of the ECJ provides that a party may not apply for a change in the composition of the Court or Chamber of the Court on the grounds of either the nationality of the judge or the absence from the Court of a judge of the nationality of the party. This can be contrasted to the ICJ where *ad hoc* judges can be appointed under Article 31 of the ICJ Statute in certain situations.
[89] Merrills op cit 116, Shaw op cit 956, Eyffinger op cit Chap 2 and Articles 81 and 84 Hague Convention 1907.
[90] Shaw op cit 955, Eyffinger op cit Chap 2.

Many international disputes have been resolved by arbitration and some treaties such as the 1982 Convention on the Law of the Sea and the ICSID[91] specifically provide for settlement of disputes by arbitration. Cases settled by arbitration include the *Alabama Claims* arbitration case of 1872 where the United States successfully claimed damages from Britain arising from failure by the latter state to prevent confederate ships from leaving Britain to attack American ships. The absence of legislation to prevent the departure of the ships from the British ports was held to be no defence to the claim**.** The *Island of Palmas Arbitration*[92] which laid down important principles on territorial sovereignty is another example of an international dispute settled by arbitration. In the *Rainbow Warrior* case[93] France and New Zealand asked the Secretary-General of the UN to act as arbitrator and he finally settled the dispute between the two states.

1.4.2.2 Judicial settlement[94]

This is the method in terms of which disputes are referred to an independent and impartial body usually consisting of legally qualified personnel just as with arbitration. Judicial settlement, though, differs from arbitration in that a judicial body which is usually a court is properly constituted and follows predetermined rules of procedure which cannot be varied by the parties at will. It comprises activities of all international and regional courts deciding disputes between subjects of international law in accordance with rules and principles of international law[95]. The main international court is the ICJ which is discussed in Chapter 4. There are regional courts such as the European Court of Justice[96], the Court of Justice of the African Union[97], the COMESA Court of Justice[98],

[91] This is the International Centre for the Settlement of Investment Disputes (ICSID) established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States 1965(also known as the Washington Convention).
[92] 22 *AJIL* (1928) 875.
[93] (1986) 74 *ILR* 241.
[94] See Shaw op cit 959.
[95] Ibid.
[96] Established by Article 13 of the TEU and discussed in Chap 4.
[97] Established by the Constitutive Act of the AU Articles 5 and 18, See also the Protocol of the Court of Justice of the AU discussed in Chap 2.
[98] The COMESA Court of Justice was established by the Treaty Establishing the Common Market for Eastern and Southern Africa which was adopted at Lilongwe, Malawi on 8 December 1994. Article 7 of the Treaty establishes the Court while Articles 19 to 44 deal with detailed matters relating to the Court.

the Court of Justice of the Economic Community for West African States[99], the Court of Justice of the East African Community[100], and of course the Tribunal.

The common feature among these courts, save for the ICJ, is that they are meant to deal with economic matters arising from the operation of the regional economic bodies which they serve although in some cases they venture into other general matters such as constitutional and administrative issues of the regional body, and human rights issues. Specialised courts include those dealing with human rights matters such as the European Court of Human Rights[101], the Inter-American Court of Human Rights[102], and the African Court of Human Rights[103]. Other specialized courts are the International Tribunal for the Law of the Sea[104] established by the Law of the Sea Convention, and the Dispute Settlement mechanism of the World Trade Organisation[105]. International criminal courts include the newly established International Criminal Court[106] and UN created *ad hoc* tribunals for crimes in the former Yugoslavia[107], Sierra Leone[108] and Rwanda[109]. The

[99] The ECOWAS was established by Treaty for an Economic Community of West African States (Treaty of Lagos) on 28 May 1975. The protocols launching ECOWAS were signed in Lomé, Togo on 5 November 1976. In July 1993, a revised ECOWAS Treaty designed to accelerate economic integration and to increase political co-operation, was signed. The treaty establishes a Court of Justice for ECOWAS.

[100] The Treaty of the EAC was signed in 1999 and came into force on 7 July 2000. The Court of Justice of the East African Community was established by the Treaty of the EAC and became operational on 30 November 2001.

[101] The European Court of Human Rights was established under the European Convention on Human Rights of 1950 to ensure compliance with that convention. There are 47 European states currently party to the convention.

[102]The Inter-American Court of Human Rights was established in 1979 with the purpose of enforcing and interpreting the provisions of the American Convention on Human Rights. The Convention was signed in 1969 and come into force on 11 July 1978. There are 24 American states party to the Convention.

[103]The African Court on Human and Peoples' Rights is a regional court that rules on African Union states' compliance with the African Charter on Human and Peoples' Rights. It came into being on 25 January 2004 with the ratification by fifteen member states of the Protocol to the African Charter on Human and Peoples' Rights Establishing the ACHPR.

[104] The International Tribunal on the Law of the Sea is established by the Statute of International Tribunal on the Law of the Sea, Annexure VI to the Convention of the Law of the Sea 1982.

[105] The dispute settlement mechanism of the WTO is found in the Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) which is part of the WTO agreements which came into force in 1995.

[106] The ICCR was established by the Rome Statute of the International Criminal Court which was signed on 17 July 1998 and came into force on 1 July 2001. Its intended to prosecute individuals for genocide, crimes against humanity, war crimes, and the crime of aggression, although it cannot currently exercise jurisdiction over the crime of aggression.

[107] The International Tribunal for the Former Yugoslavia was established by the Statute of the International Tribunal for the Former Yugoslavia through Security Council Resolution 827(1993).

latter tribunals are not permanent in nature and cannot be regarded as "courts" in the conventional sense. One thing which can be said about this proliferation of international courts is that there is no mechanism for appeals to a final court such as the ICJ which could give an authoritative ruling on matters of international law. The consequence of this trend is lack of uniformity in the development and application of international law which, as Shaw puts it, leads to 'inconsistency and confusion' which could undermine the relevance of international law in this era of globalisation[110].

1.5 Resolution of disputes in SADC

The SADC Treaty provides for a dispute settlement mechanism which comprises elements of all the above processes. Article 12 of the Treaty provides as follows:

> "Any dispute arising from the interpretation or application of this Treaty, the interpretation, application or validity of Protocols or other subsidiary instruments made under this Treaty, *which cannot be settled amicably*, shall be referred to the Tribunal."(my emphasis)

A similarly worded provision, which is found in almost all the SADC Protocols, reads:

> "Disputes arising from the interpretation or application of this Protocol, *which cannot be settled amicably*, shall be referred to the Tribunal."(my emphasis)

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[108] On 14 August 2000, the United Nations Security Council adopted Resolution 1315 requesting the Secretary-General to start negotiations with the Sierra Leonean government to create a Special Court. On 16 January 2002, the UN and Government of Sierra Leone signed an agreement establishing the Court. To the agreement is attached a Statute establishing the Special Court.

[109] The International Tribunal for Rwanda was established by the Statute of the International Tribunal for Rwanda, through Security Council Resolution 955 (1994).

[110] Shaw op cit 1011.

It is clear from the above provisions that before resorting to the Tribunal, parties must first of all attempt to resolve the dispute through "amicable" means, which must be understood to mean the peaceful means -which have been discussed above.

Before concluding this chapter I must reflect on the nature of a dispute itself, and what type of disputes the Tribunal is likely to be engaged in settling. In international law parlance a dispute can have two dimensions namely, the political and the legal[111]. It must be noted that the ICJ, which is charged with the responsibility of resolving disputes between states only, has jurisdiction to deal with legal disputes as opposed to political ones. The ICJ has described a dispute as legal if it is "…capable of being settled by the application of principles and rules of international law…".[112] This proposition is in line with the Article 38 of the Statute of the ICJ which reads in part "The Court, whose function is to decide *in accordance with international law* such disputes as are submitted to it…".(my emphasis). The provision makes it clear that for a dispute to be admissible in the ICJ, it must be capable of being decided on the basis of international law.

What is the position with regard to SADC on this issue? As will become apparent in the next chapter when I discuss the jurisdictional aspects of, and sources of law for the Tribunal, the Protocol attempts to circumscribe the types of dispute which may be brought before it. Disputes concerning the interpretation or application of the Treaty, or the interpretation, application or validity of protocols or other subsidiary legal instruments, are clearly legal disputes. But the same cannot be said of disputes relating to the interpretation, application or validity of acts of the institutions of the Community[113]. Some of the acts of the Community are purely political and clearly require a political solution. A good example is a recommendation made to the Summit by the Chairperson of the Organ on Politics and Defence in terms of the Protocol on Politics, Defence and Security Cooperation on a matter concerning a dispute whether national elections held in

[111] Shaw op cit 969.
[112] *Border and Transborder Armed Actions Case* (*Nicaragua v Honduras)(Jurisdiction and Admissibility)* ICJ Reports 1988 69 91 para 51.
[113] See Article 14 Protocol and the discussion in Chap 2.

a member state comply with the SADC guidelines on democratic elections[114]. The Summit may, on the basis of that recommendation that the elections do not meet the criteria set in the guidelines, decide not to recognize the new government of the member state as a form of enforcement action[115]. Both the recommendation of the Organ and the decision of the Summit could be potentially open for judicial review by the Tribunal since they are acts of SADC institutions. It is doubtful whether the Tribunal will entertain a claim lodged for the purpose of challenging the legality or appropriateness of such a recommendation or decision. There are also disputes which involve both political and legal issues and the Tribunal will be expected to deal with purely legal issues. It is submitted that is such cases the Tribunal should be confined to the legal aspects of a disputes as the experience of the ICJ demonstrates[116].

[114] The SADC Principles and Guidelines Governing Democratic Elections were adopted by SADC and became effective on 26 December 2003.

[115] Article 11.3(c) and (d) of the Protocol on Politics, Defence and Security Cooperation authorizes the Chairperson of the Organ to recommend to the Summit the taking of enforcement action against a party to a dispute, and the Summit itself is, with authorization from the UN Security Council, empowered to take enforcement action in accordance with Article 53 of the UN Charter. Both the decision of the Organ and the Summit could be subject to review by the Tribunal if Article 13 of that Protocol is interpreted literally as it gives the Tribunal jurisdiction to determine disputes over the interpretation or application of the protocol on Politics, Defence and Security Cooperation.

[116] See Chap 3 section on jurisdiction of the ICJ..

CHAPTER 2

2 SADC AND THE SADC TRIBUNAL

2.1 Scope and purpose SADC Treaty[117]

SADC is an international organisation which has legal personality and capacity to enter into any legal transaction and to sue or be sued. The Treaty obliges its member states to grant it legal capacity to enable it properly to exercise its functions[118]. The Treaty sets out the principles which SADC shall operate on namely, sovereign equality of member states, solidarity, respect for human rights and the rule of law as well as peaceful settlement of disputes[119]. These are traditional international law principles on which other similar international organisations are based[120]. The Treaty sets out in broad terms the objectives of SADC which may be summarised as the promotion of economic growth and development, common political values, self-sustaining development, productive employment, the consolidation of peace, security and democracy, the sustainable use of natural resources and protection of the environment, strengthening of historical, social and cultural links, eradication of poverty and communicable diseases and gender equality[121]. These objectives which are complemented by the provisions on areas of cooperation[122] are the blueprint for SADC actions and programmes. In order to achieve its objectives, SADC is authorised by the Treaty to, among other things, harmonise the political and social economic policies of members states, encourage popular participation in the activities of SADC, create appropriate institutions to implement SADC initiatives,

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[117] For a detailed discussion of the historical background of SADC, the key institutions of SADC and their powers and competences, the legal and constitutional status of SADC and the relationship between SADC and the AU see Moyo op cit. See also Ndulo op cit for a detailed discussion of the SADC legal order and some insight into SADC's approach to regional integration in comparison to the EU.

[118] Article 3 Treaty.

[119] Article 4 Treaty.

[120] See Articles 1 and 2 of the UN Charter which set out the purposes of, and the principles on which the UN is based and Article 4 of the Constitutive Act of the AU which sets out the principles of the AU and these encompass all the principles listed in Article 4 Treaty. See also Article 2 TEU which incorporates the notions of human dignity, human rights, freedom, democracy and the rule of law into the EU Treaties.

[121] Article 5.1 Treaty.

[122] Article 21 Treaty.

promote development of technology and human resources, and coordinate international relations. More importantly, according to the Treaty, SADC must also develop policies to facilitate the free movement of capital and labour, goods and services and people of the region generally[123].

The areas of cooperation are identified as food security, agriculture and land, development of human resources and development and transfer of technology, economic management and investments, infrastructure, trade, the environment, social welfare, politics and security[124]. To give practical effect to the objectives listed in Article 5 of the Treaty, provision is made in Article 22 of the Treaty for the conclusion of protocols in each area of cooperation. These are discussed in the section on sources of SADC law. Article 6 of the Treaty contains general undertakings which SADC and member states make on becoming party to the Treaty. Member states undertake to adopt measures to promote the achievement of the objectives of SADC and to refrain from taking any measure likely to jeopardize the realization or sustainability of its principles, achievement of its objectives and implementation of the Treaty[125]. Ndulo[126] states that this provision is not sufficient to make the Treaty applicable in the domestic law of the member states as the states would have to pass implementing legislation to achieve this result. This view, as we shall see with the experience of the ECJ when dealing with a comparable provision of the TFEU[127] is not necessarily correct. All depends on what the Tribunal considers the impact of the Treaty to be in the domestic law of the member states. In traditional international law doctrine, the issue of reception of international law such as treaties is governed by the domestic law of states[128]. I shall urge in this study that if this traditional

[123] Article 5.2(d) Treaty.
[124] Article 21 Treaty.
[125] Article 6.1 Treaty.
[126] Ndulo op cit 14.
[127] Article 4 (former 10 EC Treaty) TEU obligates EU member states to take appropriate measures to fulfill their obligations under the Treaties and to abstain from taking measures which could jeopardize the attainment of the objectives of the Treaties. This provision has been applied on several occasions by the ECJ when interpreting other provisions of the TFEU and the cases are discussed in Chap 4.
[128] Ngolele "The content of the doctrine of self-execution and its limited effect in South African law" (2006) 31 *SAYIL* 141-172 152 where the writer after citing various writers on the subject states "Indeed, the direct application of treaty obligations depends on the nature of the treaty ('its own enactment'), and the recognition of the doctrine of direct application by the municipal law, Also, as will be shown, the effect of

approach is followed in respect of the Treaty and its subsidiary legal instruments, the whole objective of having SADC will be defeated since it will be left to each member state to determine the effect of SADC law in its system. SADC law will not be applied uniformly and consistently in all states. The task should be left to the Tribunal to develop principles which ensure that where matters involving SADC law are concerned the effect of such laws should be the same in all SADC states. If the Tribunal adopts a robust approach as the ECJ has done in relation to the TFEU, then it might well be possible that the Tribunal will give direct effect[129] to some provisions of the Treaty.

The Tribunal has already given an indication of how it views the impact of some provisions of the Treaty to be in the domestic law of the member states. In the *Campbell*[130] case the Tribunal when dealing with Article 4(c) of the Treaty under which SADC and its member states are obliged to act in accordance with the principle of respect for human rights, democracy and the rule of law said:

> 'This means that SADC as a collectivity and as individual member states are under a *legal obligation* to respect and protect human rights of SADC citizens."(my emphasis)[131].

This statement was made in the context of an application to the Tribunal for interim relief pending the hearing of the case on the merits. The Tribunal has finally given its judgment on the merits in the *Campbell* case and the various aspects of the judgment are considered in the relevant sections of this study.

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such treaty is determined by national law." See also Olivier "Exploring the doctrine of self-execution as an enforcement mechanism of international obligations" (2002)27 *SAYIL* 99 117-118.

[129] The principle of direct effect which is discussed in full in Chapter 4 was first coined by the ECJ in the *Van Gend en Loos* Case 26/62. The effect of the principle is that the provisions of the treaty are to be interpreted so as to confer rights or impose obligations directly on private persons without the need for national legislation implementing such provisions. The persons then derive rights or incur obligations directly from the Treaty which can be enforced against institutions of the regional body, member states and other persons before the regional court or national courts. Moyo op cit 55 after citing the V*an Gend en Loos* case comments as follows: "If genuine integration (in SADC) has to be achieved, it will be important for the SADC tribunal to take a leaf from the ECJ which has been credited as being the engine behind European integration agenda. It is thus important that the SADC Tribunal makes an explicit pronouncement on direct effect of SADC law as long as such legislation meets the threshold cited above….".

[130]*Campbell* case op cit Ruling in the application for interim measures.

[131] Ibid 3, see also Moyo op cit 56.

In the *Campbell* case[132] the respondent government contented that the Treaty only sets out principles and objectives of SADC and does not set the standards against with actions of member states can be assessed. It further argued that the Treaty provisions needed further action on the part of SADC institutions such as implementing protocols, before they could be applied by the Tribunal. It pointed out that there are numerous protocols made under the Treaty, but as none of these addressed human rights or land reform, the Tribunal did not have jurisdiction in the matter. The Tribunal responded to these contentions by holding that the Tribunal is enjoined by Article 21 of the Protocol to develop its own jurisdiction having regard to applicable treaties, general principles and rules of public international law which are sources of law for the Tribunal[133]. It then held that this provision settled the question of jurisdiction since the Treaty is silent on the matter. It is submitted that both contentions are misplaced. The question of whether Treaty provisions require supplementing legislation before they can be enforced does not go to the issue of the jurisdiction of the Tribunal, but rather deals with the issue whether the Treaty provisions have direct effect in the sense that they are enforceable without need for further action on the part of SADC or member states[134].

Equally erroneous is the reference by the Tribunal to Article 21 of the Protocol as the basis of its jurisdiction because that article deals with sources of law not jurisdiction. The issue of jurisdiction is dealt with in Article 14 of the Protocol which provides that the Tribunal has jurisdiction over, among other matters, a dispute involving the 'interpretation or application of the Treaty'[135]. In the case the question of whether Amendment no. 17 to the Zimbabwe Constitution was compatible with the Treaty or not, is a question involving the application or interpretation of the Treaty hence the Tribunal had jurisdiction on that basis not on the basis raised by the respondent and the Tribunal.

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[132] *Campbell* case op cit Judgment on the merits 23-25.
[133] Ibid 24.
[134] See discussion on the status and effect of Treaty provisions *infra.*
[135] See section on jurisdiction of the Tribunal *infra.*

The Tribunal then correctly found that there is no need for a protocol on human rights to be in place before the Tribunal can find jurisdiction and then cited the express provisions of Article 4(c) of the Treaty[136]. In effect the Tribunal gave direct effect to Treaty provisions in the sense that in that provision of the Treaty no further action was needed on the part of SADC or its member states before it could be enforced. Unfortunately the Tribunal, in support of its finding that it had jurisdiction on the basis of international law, went on to cite some authorities on international law[137]. As stated above this was not necessary since the basis of Tribunal's jurisdiction is Article 14 of the Protocol and not the international law cited by the Tribunal.

SADC and member states are prohibited from discriminating against any person on grounds of gender, religion, political views, race, ethnic origin, culture, ill health, disability, or such other ground as may be determined by the Summit[138]. This is a very important provision which the Tribunal had to deal with in the *Campbell* case. The applicants in that matter contented that the respondent in the case had violated Article 6.2 of the Treaty by enacting Amendment No. 17 to the Zimbabwe Constitution. The effect of the amendment was to allow the Zimbabwe Government to compulsorily acquire land for purposes of resettling landless Zimbabweans. The Tribunal agreed with applicant's contention on the point and ruled that the respondent had violated its obligations under the Treaty for reasons which are discussed in the section on effects of Treaty provisions on the legal systems of member states.

It is interesting to note that discrimination on the basis of nationality is not prohibited by Article 6.2 of the Treaty. Presumably this is so because at this stage in SADC development it is impossible to impose a blanket prohibition on discrimination based on nationality. One assumes that the areas where discrimination on the basis of nationality is prohibited will have to be identified on a case by case basis and approved by the Summit. For example, the TFEU prohibits discrimination based on nationality in relation to the

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[136] Ibid 24.
[137] The Tribunal cited Shaw *International Law* and the Vienna Convention on the Law of Treaties in support of the principle that a state cannot use its national law to avoid its international obligations.
[138] Article 6.2 Treaty, see also Moyo op cit 55-57 where the writer deals with the impact of human rights in the SADC system as well as the Tribunal's approach in the *Campbell* case.

free movement of workers and, the right of establishment and provision of services within the EU[139].We shall also see that the ECJ has adopted the principle of non-discrimination as one of its general principles of law which underlie some of its general jurisprudence.[140]

Article 6.4 of the Treaty requires all member states to take all measures to ensure the uniform application of the Treaty. This is another important provision which, if given direct effect to, would have far reaching consequences when implementing SADC law in the national legal systems of member states. While the obligation is imposed on member states, the Tribunal will have to ensure that it is adhered to and the question is how? We shall see that the policy behind decisions of the ECJ when developing its jurisprudence on the direct and indirect effect of TFEU provisions and the principle of state liability, is to ensure that the TFEU is applied uniformly in all the member states otherwise the whole objective of having a union would be frustrated. The ECJ has also encouraged references by national courts under the preliminary rulings procedure to ensure that, under its overall supervision, EU law is interpreted uniformly by the national courts of the EU states. If the objectives of SADC are to be met, it is imperative that SADC law is interpreted and applied uniformly in the member states, and this requires that the Tribunal, as with the ECJ, plays an active role in ensuring that this is achieved through the purposive interpretation of SADC law.

Article 6.5 of the Treaty obliges member states to take necessary steps to accord the Treaty the force of national law. According to Ndulo[141], once this has done then the Treaty becomes effective as part of domestic law. But the point which is not clear here is what status the Treaty acquires in a member state's domestic law in terms of precedence between Treaty provisions and domestic law. Which law takes precedence if there is a conflict between the Treaty or other SADC law and the domestic law of a state? This is all the more acute where one is dealing with, a fundamental law of the member state such as the constitution. The Treaty provides no clear answer to this question and it will have

[139] Article 45, 43 and 56 TFEU.
[140] Chap 4 discussion on general principles as a source of law for the ECJ.
[141] Ndulo op cit 14.

to be left to the Tribunal to resolve. In relation to this absence of express provisions on the effect of the Treaty in national legal systems Moyo states:

> "Although the Treaty does not expressly encapsulates a 'supremacy clause' it is quite clear that SADC norms, within the Community's area of competence constitute a higher law and where there is a conflict with a member state's national law, it is respectfully submitted that SADC law will trump national law. This is because the SADC Treaty expressly prohibits member states from taking any measures (including the passing of legislation) which jeopardises the implementation of SADC treaties
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> ..It will have been helpful though for the SADC Treaty to state expressly as to the relationship between national law and SADC law as such will be of assistance should there be a divergence between the national law and SADC law."[142]

The judgment of the Tribunal in the *Campbell* appears to have been given on the assumption that the Treaty ought to take precedence over inconsistent national law. It did so by finding that Amendment No. 17 to the Zimbabwe Constitution violated Articles 4 and 6 of the Treaty in that the amendments denied applicants access to the courts and indirectly discriminated against the applicants on the basis of their race. Subject to observations made in the next sections, I accept in principle the correctness of these findings but submit that the Tribunal failed to deal with a number of important matters of principle. For example, does the judgment of the Tribunal imply that Treaty provisions now take precedence over the national laws in all the member states irrespective of the position of the state on the reception of international law? If that is so, then this is indeed a revolutionary step which in my view ought to have been stated in quite clear terms so as to leave no room for doubt. The second point to note is that the Tribunal did not state in clear terms whether all or some of the provisions of the Treaty take precedence over national law. Does it mean that all the provisions of the Treaty override the national laws of member states or only certain provisions, and if so which?

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[142] Moyo op cit 53.

There are two basic theories on the impact of international law on domestic law[143]. One, based on the naturalist theory of law, is the so called *monist* theory which holds and that national and international law are part of a single legal order and if there is a conflict between the two, international law reigns supreme. The other theory, the *dualist* theory, propounded by the positivist school of thought, is that the two systems of law are separate as they operate in different spheres and one cannot overrule the other. According to this theory international law is applicable in the domestic sphere only at the will of the state, implying that international law can only apply to the extent allowed by the state.

In between these divergent theories, lies actual state practice which seems to be to the effect that the status of international in the domestic legal system is determined by the domestic law of the state concerned. State practice, however, differs with some states following the monist theory, and others the dualist theory, and this practice is reflected in the SADC states[144]. However, most Commonwealth states which adopted the English common law in their legal systems tend to follow the English approach which is monist in character, especially in relation to customary international law[145]. In states which use the civil law system, the practice which was originally based on the Roman law, differs with some states giving priority to both treaty and customary law[146]. If these divergent approaches are followed in SADC the whole objectives of the Treaty might be defeated because states would then be able to choose what status to give to the Treaty resulting in some giving it supremacy while others may give it a status inferior to national law. When faced with a similar problem, the ECJ took a bold step and declared that in so far as the EU was concerned, EU law took precedence over national law in matters governed by EU law[147]. This bold move, as we shall see, was initially not wholeheartedly accepted by

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[143] See Shaw op cit Chap 4 and Ngolele op cit on the effect of self executing treaties in domestic law 151-152.

[144] Steiner and Woods *Textbook on EC Law* (2003) Chap 4 discuss the issue of the divergent approaches to the reception of international law in the EU states. This approach is reflected to some extent in the SADC states which inherited their legal systems from the former colonial powers who are some of the EU states.

[145] Shaw op cit Chap 4 generally and in particular 151-162.

[146] Shaw op cit 155.

[147] The principle of supremacy of EU law which is discussed in Chap 4 was pronounced by the ECJ in *Flaminio Costa v ENEL* Case 6/64 where the Court stated: "…the Member States have limited their

the courts of all the member states, and it is only recently that there has been acceptance. As noted above the Tribunal appears to have settled the matter albeit in a very ambiguous manner by ruling that amendments to the constitution of a member state violated the Treaty and hence the member state was in breach of its Treaty obligations. In principle this approach is correct for to have ruled otherwise would have cast doubt on the future of SADC itself as this rather sensitive matter unfortunately lies at the core of regional integration.

Articles 7 and 8 of the Treaty deal with membership issues and the only significant thing to note here is that no reservations are allowed to SADC membership. However, all member states of SADC *ipso facto* become party to the Protocol establishing the Tribunal because it forms an integral part of the Treaty[148]. This differs from other protocols to which member states can opt out as they are binding only on parties to them[149].

As the experience of the EU will illustrate, the somewhat broad provisions of the Treaty could prove valuable in the interpretation and application of the SADC law by the Tribunal. In broad terms, the SADC Treaty aims at ensuring cooperation among member states in every possible sphere of state and individual human activity, i.e. the political, economic, social and cultural spheres. This can be contrasted to the initial approach of the EU which focused on creating a coal and steel community and later an atomic energy and economic community. It is only recently that the EU has expanded its areas of cooperation to include political, social and security cooperation. But as we shall see in Chapter 4, the ECJ played a vital role in ensuring that the objectives of the original Communities[150] and now the Union are achieved and the Tribunal can do the same.

2.2 SADC Institutions[151]

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sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves."

[148] Article 16.2 Treaty.

[149] Article 22.9 Treaty.

[150] The original Communities were the European Coal and Steel Community, the European Economic Community and the European Atomic Energy Community.

[151] For a detailed discussion of SADC institutions and their powers and competences see Moyo op cit Chap 3 24-45.

Chapter 5 of the Treaty provides for the establishment and constitution of institutions of SADC as well their respective competencies. Article 9[152] lists the particular institutions which are the Summit the Organ on Politics, Defence and Security Co-operation[153], the Council of Ministers (Council), the Integrated Committee of Ministers (ICM), the Standing Committee of Officials (SCO), the Secretariat, the Tribunal, and the National Committees[154]. There is provision for the establishment of any other institutions that may be necessary and this provision has been used to establish the SADC Parliamentary Forum (SADC-PF)[155]. Since the focus of this study is the Tribunal, the brief discussion on the SADC institutions focuses on the competences of those institutions whose operations will impact on the functioning of the Tribunal. Therefore, in the next sections I discuss the Summit, the Council, the ICM, the SCO[156], the Secretariat, the SADC-PF, and the Tribunal itself.

The SADC-PF is discussed as it is intended to constitute the third arm of the SADC structure functioning as the "legislative arm" of SADC. Its role can perhaps be equated to the forerunner to the current European Parliament[157] which now plays a vital role in the overall functioning of the EU legal order.

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[152] Article 9.1 Treaty.

[153] This Organ as well as the Integrated Committee of Ministers and the SADC national committees were introduced by the 2001 amendments to the Treaty which also removed Commissions as part of the institutions of SADC.

[154] SADC institutions can be compared to AU institutions which include an advisory body known as the Economic, Social and Cultural Council. This institution which is established by Article 22 of the Constitutive Act of the AU is intended to provide for representation of civil society interests within the AU. The membership of the General Assembly of the Council currently stands at 150 persons representing various interest groups from all the member states. source www.africa-union.org (visited 04/10/10)

[155] The SADC Parliamentary Forum was established under Article 9(2) of the SADC Treaty at Blantyre, Malawi in August 1997. It was established in terms of a constitution which was approved by the Summit and the constitution sets out its mandate, composition and powers and functions.

[156] Both the ICM and SCO are committees of the Council and they are discussed under the Council

[157] The current European Parliament is the successor to the "Assembly" established by the three original founding Treaties of the Communities and then it exercised "advisory and supervisory powers" over the other institutions of the Communities. It is discussed in Chap 4.

Before considering the SADC institutions individually, a word must be said about the general nature and status of SADC and its laws. Ndulo[158] draws a comparison between the SADC institutions and institutions of the EU. He states:

> "..The European Union countries did not sign the EU treaty simply to create mutual obligations governed by the law of nations. Rather, they limited their sovereign rights by transferring them to institutions over which they had no direct control. Furthermore, it was not only member governments which were bound by the new rights and obligations, but also their citizens who became subjects of the Community. They thus created a "supranational" body as opposed to an international body of law and institutions which stood above individual member states. In contrast, the SADC treaty does not create supranational organs. For instance, SADC organs do not have power to legislate or issue directives binding on member states. As such, implementation of the relevant objectives, entirely depends on individual member states.(in support of this he cites Article 6 Treaty)" [159]

Ndulo's observations, on a proper reflection of the nature of SADC, cannot escape criticism. The first point to note is that SADC is established as an international organization with its own legal personality separate from that of its member states[160]. Member states of SADC are consequently obliged to respect the international character and responsibilities of SADC, the Executive Secretary, and other staff of SADC, and shall not seek to influence them in the discharge of their functions[161]. In addition, the Executive Secretary of SADC and its staff are not supposed to take instructions from individual member states or from outside of SADC[162]. The second point to note is that

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[158] Ndulo op cit.
[159] Ibid 18.
[160] Article 3 Treaty.
[161] Article 17.1 Treaty.
[162] Article 17.2 Treaty, see also Moyo op cit 36 where the writer argues that the fact that judges of the Tribunal and members of the SADC Secretariat are not expected to receive instructions from member states ".. is a positive development in SADC's integration project as it is crystal clear that unlike the other institutions discussed above, the Secretarial (sic) is a truly supranational institution within SADC whose emphasis is on SADC development and not on advancing national interests."

contrary to what is stated, the SADC Summit has power to legislate pursuant to Article 10.3 of the Treaty which clearly states that 'the Summit shall adopt legal instruments for the implementation of the provisions of this Treaty; provided that the Summit may delegate this authority to the Council or any other institution of SADC as the Summit may deem appropriate". There is no good reason to suppose that legal instruments adopted by SADC in this context would not bind its member states as is the case in the EU. The fact that the body making the law consists of representatives of member states, should not matter as long as the member states themselves intend the laws made to be binding on them. Therefore, SADC member states, by empowering the Summit or other institutions of SADC to legislate on their behalf, have, to some extent limited their sovereignty. For a stronger reason, by establishing a Tribunal with compulsory jurisdiction and power to take binding decisions on matters of SADC law, member states of SADC must clearly have accepted that they are limiting their sovereignty on matters falling within the ambit of SADC[163].

We shall see[164] that similar law-making arrangements exist in the EU where all EU laws in essence must be approved by the EU Council of Ministers and the European Parliament (EP). Before the EP was given substantive powers to participate in the law-making process, the EU Council was the main player, making laws on proposals from the EU Commission. There has never been doubt that such laws which were approved by the EU Council were not binding on EU states simply because they were approved by a body consisting of representatives of member states.

The reference to the EU as being "supranational" in nature must be subject to qualification. The EU Council, which plays a crucial role in the law-making process, consists of representatives of the governments of the EU member states, and the same applies to the SADC Summit and Council which consist of representatives of the

[163] Moyo op cit 40 with regard to the Tribunal states: "It must be noted from the foregoing that the Tribunal is a truly supranational institution of SADC apart from the Secretariat and such a development is reflective of the constitutionalism taking place in SADC." and "…..the SADC Tribunal is a court of justice for all intents and purposes and one can be forgiven for daring to say that it is now the highest court in the SADC region, at least when it relates to SADC law."

[164] The EU is discussed in Chap 4.

governments of SADC states. Perhaps the only political organ of the EU which fits the description of being "supranational" in nature, is the EU Commission which consists of persons chosen on the ground of their general competence and whose independence is beyond doubt[165]. Even though the Commission has wide powers of enforcement of EU laws and initiation and implementation of EU policies, it is responsible to the EP which may force it to vacate office[166].

Finally, on the question of EU citizens deriving rights and obligations from the EU Treaties, it must be stated that the EU Treaties do not expressly confer rights or impose obligations on EU citizens but, rather, those rights or obligations are a consequence of the manner in which the ECJ has interpreted the EU Treaty provisions so as to give them direct effect[167]. Again, there is no reason to suppose that the Tribunal will not interpret SADC Treaty provisions along similar lines[168].

Lastly, and of particular importance to the functioning of SADC, is the institutional balance of powers and responsibility between the various institutions. In most national legal systems the doctrine of separation of powers[169] is applied, or at least is said to apply. The concept envisages a situation where there are three main branches of the state namely, the legislative, executive and judicial. Each of these branches of state is expected to perform different functions independently of the others. In a typical case, the legislature is responsible for law-making while the executive branch implements those laws and the judiciary interprets the laws. It is said that such a set up prevents the accumulation of power in one branch of government and promotes democratic government, accountability, and the rule of law. However, such separation of powers arrangements do not exist in SADC as only the executive and judicial organs are specifically provided for by the Treaty. There is no SADC parliament, so to speak, with

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[165] Article 17.3 TEU.
[166] Article 17.8 TEU.
[167] See the classic case *Van Gend en Loos v Nederlandse Administratie der Belastingen* (Case 26/62) and the discussion on the topic in Chap 4.
[168] See *Campbell* case op cit.
[169] Hood Phillips & Jackson *Constitutional and Administrative Law* (2001) Chap 1 12 -13 and Chap 2 26 - 28 for a discussion on the separation of powers.

legislative powers as in other similar institutions such as the EAC, EU and ECOWAS. All these bodies have regional assemblies which purportedly are representative of the ordinary people who elect them[170].

The experience of the EU in particular, illustrates the need for such a body and efforts put in place to ensure that decision making powers are not concentrated in one group namely, the executive branch consisting of heads of state or government. Issues could arise as to the respective competences and capacities of the SADC institutions which call for intervention by the Tribunal. The Tribunal might be asked to determine whether action taken by institutions of SADC are within the purview of the Treaty or SADC protocols. The exercise of such review powers by the Tribunal ensures that SADC institutions act within the limits circumscribed by SADC law and that the interests of both SADC states and inhabitants of the SADC region are protected by law.

2.2.1 The Summit

The SADC Summit, the supreme policy-making institution of SADC, consists of the heads of state or government of SADC member states[171]. It has no equivalent in the UN system which is discussed in Chapter 3 but, the UN organ nearest to it is the UN General Assembly which consists of representatives of all member states of the UN. However, functionally the two institutions are worlds apart. The Summit does appear to find equivalence in the EU in the form of the European Council (EC)[172] and the Council of Ministers of the EU (EU Council)[173] which are discussed in Chapter 4. Functionally, the Summit differs from European Council in that, even though the EC has overall policy direction over the EU, the EC has no law-making powers[174] as does the Summit. The

[170] The EAC has a legislative body called the East African Legislative Assembly, the EU has a parliament called the European Parliament discussed in Chap 4 while the ECOWAS has a parliament called the ECOWAS Parliament.
[171] Article 10 Treaty.
[172] The European Council which is established by Article 13 TEU consists of the heads of state or government of member states of the EU. The EC performs mainly political functions and is now formally part of the European Union structure through amendments made introduced by the Lisbon Treaty.
[173] The EU Council of Ministers which was established by Article 13 TEU forms part of the structures of the European Union and has power to make decisions which are binding on member states of the EU.
[174] Article 15.1 TEU.

Summit performs law-making functions similar to those of the EU Council except that the Summit performs such function on the recommendation of the Council[175], while the EU Council performs the law-making function subject to the complex consultation, co-operation and co-decision procedures of the EU Treaties discussed in Chapter 4.

The main functions of the Summit are to provide overall policy direction and control to SADC and to adopt legal instruments for the implementation of the provisions of the Treaty, to create committees and other institutions and organs of SADC, to appoint the Executive Secretary and the Deputy Executive Secretary and to decide on the admission of new members to SADC[176]. The decisions of the Summit are taken by consensus and are binding on SADC member states unless the Summit decides otherwise[177]. The Summit may delegate its law-making function to the Council or to any other institution of SADC[178]. The Treaty provides for the election of a Chairperson and Deputy Chairperson of SADC on a one yearly rotational basis, and requires that Summit meet at least twice a year. For present purposes the most important functions of the Summit are its policy decisions and the adoption of legal instruments which include protocols and other subsidiary legislation. This process has already commenced[179].

One issue which might arise is whether these decision and law-making powers of the Summit may be subject to challenge before the Tribunal as 'acts of the institutions of the Community' as contemplated in Article 14 of the Protocol. If so, to what extent may the Tribunal review powers exercised by the Summit, in particular on matters relating to politics, defence and security? In addition, who is entitled to challenge these acts and in which forum and what are the likely consequences of such challenges on the institutional balance between the respective institutions of SADC? If a particular policy or decision is successfully impugned before the Tribunal, are there remedies for those who have been adversely affected by the decision or policy bearing in mind the principle of state sovereignty? The answers to these questions and others are likely to be hard to find but

[175] See Articles 10 and 22 Treaty.
[176] Article 10 Treaty.
[177] Article 10.9 Treaty.
[178] Article 10.3 Treaty.
[179] Currently there are 23 SADC protocols and these are listed in the Appendix.

the experiences of the ICJ[180] and ECJ[181] in relation to these matters will hopefully throw some light on how the Tribunal could approach these matters. The question of challenges to the interpretation, application or validity of legal instruments as envisaged in the Protocol, is in theory not likely to present much of a problem, but in practice things might not be so easy as the experience of the EU shows. Another pertinent issue is the delegation of law-making powers by the Summit: to what extent can it delegate its powers and could such delegation also be subject to judicial review?

A literal reading of Article 14 of the Protocol where it refers to "acts of institutions of the Community" could be reasonably interpreted to mean that all decisions of the Summit which are binding in terms of Article 10.9 of the Treaty can be the subject of review by the Tribunal. This interpretation of Article 14 could have serious repercussions where the Tribunal appears to interfere in sensitive matters which touch on the sovereignty of the member states. It is easy to pick some examples of matters falling in this category. For example the question of enhancing democracy in Swaziland has been a thorny issue, while the land question and political polarization are currently difficult issues in Zimbabwe. Such matters may be referred to the Organ which has jurisdiction over inter-state and intra-state conflicts involving members states[182]. It has the power to apply any of the means of peaceful settlement of disputes discussed in Chapter 1, or to recommend that the Summit take enforcement action against a defaulting state. Could the state concerned bring an action before the Tribunal challenging the decision to recommend enforcement action or, if the Summit acts on the recommendation, the decision of the Summit to take action? This course of action is a possibility but it is suggested that in such cases the Tribunal should exercise extreme judicial caution as an unfavourable decision may be unacceptable to the party concerned which may then refuse to comply

[180] The possibility of judicial review of decisions of the UN Security Council is discussed in Chap3 section on the Security Council.
[181] The ECJ has very limited jurisdiction on matters covered by the former 'second' and 'third' pillars of the. In particular, second pillar matters which relate to foreign and security policy fall outside the jurisdiction of the ECJ.
[182] The jurisdiction of the Organ is set out in Article 11.2 of the Protocol on Politic, Defence and Security Cooperation.

with it[183]. In short, the Tribunal should be careful to distinguish between political and legal disputes, leaving the former to be resolved politically.

2.2.2 The Council

Article 11 of the Treaty deals with matters relating to the Council. The Council consists of one minister from each member state, preferably a minister responsible for foreign or external affairs, and it performs supervisory, executive and advisory functions under the overall supervision of the Summit[184]. The Council has no equivalent in the UN structures, but it finds some equivalence, for certain of its functions, in the Council of Ministers of the EU discussed in Chapter 4. The supervisory function includes overseeing the functioning and development of SADC and the implementation of SADC policies and execution of its programmes. Its advisory functions include advising the Summit on overall SADC policy and functioning, recommending to Summit the establishment of various structures, appointments of the Executive Secretary and the Deputy and on the adoption SADC legal instruments.

The executive functions entail approval of policies, strategies and programmes (presumably emanating from subordinate bodies), directing, coordinating and supervising the operations of subordinate SADC institutions, determining terms and conditions of SADC staff, developing the SADC common agenda and performing other duties assigned to it by the Summit or the Treaty. The Council can exercise legislative powers if such power is delegated to it by the Summit pursuant to Article 10.3 of the Treaty. The power to delegate is likely to be quite useful when SADC has developed to the stage where there is need for detailed legislation as is happening in the EU. In the EU, an EU legislative act

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[183] Following the Tribunal's ruling in the *Campbell* case several senior officials in the Zimbabwe were quoted in the press as having said that they would disregard the ruling and go ahead to seize more land from white farmers. The basis for this stance is that the land issue in Zimbabwe is not a legal but a political issue. In that respect the prosecution of white farmers in whose favour the Tribunal had ruled for defying government orders to leave the farms would continue (source the Zimbabwe Independent of 18 December 2008 online www.theindependent.co.zw).(visited12/12/09).

[184] Functions of the Council are listed in Article 11.2 Treaty.

may delegate power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act[185].

As with the Summit, the Council has a Chairperson and a Deputy appointed by the relevant office holders of the Summit. Decisions are by consensus and Council reports to the Summit. Some pertinent issues relating to these functions of the Council concern whether they constitute "acts of the Community institutions" as envisaged by the Protocol? If so what is the legal effect of such acts and the consequences for breach thereof, and what remedies are available? The ECJ has been confronted with some of these issues in relation to acts of the EP, the EU Council as well as the Commission and its jurisprudence in the area will prove valuable.

2.2.3 The Integrated Committee of Ministers (ICM)

The ICM[186] is a new institution which was introduced by the 2001 amendments to the Treaty to take over functions which were previously performed by the various SADC sectors located in each member state. As a result of the restructuring of SADC institutions, all those various sectors in the respective areas of cooperation are now centralized in the form of directorates located at the SADC headquarters in Gaborone, Botswana. The ICM is essentially a committee of the Council and thus reports to and is accountable to the Council. Its decisions are also by consensus[187]. The ICM has no equivalent in the UN system but performs functions similar to those of the Directorates which fall under the auspices of the Commission of the EU discussed in Chapter 4. The ICM which consists of two Ministers from each member state is charged with the responsibility of overseeing the activities of the core areas of integration which include trade, industry, finance and investment, infrastructure and services, food agriculture and natural resources and social and human development. In addition, the ICM monitors certain SADC special programmes, provides policy directives to the Secretariat, makes decisions pertaining to the directorates and evaluates the work of those directorates. The

[185] Article 290 TFEU.
[186] Matters pertaining to the ICM are contained in Article 12 Treaty.
[187] Article 12.6 Treaty.

ICM is empowered to make decisions for implementation of programmes which would otherwise have to await a Council decision. The same questions raised regarding decisions of the Council, apply to decisions of the ICM.

2.2.4 The Standing Committee of Officials (SCO)

The SCO is another committee of the Council which acts in a technical advisory capacity to the Council. It consists of one permanent secretary or a person of equivalent rank from each member state[188]. The SCO can be equated with the Committee of Permanent Representatives (COREPER)[189], a permanent body which is responsible for preparing the work of the EU Council and carrying out tasks assigned to it by the EU Council. The SCO can also be equated to the Permanent Representatives Committee of the AU another permanent body which is responsible for preparing the work of Executive Council of the AU[190]. The function of the SCO is to process documentation from the ICM to the Council. All its other procedural matters are the same as those of the Council and it reports to and is responsible to the Council.

2.2.5 The Secretariat

The Secretariat is described as the 'principal executive institution of SADC'[191] and in this respect its position can be likened to that of the Commission[192] of the EU. The Secretariat is responsible for planning and management of SADC progammes, implementation of decisions of all the other institutions of SADC, except those of the SCO and the Tribunal, coordination and harmonisation of SADC policies and strategies, gender mainstreaming and various other SADC activities[193]. In addition, the Secretariat also performs the administrative and other linked functions of SADC and, in this respect, prepares administrative regulations and other rules for management of SADC affairs.

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[188] Article 13 Treaty.
[189] COREPER is provided for in Article 16.7 TEU.
[190] This committee is established by Article 21 of the Constitutive Act of the AU.
[191] Article 14 Treaty.
[192] The Commission which is discussed in Chap 4 serves as the executing organ of the EU.
[193] The responsibilities of the Secretariat are listed in Article 14.1.

The Secretariat is headed by the Executive Secretary who is directly responsible to Council for matters relating the activities of SADC and administrative and financial matters including the appointment of SADC staff in accordance with conditions laid down by the Council, and the preparation of SADC's annual reports[194]. The position of the Secretariat, except for the law-making function, can be likened to that of the EU Commission which is discussed in Chapter 4. In this regard, the SADC Secretariat is poised to play a crucial role in the operations of SADC similar to that played by the EU Commission. In particular the Secretariat could be charged with the responsibility of bringing disputes or defending matters brought against SADC by other parties. Since the Treaty does not specifically deal with these matters, it will then be up to the Summit or Council to determine the extent of the Secretariat's powers. For example, the provisions regulating the manner in which matters may be brought before the Tribunal by the Secretariat may be spelt out in subordinate legal instruments of SADC. They could be modeled on TFEU provisions such as Articles 258 and 259 which set out the procedures for bringing actions against EU member states in the ECJ.

2.2.6 The SADC Parliamentary Forum (SADC-PF)

Both the original and the amended Treaties make no provision for a legislative institution of SADC. This lacuna in SADC was realised as long ago as 1993 when Speakers/Presiding Officers of several states gathered in Windhoek, Namibia, for a consultative meeting on a SADC Parliamentary Forum. That meeting culminated in the passing of a resolution calling for the establishment of a parliamentary forum whose structures, role, functions and administrative issues would be provided for in a constitution.

The constitution of the SADC-PF was subsequently approved by the national parliaments of the member states and forwarded to the Summit of SADC in Blantyre, Malawi, in

[194] Articles 14.2 and 15 Treaty.

August 1997[195]. At this meeting the Summit formally approved the constitution of the forum and the establishment of the SADC-PF[196] as an autonomous institution of SADC. The SADC-PF was established under Article 9.2 of the Treaty which provides for the establishment by the Summit of "other institutions" as may be necessary and, as such, it is not one of the "core" institutions of SADC listed in Article 9.1 of the Treaty.

This somewhat anomalous position has been a cause for concern within the SADC-PF with views being expressed that a new SADC Parliament with equal status to the other "core" institutions of SADC should be established[197]. This could be achieved by amendment to the Treaty and the adoption of a protocol on the SADC Parliament by the Summit. A draft amendment to the Treaty and a Draft Protocol on the SADC Parliament were adopted by the 15th Plenary Session of the SADC Forum in Maseru, Lesotho, between the 1st and 6th December 2003. The proposals contained in these documents are yet to be approved by the SADC Summit.

The SADC-PF constitution provides for a membership of three nominees from each of the thirteen member states, together with the presiding officer of each of the member states[198]. The three members are to be "elected" to the SADC-PF by their national parliaments but the procedure for elections is not set out leading one to assume that each national parliament can devise its own procedure for election.

By its constitution, the SADC-PF is established as an advisory, recommendatory and consultative body[199]. It has no legislative powers, and its recommendations in relation to SADC are not binding on SADC and its institutions. Its function in the law-making process is therefore confined to the making of recommendations on the harmonisation of laws in the region, and considering and making recommendations on international treaties and draft treaties referred to it by SADC. As stated earlier, its constitution envisages the

[195] The constitution of the SADC –PF is a publication of SADC-PF and can be accessed on its website www.ssdcpf.org. (visited 02/02/10). The secretariat of SADC-PF is located in Windhoek, Namibia.
[196] The SADC-PF consists of all SADC member states except Madagascar.
[197] Moyo op cit 60-61 argues for a SADC parliament directly elected by universal suffrage by SADC citizens so as to provide democratic legitimacy to SADC.
[198] Article 6 SADC-PF constitution.
[199] See Article 8(3) SADC-PF constitution.

forum transforming into a SADC Parliament with full legislative powers at some future date.

The SADC-PF constitution confers power on the forum to consider and approve its own budget and this power gives the forum a large measure of autonomy in performing its functions. This apparent autonomy may be explained by the fact that its funds are not SADC funds, but are sourced from contributions from national parliaments and donations from well-wishers.

The constitution also empowers the SADC-PF to scrutinize and make recommendations on the budget of SADC[200]. This power appears to be self-declared as the SADC Treaty gives exclusive powers over the SADC budget to the Executive Secretary and the Council[201]. In any event, the power has never been used by the SADC-PF.

The SADC-PF has power to discuss any matter pertaining to SADC but has no real power to approve anything relating to SADC. Its functions are limited to giving advice or making recommendations to the executive authorities of SADC.

The position of the SADC PF can be compared to that of the European Parliament discussed in Chapter 4. The EP, unlike the SADC-PF, is established by the Treaties and its organizational structures, powers and functions are provided for in the EU Treaties[202]. Originally the EP was simply an advisory and supervisory body but gradually more functions were assigned to it. Currently it has standing before the ECJ albeit with some restrictions[203]. As for the SADC-PF, it can be argued that being an organ of SADC, it also has standing before the Tribunal in any of the disputes envisaged in the Protocol[204].

[200] See Article 8(3)(c)(vii) SADC-PF constitution.
[201] See Article 15.1(i) Treaty.
[202] Article 14 TEU and Articles 223 to 234 TFEU deal with all matters relating to the EP.
[203] See discussion on the EP in Chap 4.
[204] The Tribunal has confirmed in a recent judgment *Bookie Monic Kethusegile-Juru v SADC-PF* SADC T Case No. 02/2009 3 a dispute over the unlawful termination of an employment contract that the SADC-PF is an institution of SADC whose "acts" are "acts of the institutions of the Community" as envisaged in Article 14 (b) of the Protocol. The Tribunal cited the 1997 resolution of the SADC Summit which established the SADC-PF as an autonomous institution of SADC in accordance with Article 9.2 of the Treaty.

It is thus important to consider the experience of the EP so as to draw some lessons for the Tribunal as to the type of disputes in which a supposedly legislative body is likely to be involved.

2.3 The SADC Tribunal

The Tribunal is established by Article 16 of the Treaty and its composition jurisdiction and other matters are provided for in the Protocol[205]. The Tribunal consists of not less than ten members appointed from nationals of member states[206]. The members must possess qualifications required for appointment to the highest judicial offices in their respective states, or must be jurists of recognized competence[207]. The Council shall designate five of the members as regular members who shall sit on a regular basis[208]. The remaining five members constitute a pool from which the President may invite a member to sit when a regular member is temporarily absent[209]. The quorum of the Tribunal is three members. The Tribunal sits when required to consider a case submitted to it which means that the members are not appointed on a full-time basis[210]. However, when the workload so requires, the Council may decide that members serve on a full-time basis in which case those members shall not hold other office or employment[211].

Each state is entitled to nominate one candidate and the Council selects members from the list nominated by the states and makes a recommendation to the Summit which finally appoints members of the Tribunal[212]. Members are appointed for a period of five years and are eligible for re-appointment for a further five years only[213]. The members can only vacate office through expiry of term, death, or resignation. They are entitled to immunity

[205] Protocol on the Tribunal op cit.
[206] Article 3 Protocol.
[207] Article 3.1 Protocol.
[208] Article 3.2 Protocol.
[209] Ibid.
[210] Article 6.4 Protocol.
[211] Article 6.5 Protocol.
[212] Article 4 Protocol.
[213] Article 6 Protocol.

from legal proceedings arising from things done in their judicial capacity while the members' term and conditions of service are determined by the Council[214]. There is provision for the appointment of a Registrar and any necessary staff[215], and the seat of the Tribunal is determined by the Council and is currently Windhoek, Namibia. The procedures and other matters relating to the Tribunal are set out in the rest of the Protocol and the Rules of Procedure (Rules) but, for the purposes of this study, only those aspects having a bearing on the subject matter of this study are considered.

Before moving on to the selected areas of study, a brief note must be made regarding future methods of interpretation of the Treaty and subsidiary legal instruments by the Tribunal. The Tribunal is mandated by Article 16 of the Treaty "…to ensure adherence to and the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it." Neither the Treaty nor the Protocol specifies the methods to be used by the Tribunal in ensuring the proper interpretation of the Treaty and subsidiary legal instruments. It is left to the Tribunal to develop its own methods of interpretation having regard to Article 21 of the Protocol. This provision empowers the Tribunal to, among other things, "…develop its own Community jurisprudence having regard to applicable treaties, general principles and rules of public international law and any rules and principles of the law of States." To this extent the Tribunal has a wide mandate to evolve its own methods of interpretation which could take into account both international law and the national law of member states. I shall urge in subsequent parts of this study that the concept of principles and rules of public international law encompasses rules of customary international law, judicial decisions, general principles of law and any other possible sources of law which other international courts or tribunals have had recourse to. In so far as treaty interpretation is concerned, the Vienna Convention on the Law of Treaties 1969 becomes pertinent because that convention is generally accepted as a codification of some rules of customary international law on treaties. Articles 31 to 33 of the Convention deal with treaty interpretation and the rules set out there could be used by the Tribunal. The rules

[214] Articles 10 and 11 Protocol.
[215] Article 12 Protocol.

are discussed in the section on sources of law for the Tribunal: applicable law and in Chapter 3 in the section on sources of law for the ICJ: international conventions. In the *Campbell* case, the Tribunal referred to the Vienna Convention in support of the principle that a party may not invoke its internal law to justify its failure to carry out international obligations[216] and there appears to be no good reason why it should not apply other provisions of that Convention.

The ECJ has developed its own methods of interpretation of EU Treaties which are discussed in Chapter 4. These will be particularly helpful bearing in mind that such methods of interpretation may differ from the methods used in national systems. This becomes apparent when one considers that the SADC national legal systems vary between common law and civil systems depending on the colonial legacy left by the respective former colonial power.

The other aspect which is related to methods of interpretation used or to be used by the Tribunal is the doctrine of precedent. Article 32 of the Protocol which provides that decisions of the Tribunal shall be binding upon parties to the dispute in respect of that particular case is similarly worded to Article 59 of the Statute of the ICJ. This latter provision has been interpreted to mean that the principle of *stare decisis* (abide by previous decisions) or precedent is not applicable in international law[217]. The practice of the both the ICJ and the ECJ, as we shall see, is not to be bound by previous decisions but they will generally follow them for the sake of consistency and legal certainty.

2.4 Parties (Access to the Tribunal)

Article 15 of the Protocol which sets out the scope of jurisdiction of the Tribunal, provides that it shall deal with disputes between member states, and between private persons and states. Articles 17 to 19 extend the scope of jurisdiction to include disputes between the Community on the one hand, and states, private persons, and SADC staff, on the other hand. Finally, Article 20 of the Protocol confirms the advisory jurisdiction

[216] *Campbell* case op cit 20.
[217] See Chap 3 for discussion on judicial decisions as a source of law for the ICJ.

which is conferred on the Tribunal by Article 16 of the Treaty. I will in turn deal with each of the respective parties who have access to the Tribunal.

2.4.1 States

Traditional international law has always considered states as its primary subjects and to that extent international law has conferred unlimited legal personality on states[218]. It is only in recent times that international law has been forced to acknowledge that there are players other than states in international relations which, albeit to a limited extent, have international legal personality[219]. However, other entities enjoy legal personality to the extent that it is conferred on them by agreement. The case of private persons is discussed in the next section. Following the traditional doctrine only states have access to the ICJ[220] although there have been calls for expanding the jurisdiction of that court to include international organisations among others[221].

The Protocol confers jurisdiction on the Tribunal in disputes between states as well as between states and private persons[222]. The conferment of jurisdiction on inter-state disputes is not exceptional considering that the membership of SADC itself consists exclusively of states. States may find themselves before the Tribunal as claimants or applicants against other member states or as defendants or respondents in actions brought by other member states. States may also become litigants before the Tribunal in actions bought by private persons or in actions states themselves bring against private persons. These heads of jurisdiction are discussed further in the following sections.

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[218] See Brownlie op cit 58. See also Shaw op cit Chap 5 generally and 177 where he cites Lauterpacht as having observed that "the orthodox positivist doctrine has been explicit in the affirmation that only states are subjects of international law".

[219] See for example the ICJ opinion in *Reparation for Injuries Suffered in the Service of the UN* Case ICJ Reports 1949 174, Shaw op cit 176.

[220] Article 34 Statute of the ICJ.

[221] See discussion of the ICJ in Chap 3.

[222] Article 15 1 Protocol.

In so far as states are concerned, one thing to note is that once a dispute has been referred to the Tribunal the consent of other parties is not required[223], in other words the Tribunal enjoys compulsory jurisdiction over states and private persons on matters falling within the ambit of the Treaty. Member states may also find themselves before the Tribunal in actions brought against them by SADC institutions or actions initiated by the states themselves against SADC institutions under Article 17 of the Protocol.

Article 17 of the Protocol confers exclusive jurisdiction on the Tribunal in disputes between SADC and member states over a matter of SADC law, and this appears to be the case in all disputes involving SADC as a party[224]. The conferment of exclusive jurisdiction on the Tribunal in matters in which SADC is a party, implies that parties are free to refer other disputes in which SADC is not a party to other fora even if they involve matters covered by SADC law since there is nothing to prevent them from doing so. Disputes over SADC law could thus, instead of being referred to the Tribunal, be referred to national courts, international courts such as the ICJ, or even to arbitration. The possibility that disputes involving SADC law may be taken to courts or tribunals other than the Tribunal, could pose serious problems for the uniform interpretation and application of SADC law. This is so because those other courts or tribunals may not be in a position to ensure the uniform interpretation and application of SADC law in all situations. Secondly, there will be no obligation on those courts or tribunals to interpret SADC law consistently and uniformly. It is unfortunate that neither the Treaty nor the Protocol confers exclusive jurisdiction on the Tribunal in disputes involving SADC law except in cases where SADC itself is party to the proceedings. Such a provision would prevent the situation described above –better known as “forum shopping”.

In Chapter 4 we shall see that one of the policies underlying the judicial activism of the ECJ, is to ensure uniform application of EU law in all the member states of the EU. This, it is submitted, should also be the policy underlying SADC law, and the Tribunal might need to devise ways of ensuring that this happens.

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[223] Article 15.3 Protocol.

[224] Articles 18 and 19 Protocol also confer exclusive jurisdiction on the Tribunal in disputes involving SADC and private persons as well as its staff.

In relation to member states being parties to proceedings, we shall see that member states of the EU can be party to proceedings before the ECJ in various ways. They can become parties when they bring infringement action against other member states pursuant to Article 259 of the TFEU. They can be defendants in actions brought against them by the Commission under Article 258 of the TFEU, or by other member states under Article 259. The ECJ has developed a large body of jurisprudence, based on cases brought before it by or against member states, and this jurisprudence which touches on procedural aspects, types of infringement and defences which have been raised by the states, is considered in Chapter 4.

2.4.2 Private persons

Private persons, can also find themselves before the Tribunal in several ways. They can bring actions or applications directly before the Tribunal against member states of SADC under Article 15 of the Protocol. They can also find themselves being defendants or respondents before the Tribunal in actions or applications brought against them by member states. It appears from Article 15 that the Tribunal seems to have no jurisdiction over actions brought by private persons against other private persons[225] and this seems to be unfortunate because, as we shall see, the nature of SADC law itself invariably involves both activities of states as well as economic activities of private persons[226].

The position regarding the Tribunal's lack of jurisdiction over disputes between private persons was confirmed by the Tribunal in the *Campbell* case[227]. Prior to the hearing of the main case, two groups of private persons filed separate applications to intervene in the proceedings in terms of Article 30 of the Protocol as read with Rule 70 of the Rules. The Tribunal correctly stated that it has no jurisdiction over disputes between private

[225] Article 15.1 of the Protocol confers jurisdiction on the Tribunal in disputes "between States", and between "natural and legal persons and States" and there is no mention of disputes between "natural and legal persons".
[226] For example provisions on intellectual property rights under Article 24 Trade Protocol and on competition policy under Article 25 Trade Protocol would by their nature involve rights and obligations of private persons.
[227] *Campbell* case op cit.

persons[228]. However, it is submitted that on the facts of the case the Tribunal's finding was incorrect. Article 30 of the Protocol provides that a state, or natural or legal person that has "an interest of a legal nature that may affect or be affected by the subject matter of a dispute before the Tribunal" may request to be permitted to intervene. In my view the intervener need not satisfy the jurisdictional requirements of Article 15 of the Protocol: all that is required is that there be a dispute between states or a state and a private person which is validly before the Tribunal. This must be so irrespective of whether the intervener is a state or private person.

The Tribunal's finding if taken to its logical conclusion could produce absurd results. For instance, a private person would not be allowed to intervene in a dispute involving say two states and a private person simply because there is a private person involved in the dispute. This approach disregards the fact that the Tribunal's ruling in the matter could go in favour of either the private person or the states, and in either case affect the legal interests of the intervener. Should the intervener be denied access to the Tribunal simply because a private person happens to be party to the proceedings even though the ruling of the Tribunal would adversely affect his legal interests? In my view this cannot be a proper interpretation of Article 30 and it is submitted that all that the intervener needs to prove in order to be allowed to intervene, is that he has an interest of a legal nature in a dispute that is properly before the Tribunal regardless of the identity of parties to that dispute.

The only limitation on the right to bring actions by private persons against member states is the requirement that before such action is brought, the person must have exhausted all available remedies, or be unable to proceed under the domestic jurisdiction[229]. The requirement of exhaustion of domestic remedies does not seem to apply in cases brought before the Tribunal by private persons against SADC institutions, by SADC institutions against private persons, by states against private persons, or by states against other states. This is so because Article 15.2 of the Protocol specifically provides that no *natural or*

[228] Ibid 6-7. This is so because under Article 15.1 the Tribunal has no jurisdiction in disputes between private persons.
[229] Article 15.3 Protocol.

legal person shall bring an action against a *state* unless he or she has exhausted all available remedies or is unable to proceed under domestic jurisdiction (my emphasis). It follows, therefore, that the requirement for exhaustion of domestic remedies applies only where a private person wishes to bring an action against a state.

The principle of exhaustion of local remedies is a well established principle of international law[230]. The rationale for the principle is that before a state can be summoned before an international court or tribunal it must be given an opportunity to remedy any wrong it may have committed through its domestic procedures[231]. It is also intended to reduce the number of claims that might be brought in the international arena by private persons[232]. In applying this principle the Tribunal will, of course, need to take account of the existing jurisprudence emanating from other international courts or tribunals including the ICJ. In particular, the Tribunal can benefit immensely from the jurisprudence of the African Commission on Human and Peoples'[233] which among other things, is charged with the responsibility of ensuring the protection of human and peoples' rights under conditions laid down in the African Charter on Human and Peoples' Rights of 1981[234]. The African Charter requires that before a complaint can be admitted the complainant must have exhausted all local remedies, if they exist, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged[235]. The Commission has dealt with several cases which required an interpretation of what constitutes exhaustion of local remedies and in the process it has developed a number of principles which may of use to the Tribunal[236]. In the case of the

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[230] Shaw op cit 730, and in the *Campbell* case op cit 19 the Tribunal remarked: "The concept of exhaustion of local remedies is not unique to the Protocol. It is also found in other regional international conventions." and went on to cite the European Convention on Human Rights and the African Charter on Human and Peoples' Rights. See discussion of the principle in Chap 3.

[231] Shaw op cit.

[232] The Tribunal dealt with the rationale behind the principle 20.

[233] The African Commission was established by Article 30 of the African Charter on Human and Peoples' Rights of 1981. Information and decisions of the Commission can be accessed on its website www.achpr.org (visited 02/09/10).

[234] Article 45 of the African Charter sets out the functions of the Commission one of which is the protection of human and peoples rights (Article 45.2).

[235] Articles 50 and 56.6 African Charter.

[236] Some of the cases include *Rencontre Africaine pour la Defense des Droits de l'Homme v Zambia* Communication 71/92, *Alhassan Abubakar v Ghana* Communication 103/93, *Sir Dawda K. Jawara v The Gambia* Communication 146/96, *Rights International v Nigeria* Communication 215/98 others.

Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development in Africa[237] the Commission had to consider what constitutes an unduly prolonged process under Article 56.5 of the African Charter. The Commission noted that there are no standard criteria which can be used to determine when the process has been unduly prolonged and that each case has to be treated on its own merits[238]. The Commission reasoned that the process can be said to be unduly prolonged if there is no justification for the delay[239]. Factors such as civil war or strife or delays caused by the victim of the alleged human rights violations or his family or representatives could be justification for delays. The Commission then applied the common law doctrine of the reasonable man's test and held in the case that a delay of more than four years by the Zimbabwean courts to finalise election petitions challenging election results was an undue prolongation of the process and thus the complaint was admissible[240]. The Commission has also applied the principle that only remedies of a judicial nature are considered to be effective remedies for acts of human rights violations. This was said to be so in the case *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development (on behalf of Andrew Meldrum)* against the Republic of Zimbabwe[241]. In that case the Commission cited with approval its previous decision on the point and reaffirmed that "the principle of exhaustion of domestic remedies, presupposes existence of effective judicial remedies. Administrative or quasi judicial remedies which do not operate impartially are considered as inadequate and ineffective."[242] While the principle requires that only judicial remedies are effective might apply in cases concerning human rights violations the same may not be the case with cases brought under SADC law not involving alleged human rights violations. It is possible that the Tribunal may hold that in some instances administrative proceedings are sufficient if they resolve the matter conclusively. In the same case the Commission also applied the principle of constructive exhaustion of local remedies. This principle applies where efforts to seek judicial remedies are frustrated or impeded by the respondent state

[237] Communication 293/2004.
[238] Ibid para 58.
[239] Ibid para 60.
[240] Ibid para 61.
[241] Communication 294/2004.
[242] Ibid paras 39 and 51.

such that exhausting the remedies amounted to a 'senseless formality'[243]. In the case the Commission found that the conduct of the respondent state in defying court orders by going ahead with a deportation of the victim effectively deprived him of judicial protection. In that case the principle of constructive exhaustion of local remedies applied and the complaint was admissible[244]. In two other cases *Obert Chinhamo*[245] and *Micheal Majuru*[246] against the Republic of Zimbabwe the Commission mentioned the rationale for the requirement for exhaustion of local remedies as well as the criteria to be applied to determine whether the requirement has been complied with in cases brought before it. The rationale for the requirement is to give the state concerned an opportunity to remedy the matter through local processes[247]. The criteria are that the remedy must be available, effective and sufficient[248]. In both cases the Commission found that the complainants had failed to satisfy the criteria especially that they had failed to exhaust local remedies which they could have done while inside the country or when they had left the country because Zimbabwean law allowed cases to be instituted in its courts by absentee litigants through their lawyers. The Commission distinguished four of its previous decisions on the point where it had found that there was constructive exhaustion if the victims could not approach the local courts because they had left the country because of fear of persecution by agents of the respondent states[249]. Finally, the Commission has also dealt with the requirement that for the complaint to be admissible, it must be submitted within a reasonable period from the time that local remedies are exhausted. Article 15.3 of the Protocol which deals with exhaustion of available remedies does not set a time frame

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[243] Ibid para 54.
[244] Ibid para 55.
[245] Communication 307/2005
[246] Communication 308/2005
[247] Ibid paras 52 and 77 of both decisions the Commission stated "The rationale for the exhaustion of local remedies is to ensure that before proceedings are brought before an international body, the State concerned must have the opportunity to remedy the matter through its own local system. This prevents the international tribunal from acting as a court of first instance rather than as a body of last resort."
[248] In both decisions (paras 54 and 79) the Commission cited its finding in the *Jawara* case op cit where it stated "a remedy is considered available if the petitioner can pursue it without impediment; it is deemed effective if it offers a prospect of success and it is found sufficient if it is capable of redressing the complain…..the existence of a remedy must be sufficiently certain, not only in theory but also in practice, failing which, it will lack the requisite accessibility and effectiveness. …Therefore, if the applicant cannot turn to the judiciary of his country because of fear for his life (or even those of his relatives), local remedies would be considered to be unavailable to him".
[249] The cases are *Jawara*, *Abubakar*, *Rights International* op cit and *Gabriel Shumba v Republic of Zimbabwe* Communication 288/2004. *Chinhamo* case para 64 and *Majuru* case para 90.

within which case must be brought before the Tribunal after exhaustion of remedies[250]. However, despite this omission, it is submitted that the matter ought to be brought before the Tribunal within a reasonable time after exhaustion of remedies and that the jurisprudence developed by the Commission on this point might be of use to the Tribunal. In this respect the Commission noted that the African Charter does not provide for what constitutes reasonable period and that this was left to be interpreted by the Commission. The Commission then referred to both the European and Inter-American Human Conventions which gave a period of six months within which a complaint must be brought[251]. While noting that six months was a standard period it reasoned that each case must be treated on its own merits. It then found in the *Majuru* case that the twenty-two months which had elapsed after he could have brought the case was unreasonable while in the *Chinhamo* it found that the period of ten months was reasonable in the circumstances. Both complaints were ruled to be inadmissible by the Commission.

In the *Campbell*[252] case, one of the issues raised by the respondent was that the applicant was not properly before the Tribunal as it had not exhausted all available remedies in the Zimbabwe legal system. At the hearing of the application for interim relief the Tribunal refused to deal with this issue arguing that it was of no relevance to the application for interim relief[253]. It, however, dealt with the issue in the final judgment finding that the requirements for exhaustion of local remedies had been satisfied in the case as Amendment No. 20 to the Zimbabwe Constitution had in clear terms ousted the jurisdiction of the Zimbabwean courts to entertain matters relating to the acquisition of agricultural land, hence there were no remedies to be exhausted under domestic law[254].

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[250] The absence of time frames within which cases may be brought before the Tribunal is a general weakness of the whole legal regime created by the Treaty and the Protocol. Neither of these legal instruments sets time frames for bringing cases before the Tribunal after the cause of action has arisen. This is a serious defect which needs attention as cases can be brought many years after the incident and this defect seriously undermines the credibility of any legal system including that of SADC.

[251] *Majuru* case op cit paras 108-109.

[252] *Campbell* Ruling on application for interim measures op cit.

[253] Ibid 7.

[254] *Campbell* case judgment in main case 21-23.

The Tribunal further observed that this very point had been confirmed by the Supreme Court of Zimbabwe on 22 February 2008[255].

Private persons can also find themselves before the Tribunal in their disputes with SADC institutions[256]. They may appear before the Tribunal either as applicants or claimants in applications or actions against SADC institutions or as respondents or defendants in cases brought against them by SADC institutions. Private persons who are staff of SADC, may also find themselves before the Tribunal either as claimants or applicants in cases relating to their employment brought by them against SADC institutions, or as defendants or respondents in cases relating to their employment brought against them by SADC institutions[257]. In all these situations the Tribunal has exclusive jurisdiction over the cases, meaning that the dispute cannot be taken to any forum other than the Tribunal.

Granting private persons direct access to the Tribunal is innovative and a deviation from the normal practice of denying private parties access to international tribunals as exemplified by non-access of private persons to the ICJ. But the need for such access can be demonstrated by the number of cases brought in the ICJ by states on behalf of their nationals under the right of diplomatic protection[258]. The framers of the EU Treaties realized the importance of granting private persons access to the ECJ. Private persons are granted direct access to the ECJ by the TFEU, albeit subject to limitations[259].

SADC's decision to grant access to private persons, albeit limited to actions against states and SADC institutions, can thus be viewed as a major innovation in the area of granting

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[255] *Campbell* case op cit 21, the Supreme Court judgment was in the case *Mike Campbell (Pty) Ltd v Minister of National Security Responsible for Land, Land Reform and Resettlement* (SC 49/07).
[256] Article 18 Protocol.
[257] Article 19 Protocol.
[258] This issue is discussed in Chapter 3. Many cases have surfaced before the ICJ involving diplomatic protection and these include the *Nationality Decrees in Tunis and Morocco* PCIJ Series B no 4 1923 7, the *Mavrommatis Palestine Concessions* PCIJ Series A no 2 1924 12, the *Nottebohm* case ICJ Reports 1955 4, *Barcelona Traction* case ICJ Reports 1970 3, *Interhandel* case ICJ Reports 1959 6, *ELSI* case ICJ Reports 1989 15, *La Grand* case ICJ Reports 2001 466 and *Avena and others* case ICJ Reports 2004 12 to mention just a few. The difficulties of granting access only states access to the ICJ were also exposed in the South West Africa cases and these are discussed in Chapter 3 section of access to the ICJ.
[259] Articles 263, 265 and 340 EC TFEU grant private persons direct access to the ECJ while Article 267 grants private persons indirect access to the ECJ through the preliminary rulings procedure. All these provisions are discussed in Chap 4.

such persons access to international justice. The only limitation already discussed is that imposed by Article 15.2 of the Protocol, namely the requirement for exhaustion of domestic remedies before the private person can approach the Tribunal. This appears to be a reasonable restriction which is also consistent with general international law which imposes a similar restriction. The mechanisms for determining whether domestic remedies have been exhausted have been subject to decisions of international courts or tribunals including the ICJ and the jurisprudence of those courts which is discussed later should prove invaluable to the Tribunal.

Lastly, the private persons are not limited to nationals of SADC member states implying that any person of whatever nationality can bring an action in the Tribunal on a matter of SADC law. In addition, the Tribunal has compulsory jurisdiction over the parties in the sense that the consent of the other party is not required before a case can be referred to the Tribunal. In the case of member states, this is not problematic as all of them are bound by the Protocol which is an integral part of the Treaty. But what if a member state brings a case involving SADC law against a company which is owned by non-SADC nationals? Should the foreign-owned company be subjected to the compulsory jurisdiction of the Tribunal? The answer to this question might lie in the application of the various legal principles governing the jurisdiction of the courts namely: presence of the defendant in the court's jurisdiction, habitual residence of defendant in a state, or presence of defendant's assets in the court's jurisdiction[260]. But difficulties may arise where the defendant company is located outside the SADC region.

2.4.3 SADC and its institutions

We have noted that Article 17 of the Protocol provides that the Tribunal has exclusive jurisdiction over disputes between member states and SADC. These disputes must fall within the ambit of Article 14 meaning that they must relate to interpretation and application of the Treaty or subsidiary laws, or the validity of subsidiary laws, or must involve matters referred by agreement between states. The parties here are states and any

[260] Shaw op cit 578.

competent institution or organ of the SADC. We have already noted that the standing of states before the Tribunal is not likely to pose difficulties but, for SADC institutions or organs, problems might arise. For example, which institution or organ qualifies as competent to bring or defend a case? Is it the Summit or the Council or even the ICM which confers this competence on the institution or organ or is this to be laid down in subsidiary law of SADC? Once again the Tribunal will have to tackle these open questions probably having regard to the experience of other international courts.

One thing is however clear from the Treaty: institutions of SADC are those listed in Article 9.1 and any other institutions created under Article 9.2 such as the SADC-PF. All these institutions are potential litigants before the Tribunal. But surely not all acts or omissions attributable to these institutions should be justiciable? There ought to be matters which fall outside the jurisdiction of the Tribunal. The ICJ does not offer much in this respect as none of the institutions of the UN can be party to contentious proceedings before that court, and even in cases of seeking advisory opinions, there are no parties before the court. However, we shall see that in the EU, the ECJ has on several occasions been called on to decide issues of competency on the part of EU institutions[261]. This has happened notwithstanding that the EU Treaties have elaborate provisions dealing with issues of capacity to bring cases before the ECJ. The ECJ's experience should offer some useful guidance to the Tribunal in this respect.

Article 18 of the Protocol confers exclusive jurisdiction on the Tribunal to deal with disputes between private persons and SADC. As indicated earlier, this is a clear case of innovation in international law which has traditionally not given private persons access to international courts. The EU Treaties as we shall see, grant very limited direct access to the ECJ only in actions against institutions of the EU. Again the same questions relating to the competent SADC institutions or organs arise in this case. It should be noted here that there is no requirement that the private person must exhaust domestic remedies before approaching the Tribunal. It is possible that a matter involving SADC might also involve a member state (e.g. where a member state takes a measure in compliance with a

[261] See Chap 4 and the experience of the European Parliament.

SADC subsidiary law the validity of which is questioned) such that the person has a choice whether to proceed against the member state in the national courts or the Tribunal, or against both the member state and the SADC institution in the Tribunal. Ought the person be required to exhaust domestic remedies in the national courts before proceeding against the SADC institution in the Tribunal?

2.4.4 SADC staff members and SADC

The Tribunal is given exclusive jurisdiction over disputes between SADC and its staff over conditions of employment. This is a general provision in most international organizations. In the UN, the UN Administrative Tribunal[262] is charged with such responsibility subject to appeal to the ICJ, and the Tribunal may draw some lessons from these courts' experience. The General Court which is a component of the Court of Justice of the EU, also has jurisdiction over staff matters subject to the right of appeal to the ECJ, and again this court has accumulated considerable experience which can be used by the Tribunal[263].

2.5 Jurisdiction of the Tribunal

The Tribunal exercises four main types of jurisdiction namely, jurisdiction conferred under Article 14 of the Protocol, the preliminary-rulings jurisdiction under Article 16 of the Protocol, advisory jurisdiction under Article 16.4 of the Treaty read with Article 20 of the Protocol, and the appellate jurisdiction under Article 20A of the Protocol. The last head of jurisdiction was brought about through the 2007 amendments to the Protocol[264]. A new Article 20A was inserted into the Protocol and its effect is to confer appellate jurisdiction on the Tribunal in disputes relating to findings and conclusions of panels

[262] The United Nations Administrative Tribunal was established by General Assembly resolution 351 A (IV) of 24 November 1949; the annexed Statute defines the mandate of the Tribunal. Its objective is designated as passing judgment upon applications alleging non-observance of contracts of employment of staff members or of their terms of appointment (Article 2 of the Statute).

[263] See Article 256 TFEU which empowers the General Court to hear disputes between the EU and its servants pursuant to Article 270 TFEU. See discussion in Chap 4.

[264] The Protocol was amended by the Agreement Amending the Protocol on the Tribunal of 3 October 2007.

established under any of the SADC protocols. When hearing the appeal, the Tribunal is confined to issues of law and legal interpretations covered in the panel's report[265]. However, the Tribunal's appellate is not considered in this study since the legal principles which the Tribunal will apply when determining an appeal are the same as those which apply when exercising its ordinary jurisdiction. The Tribunal also has power, subject to certain requirements, to grant interim orders under Article 28 of the Protocol. One question which may arise is whether there is a relationship between Articles 14 and 16 of the Protocol. Article 14, the text of which is set out below, sets out the basis on which the Tribunal may find jurisdiction in any given case. Article 16 of the Protocol confers jurisdiction on the Tribunal to give preliminary rulings '…*in proceedings of any kind* and between any parties before the courts or tribunals of member states'(my emphasis). The emphasized words call for comment. They could be interpreted to mean any proceedings before a national court or tribunal even those which do not involve any of the matters listed in Article 14. In other words, the Tribunal could give a ruling on any matter referred to it including matters of the national law of member states.

The other possible narrower interpretation which can be given to the relationship between the two articles, is that the proceedings referred to in Article 16 of the Protocol must involve a matter which falls within the ambit of Article 14 of the Protocol. The latter view appears preferable as the very rationale for establishing a Tribunal was to ensure adherence to and the proper interpretation of the Treaty and subsidiary instruments, and to adjudicate upon such disputes as may be referred to it[266]. The reference to 'any such dispute as may be referred to it' surely cannot mean a dispute falling outside the ambit of the Treaty. To accept such an interpretation amounts to giving the Tribunal an open cheque to adjudicate over all possible disputes arising even in the national context, such as those involving customary law, Sharia law, the criminal law, etc of member states.

The reference in paragraph 2 of Article 16 of the Protocol to '…a question of interpretation, application or validity of the *provisions* in issue'(my emphasis) further

[265] Article 15.4 Protocol which was also introduced by the 2007 amendments to the Protocol.
[266] Article 16.1 Treaty.

adds to the confusion. It is not clear which provisions are being referred to here since the preceding paragraph does not refer to "any provisions" or "to any law," but rather to 'proceedings of any kind'. This might well have been a drafting error, but one can be forgiven for suggesting that the provisions being referred to here are those contained in Article 14. This appears to be so because this is the only article which makes reference to the interpretation, application or validity of provisions of the Treaty, subsidiary legal instruments, or acts of SADC institutions.

The combined effect of Articles 14 and 16 of the Protocol can be contrasted with Article 267 of TFEU which governs the preliminary rulings jurisdiction of the ECJ. That article sets out the matters on which references can be made to the ECJ and these matters correspond substantially to the matters referred to in Article 14 of the Protocol.

Without further ado I proceed on the basis that the matters which can be referred under Article 16 of the Protocol are those listed in Article 14 of the Protocol.

Article 14 reads:

> "The Tribunal shall have jurisdiction over all disputes and all applications referred to it in accordance with the Treaty and this Protocol which relate to:
>
> (a) the interpretation and application of the Treaty:
>
> (b) the interpretation, application or validity of the Protocols, all subsidiary instruments adopted within the framework of the Community, and acts of the institutions of the Community;
>
> (c) all matters specifically provided for in any other agreements that states may conclude among themselves or within the Community and which confer jurisdiction on the Tribunal.

Paragraph (a) covers a wide range of matters which can be brought before the Tribunal. It can cover disputes involving infringement of the Treaty, or subsidiary legal instrument provisions by member states, private persons, or SADC institutions. In the EU system, if such disputes involve states they resemble proceedings contemplated in Articles 258 and 259 of the TFEU and proceedings against states for liability for breach of EU law as developed by the ECJ. These matters are discussed fully in Chapter 4. If the disputes involve SADC institutions then they resemble the action for damages against EU institutions which can be instituted under Article 340 of the TFEU. If the breach involves private persons, there is no direct example in the EU system but presumably action can be taken against those persons in the Tribunal by states or SADC institutions.

Paragraph (b) could cover matters involving what might be termed 'judicial review' of subordinate legislation and acts of SADC and its institutions, and resembles the actions for annulment and failure to act under Articles 263 and 265 of the TFEU. Under this head could also fall claims for compensation for damages suffered as a result of unlawful acts by SADC institutions, an action which resembles the action under Articles 268 and 340 of the TFEU. The matters referred to in paragraph (c) are determined by the contents of the agreements entered into by the states themselves, and thus involve interpretation of the treaties governing them.

For convenience, I will discuss the overall jurisdiction of the Tribunal under the following headings:

a) actions by or against private persons, member states, or SADC institutions for infringement of SADC law under Article 14(a) and (b);

b) actions by or against private persons, member states, or SADC institutions for compensation for damages caused by unlawful acts by private persons, member states, or SADC institutions under Article 14(a) or (b) of the Protocol (excluding actions between private persons which may not be brought directly before the Tribunal by virtue of Article 15.1 of the Protocol);

c) review of the validity of subordinate legislation and other acts of SADC institutions under Article 14(b) of the Protocol, or the validity of measures taken by member states under SADC law;

d) matters governed by mutual agreement under Article 14(c) of the Protocol;

e) preliminary rulings jurisdiction under Article 16 of the Protocol;

f) advisory jurisdiction under Articles 16 of the Treaty and 20 of the Protocol; and

g) interim jurisdiction under Article 28 of the Protocol.

2.5.1 Actions for infringement of SADC law by or against private persons, states or SADC institutions

The jurisdiction of the Tribunal to determine disputes relating to the interpretation and application of the Treaty is very wide. Matters relating to interpretation may cover issues over the meaning of provisions of the Treaty, while those relating to its application may refer to how a provision of the Treaty is to be applied in a given situation. A dispute may arise where, for example, there is an allegation that a private person, state or SADC institution has failed to fulfill his or its obligations under the Treaty by, say, failing to take a measure, or do something which is or was required to be taken or done under the Treaty or subordinate legislation. A good example is failure by a member state or SADC institution to abide by the obligations assumed under Article 6 of the Treaty[267].

We shall see that the general obligation under Article 4.3 (former 10 EC Treaty) of the TEU which is similarly worded to Article 6 of the Treaty has been used widely by the ECJ to hold EU states in breach of their obligations under the Treaties. If SADC discriminates against a member state, that state can bring a case against SADC or the

[267] The possible effect of this provision was discussed in the introduction to this Chapter.

relevant institution of SADC. Breach of obligations assumed under SADC subsidiary legal instruments, could also render a private person, member state, or SADC institution liable under Article 14(b) of the Protocol.

One issue which has arisen in the application of Articles 258 and 259 of the TFEU - which deal with actions against EU member states for breach of EU Treaty obligations - is what entities constitute the state. The ECJ has given a broad definition of state to include government departments, state-funded and regulated agencies providing public services, local authorities, and even national courts[268]. All these entities are potential litigants before the ECJ, but usually it will be the state which is the actual defendant.

Under the Protocol, actions can be brought against states or SADC institutions by private persons giving private persons a wide range of judicial remedies. The reverse should also be the case, member states or SADC institutions should be able to bring infringement actions against private persons that are in breach of their obligations under the SADC Treaty. This can occur where a private company, for example, discriminates against another private person from another member state on any of the grounds stated in Article 6 of the Treaty. Although the obligation not to discriminate is directed at states and SADC institutions, it is possible that the Tribunal may hold private persons liable for violation of such prohibition if it takes the view that the Treaty has direct effect in the national legal systems such that it confers rights or imposes obligations on both private persons, states and SADC institutions. The experience of the ECJ can be used in this regard. In the case *Defrenne v SABENA*[269] the ECJ was confronted with the interpretation of Article 157 (former 141 EC Treaty) which then read:

> "Each member state shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work."

[268] Fairhurst op cit Chap 7. See also Chapter 4 section on jurisdiction of the ECJ: direct actions against member states and section on the development of law by the ECJ: direct effect of EU directives.
[269] Case 43/75.

The claimant, a private person, brought an action against her employer, another private person, alleging discrimination contrary to Article 157. One of the arguments raised by the defendants was that the wording of the article confined the obligation to the member state itself, hence the obligation not to discriminate could not be extended to individuals. Dismissing this argument, the ECJ held that the reference to "Member States" in the article could not be interpreted to exclude the intervention of the courts in the direct application of the TFEU. It stated:

> "…Article 157(former 141) is mandatory in nature, the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals."[270]

The reasoning used in this case could equally be applied to Article 6.2 of the Treaty which prohibits SADC and member states from discriminating against any person on the stated grounds. It would be self-defeating to prohibit member states and SADC institutions from discriminating and then allow private persons residing in the region to discriminate against other persons. In this case it is submitted that since private persons cannot bring actions against other private persons directly in the Tribunal[271], any member state or SADC institution, may bring infringement proceedings in the Tribunal against the offending person, or the affected person can institute proceedings in the national courts and hope that the matter will be referred to the Tribunal under Article 16 of the Protocol.

Apart from failure to comply with Treaty or subsidiary legislation provisions, states may also infringe the Treaty or legislation by failing to properly implement secondary legislation. There are many SADC protocols[272] which require immediate action on the part of member states to make them operational in the domestic sphere. Some examples

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[270] Ibid para 35.
[271] Article 15.1 of the Protocol confers jurisdiction on the Tribunal in disputes "between States", and between "natural and legal persons and States" and there is no mention of disputes between "natural and legal persons".
[272] Protocols and their nature and effect are discussed in the next section on sources of law.

include the Protocol on Extradition[273]which requires a member state to extradite in accordance with the protocol and its domestic law, any person in its jurisdiction wanted in another state party in connection with an extraditable offence[274], the Protocol on Combating Illicit Drugs[275] which obliges member states to promulgate and adopt domestic legislation to give effect to international conventions listed in that protocol[276], the Protocol on Mutual Legal Assistance in Criminal Matters[277] which obliges member states to provide each other, in accordance with the protocol, with mutual legal assistance in criminal matters and to designate in their territories, central authorities to deal with requests for legal assistance[278] and the Protocol on Fisheries[279] which requires member states to take measures at both national and international level, suitable to harmonise laws, policies and plans on fisheries to achieve the objectives of the protocol[280], to mention but a few. As can be noted from the examples, an infringement of subsidiary legal instruments could involve failure to implement a legislative, an executive, or an administrative obligation required on the part of the state.

States may raise defences to actions brought against them for infringement of SADC law as has been the case in the EU. Such defences include, in the case of non-implementation of EU directives, shortage of parliamentary time, *force majeure*, impossibility, or difficulty. However, as we shall see, all these defences have been rejected by the ECJ[281]. The ECJ has also rejected defences raised by member states that they failed to comply with their obligations because EU institutions had failed to comply with their own obligations under the Treaties. The ECJ reasoned in such cases, that member states cannot take the law into their hands by failing to comply with their obligations in retaliation to inaction on the part of EU institutions.

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[273] The Protocol on Extradition was signed on 3 October 2002 but has not yet come into force.
[274] Article 2 Protocol on Extradition.
[275] The Protocol on Combating Illicit Drugs was signed on 24 August 1996 and came into effect on 20 March 1999.
[276] Article 4 Protocol on Combating Illicit Drugs.
[277] The Protocol on Mutual Legal Assistance in Criminal Matters was signed on 3 October 2002 and is not yet in force.
[278] Articles 2 and 3 Protocol on Mutual Legal Assistance in Criminal Matters.
[279] The Protocol on Fisheries was signed on 14 August 2001 and came into force on 8 August 2003.
[280] Article 5 Protocol on Fisheries.
[281] Fairhurst, op cit 197-198. See Chap 4 section of jurisdiction of the ECJ: defences raised by member states in direct actions.

The matters which arise in relation to states must equally apply to SADC institutions when they breach SADC law. The TFEU does not make specific provision for situations where EU institutions infringe the Treaties except that the institutions may be liable to compensate if damage is caused by their unlawful acts. Furthermore, the acts of such institutions are subject to review by the ECJ.

The last point to consider under this section is what happens if the Tribunal finds that a member is in breach of its obligations under SADC law. This issue which involves enforcement of judgments is considered is the section on enforcement.

2.5.2 *Actions by or against private persons, member states, or SADC institutions for compensation for damages caused by unlawful acts*

An issue which is not specifically addressed by the Treaty or Protocol, is whether member states or institutions of SADC are liable to compensate for damage or loss caused by acts which are contrary to their obligations under SADC law. There is no doubt that in the process of implementing SADC laws, policies or programmes, members states or SADC institutions can cause damage or loss to persons or other states which may require compensation. This omission is unfortunate as one would have expected that the SADC institution, based as it is- on the concept of the rule of law, ought to have addressed this important matter to ensure that persons who suffer damage or injury as a result of unlawful acts, obtain a remedy. To leave this issue to be implied creates a state of legal uncertainty as the Tribunal or a national court faced with a situation would not have a ready answer. The Tribunal or national court would be left to infer from the whole Treaty scheme, including general legal principles, whether liability arises in such cases.

Even then, the Tribunal would still have to determine the circumstances under which liability may arise and questions of reparation. In the absence of express provisions in SADC law governing such matters, the Tribunal will have to look elsewhere for guidance. The guiding principle in this regard would have to be Article 21 of the Protocol

which authorizes the Tribunal, among other sources, to have regard to general principles of public international law and of the law of states. As a starting point the Tribunal may have regard to the general principle established by the ICJ in its case law that a claimant is entitled to receive compensation for proven injury[282]. The national laws of many states including SADC members states, have laws regulating the liability of the state or other public bodies for unlawful acts. However, a thorough comparative examination of such laws is beyond the scope of this study.

The experience of the ECJ may shed some light as to how the matter has been dealt with. The original EU Treaties did not make provision for the payment of compensation for damage or loss caused by states in the course of implementation of EU law or policies. Thus, a person who suffered damage or loss resulting from actions by a member state while implementing EU law, had no remedy in the ECJ even where such breach of obligations had been established through Article 258 of the TFEU proceedings. At the same time, private persons had no right to bring actions against member states directly in the ECJ for breaches of EU law.

Noting these deficiencies, the ECJ then devised an indirect way of ensuring that the injured party gets some relief. This was achieved through the development of the principle of state liability in the *Francovich* case which is discussed fully in Chapter 4[283]. In short, the principle holds that an EU state is liable, under certain conditions, to compensate for damage or loss caused through breach of EU law. The only difference is that under EU law the claim for compensation has to be made in the national courts which are obliged to apply the principles governing state liability set by the ECJ. This is because private persons cannot bring cases directly against EU states in the ECJ. If the principle of state liability is accepted in the SADC context, then actions for compensation against member states or SADC institutions can be brought before the Tribunal because

[282] The *Chorzov Factory Case* (1928) PCIJ Ser. A No. 17 and the *Danube Dam (Gabcikovo-Nagymaros Project) (Hungary v Slovakia)* ICJ Reports 1997 7 discussed in Chap 3.

[283] *Francovich v Republic of Italy* Cases C-6 & 9/90.

private persons can bring cases against states in the Tribunal[284]. In principle, there is also the possibility that actions for compensation for damage or loss caused by breach of the Treaty, can be brought against private persons by member states or SADC institutions.

With regard to the liability of SADC institutions for breach of SADC law, the experience of the EU is again pertinent. Articles 268 and 340 of the TFEU govern the liability of EU institutions to compensate for damages or loss caused by their unlawful acts. The conditions of liability are to be applied in accordance with the general principles common to the laws of EU member states. The ECJ has developed these principles and they are fully discussed in Chapter 4.

2.5.3 Judicial review of the validity of subordinate legislation and other acts of SADC institutions or the validity of measures taken by member states under the SADC law

Article 14(b) of the Protocol confers jurisdiction on the Tribunal to determine disputes involving "the interpretation, application or validity of the Protocols, all subsidiary instruments adopted within the Community, and acts of the institutions of the Community." This provision essentially empowers the Tribunal to interpret, decide on the application of, and determine the validity of both subordinate legislation and acts of SADC institutions. It is substantially a combination of some elements of jurisdiction of the ECJ under Articles 263 and 267 of the TFEU. Under Article 263 of the TFEU, the ECJ has power to review the legality of acts adopted by institutions of the EU, and in the case of the European Parliament and the European Council, only those acts which are intended to produce legal effects for third parties. Article 267 of the TFEU on the other hand, empowers the ECJ, on reference from a national court, to give preliminary rulings on among other matters, the interpretation of the Treaty and the validity and interpretation of acts of the institutions of the EU. The difference in these provisions is that the Tribunal has a wider mandate to deal with issues of interpretation, application,

[284] Article 15 Protocol.

and validity of acts of SADC institutions not only upon a reference by a national court under Article 16 of the Protocol, but also in direct actions brought before the Tribunal itself. The other difference is that while the Tribunal is empowered to decide on the 'application' of the Treaty and subsidiary instruments, the ECJ is only empowered to decide on the interpretation and validity of such acts. However, neither the Tribunal nor the ECJ has authority to rule on the validity of their respective treaties.

While Article 263 of the TFEU is confined to the 'legality' of acts of EU institutions, it is submitted that the concept of legality does not differ from that of 'validity' which is used in both Article 14 of the Protocol and Article 267 of the TFEU. An act which is legal is valid and the reverse should be true, an illegal act cannot be a valid act. To this extent I consider that the jurisprudence developed by the ECJ in relation to the legality of acts under Article 263 of the TFEU is relevant in relation to the validity or invalidity of acts under Article 14(b) of the Protocol. However, in this section, I consider the legislative and other acts of the SADC institutions only in relation to their *validity*, while the question of their interpretation and application are considered in the section on preliminary rulings jurisdiction.

The TFEU does not define what constitutes "acts of the institutions" for the purposes of Article 263 of the TFEU and neither does Article 14(b) of the Protocol define what amounts to 'acts of the SADC institutions'. However, the Protocol gives a good indication of the type of acts that can be declared invalid by referring to protocols and subsidiary instruments adopted within the SADC context. These types of act can be regarded as legislative acts of SADC. However, it is not clear whether the reference to "acts of the Community institutions" includes legislative acts or is restricted to acts of an executive nature, such as decisions of the Summit or Council. Another issue which may arise is whether measures taken by member states relying on impugned SADC acts could also be invalidated by a declaration of invalidity under Article 14(b) of the Protocol. It is submitted that this should be so because the national measure's validity should depend on the validity of the SADC act.

Fortunately for the ECJ, Article 263 of the TFEU sets out the grounds on which the acts can be declared illegal while Article 14 of the Protocol does not do so but leaves it to the Tribunal to determine the grounds of invalidity. Finally, the TFEU sets out the consequences of annulment of an act while the Protocol is silent on the issue. I shall, therefore, consider three main issues in relation to the Tribunal namely, the acts which may be challenged, the grounds for challenge and consequences of annulment.

That the Tribunal can determine the validity of SADC protocols as well as subsidiary legal instruments is clear. But what is less clear is whether the validity of the Protocol itself is also reviewable. Protocols should be reviewable because they are legally binding[285]. Since the Tribunal has no jurisdiction to question the validity of Treaty provisions, it appears that it also has no jurisdiction to question the validity of a provision of the Protocol because the Protocol, unlike other protocols, forms an integral part of the Treaty[286]. But whether all legal instruments and other "acts" adopted by SADC institutions are also legally binding is another issue. One has to determine what the concept of legally binding entails, and guidance can be sought from the ECJ.

The test applied by the ECJ to determine whether an act, whatever its form or nature, is subject to review under Article 263 of the TFEU is whether the act is intended to have or produce legal effects on those affected by it[287]. The guiding principle established by the ECJ is that the nature or form of the act is not relevant, what is relevant is its effect, that is whether it alters the legal position of a person. There is wisdom in adopting this approach because it is all embracing and obviates the practice sometimes used in certain jurisdictions of trying to distinguish between whether an act is legislative, administrative or judicial[288]. If this approach is adopted, then all acts of SADC institutions such as the

[285] Article 10.9 Treaty which provides that all decisions of Summit which must include protocols and other legal instruments referred to in Article 10.3 are binding unless otherwise provided for in the Treaty. Protocols are also binding on parties to them by virtue of Article 22.9 Treaty.
[286] Article 16.2 Treaty op cit.
[287] See the ECJ cases *IBM v Commission* Case 60/81 and other cases discussed in Chap 4.
[288] See Hoexter *Administrative Law in South Africa* (2007) 49 where the writer states "For administrative lawyers this 'classification of functions' (into legislative, executive and judicial) is significant because of the courts' tendency in the past to attach too much importance –and too many legal consequences –to the categorises and subcategories, such as 'quasi-judicial' and 'purely administrative' action."

various memoranda of understanding[289], declarations[290] issued by the institutions, and other acts would have to be scrutinized by the Tribunal to determine whether they are intended to produce legal effect before they could be reviewed.

One other matter which needs mention here are the grounds on which an act can be invalidated by the Tribunal. Many legal systems, including those of SADC member states, have developed various grounds on which acts of the administration can be declared invalid. For example, in systems based on the common law, an administrative act may be challenged broadly on the grounds of illegality, failure to comply with fair procedures, and unreasonableness of the act itself[291]. The Tribunal can blend some of these grounds to those emanating from the civil law jurisdictions of some SADC states in order to find common ground. The Tribunal can also draw some inspiration from the work of the ECJ in applying the grounds stated in the TFEU. The grounds stated in Article 263 of the TFEU are lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application, or misuse of powers. These grounds are discussed fully in Chapter 4. I can just mention here that the ECJ has used the concept of 'of any rule of law relating to its application' to incorporate 'general principles of law' in the application of Article 263 of the TFEU[292].

The last issue to consider here are the consequences of annulment of a legislative act or other act of a SADC institution, or of a measure taken by a member state pursuant to an invalid act of SADC. Neither the Treaty nor the Protocol expressly mentions what the effect of such an annulment is thus again the Tribunal is left to seek guidance from the experience of other courts. The TFEU contains provisions dealing with the consequences of annulment of acts of EU institutions. Article 264 of the TFEU provides that if the ECJ finds that an action for annulment is well founded, it shall declare the act to be void. In the case of regulations, the ECJ shall determine which effects of a regulation declared

[289] E.g. MOU on Cooperation in Taxation and Related Matters signed and came into force on 8 August 2002 and others listed in Appendix 1.
[290] E.g. Declarations on Gender and Development, Productivity, HIV and AIDS and others which are all listed in Appendix 1.
[291] Burns and Beukes *Administrative Law Under the 1996 Constitution* (2006) Chap 8, Hoexter op cit 223-412.
[292] See Wyatt and Dashwood op cit 235-237 and Steiner and Woods op cit 154-155.

void shall be definitive, which means that where a regulation is declared void, not all things done under it are void and that the ECJ may give an indication as to when the declaration becomes operative. The TFEU also requires the institution or institutions whose acts have been declared void to take necessary measures to comply with the judgment of the ECJ. The obligation to remedy the wrongful act does not affect any liability to compensate for damage or loss which might arise under Article 340 of the TFEU. These principles, though set out in treaty form, may offer some guidance to the Tribunal as to how it can deal with the consequences of the annulment of an act of a SADC institution.

In cases where a national measure taken pursuant to a SADC act becomes invalid because the SADC act itself is invalid, the position may not be so clear. It is submitted that in such cases, both the SADC institution and the member state should be obliged to take the necessary steps to rectify the defect and that, if any liability to compensate for loss or damage arises from the impugned act or measure, both the institution and state should be liable.

2.5.4 Matters governed by mutual agreement

The Protocol envisages that states may conclude agreements outside the ambit of SADC or within SADC, but not as part of the SADC legal order, and those agreements confer jurisdiction on the Tribunal to resolve disputes. In the first situation one can think of cases such as the Southern African Customs Union (SACU), an institution established by some member states of SADC, which allows unhindered trade between those states and applies a common external customs tariff in respect of non-members.[293] If the SACU member states agree to have disputes arising from the agreement adjudicated by the Tribunal, then Article 14(c) Protocol applies. The same might apply if some SADC member states who are also members of the Common Market For Eastern an Southern

[293] SACU was first established on 9 June 1910 by agreement between Botswana, Lesotho, South Africa (which included South West Africa now Namibia) and Swaziland. The 1910 agreement was replaced by the agreement of 11 December 1969 which was revised in 2002 consisting of the same member states now including Namibia. The revised agreement came into force on 15 July 2004.

Africa (COMESA)[294] were to agree to have their disputes resolved by the Tribunal. While the existence of economic communities or unions within economic communities or unions, is not desirable, SADC acknowledges such existence and has catered for them in the Treaty[295]. The second part of Article 14(b) which refers to agreements entered into within the community, envisages agreements entered into in terms of protocols such as the Revised Protocol on Shared Watercourses[296] which allows members states sharing a watercourse to enter into shared watercourse agreements[297]. Disputes over the interpretation or application of such agreements may be referred to the Tribunal for settlement[298].

2.5.5 Preliminary rulings jurisdiction

The preliminary rulings procedure is covered by Article 16 of the Protocol which provides that the Tribunal has jurisdiction to give preliminary rulings in proceedings of any kind and between any parties before the courts or tribunals of member states. It also provides that the Tribunal does not have original jurisdiction on the issue, but may rule on a question of interpretation, application or validity of the provisions in issue if the question is referred to it by a court or tribunal of a member state for a preliminary ruling[299]. I have considered what the terms 'provisions' as used possibly refers to. This article must be read subject to Article 14 of the Protocol which restricts the jurisdiction of the Tribunal to matters contained in that article. The essence of this procedure is that if an issue of the interpretation, application or validity of SADC law arises in proceedings before a national court or tribunal, then the court may refer the question to the Tribunal which may give a preliminary ruling on the issue and return the case to the national court

[294] COMESA which a successor to the Preferential Trade Area was established by the Treaty establishing the Common Market For Eastern and Southern Africa signed on 8 December 1994. COMESA consists of 19 member states which are Burundi, Comoros, D. R. Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe and 8 of these are SADC member states.
[295] Article 24 Treaty which allows both SADC and its member states to enter into agreements with other states or organizations whose objectives are compatible with objectives of SADC and the Treaty.
[296] The Revised Protocol on Shared Watercourses was signed on 7 August 2000 and came into force on 22 September 2003.
[297] Article 6 Revised Protocol on Shared Watercourses.
[298] Article 7.2 Revised Protocol on Shared Watercourses.
[299] Article 16.2 Protocol.

for finalization having regard to the ruling. It appears that this is the only way in which disputes between private persons over SADC law can end up before the Tribunal because, as we have seen, Article 15 of the Protocol does not confer jurisdiction on the Tribunal over disputes between private persons[300]. At the same time Article 16.1 of the Protocol confers jurisdiction to give preliminary rulings in "proceedings of any kind and between *any parties* before the courts or the tribunals of member states."(my emphasis). The reference to "any parties" in the provision is wide enough to include private persons.

The circumstances under which and the procedure to be followed by a national court when making a reference to the Tribunal are set out in Part XV of the Rules which are annexed to the Protocol. Rule 75 of the Rules reads:

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

There is some difference in the wording of this Rule and Article 14 of the Protocol which may cause problems of interpretation. Both Article 14 of the Protocol and Rule 75.1 refer to "the interpretation or application of the Treaty". However, when it comes to protocols and other legal instruments, Article 14 of the Protocol also refers to their "validity" but Rule 75.1 makes no such reference. Secondly, Article 14 of the Protocol makes specific

[300] See *Campbell* case judgment op cit 6-7 where the Tribunal dismissed two applications to intervene in the matter on the basis that the Tribunal had no jurisdiction over disputes between private persons.

reference to “Protocols”, “subsidiary instruments” and “acts of the institutions of the Community”, while Rule 75.1 refers to “Protocols” and “decisions and directives of the Community or its Institutions.” It is not clear why there is this divergence in wording between provisions dealing with the same matter. In particular, the omission of the term “validity” in Rule 75, if it was deliberate, should be cause for concern. It is hoped that the divergence is a result of a drafting error which can be rectified when the provisions are applied or interpreted.

Apart from these observations, the combined effect of Articles 14 and 16 of the Protocol read with Rule 75 resemble similar provisions contained in the TFEU[301]. Article 267 of the TFEU contains similar provisions and procedures and the utilisation of these provisions by the ECJ and national courts of the EU, has contributed immensely to the uniform development of EU law by the ECJ. The jurisprudence of that court is directed at ensuring that the EU law is applied uniformly in all member states but, as we shall see, this has not been without difficulty. For example, the ECJ has had to deal with issues of what matters may be referred, the courts or tribunals of member states entitled or obliged to refer, admissibility of references, circumstances when a reference is not necessary, the issue of whether interpretation differs from application, and interim measures pending a ruling. A large number of principles have developed from the case law of the ECJ which could be useful to the development of SADC law by the Tribunal. The cases and principles are considered in relation to the provisions of the Protocol in Chapter 4.

2.5.6 The advisory jurisdiction

The advisory jurisdiction of the Tribunal in contained in Article 16.4 of the Treaty and Article 20 of the Protocol. The effect of these provisions is that either the Summit or the Council may request an advisory opinion on any matter from the Tribunal and the Tribunal shall give such opinion. There appear to be no limitations or restrictions on the type of matters which can be referred to the Tribunal for an advisory opinion implying

[301] Article 267 TFEU sets out the preliminary rulings procedure between the ECJ and the national courts of EU states and is discussed in Chap 4.

that the Summit or Council can seek an advisory opinion on any matter, including political matters. These provisions can be contrasted to the provisions of the UN Charter and Statute of the ICJ which deal with advisory opinions. These provisions refer to opinions being sought on any 'legal question' by the UN bodies[302].

It must be noted that under normal circumstances a court whose function is to adjudicate over disputes, does not give advisory opinions to any person. The rationale here seems to be that by giving its opinion the court can compromise its partiality if subsequent legal proceedings are brought before the same court by either of the parties to whom the opinion was given. The provisions in the SADC law appear to have been borrowed from the ICJ which is empowered to give such opinions at the request of the Security Council or General Assembly of the UN, or by an organ of the UN authorized to make such request by the UN General Assembly[303]. The problem of conflict of interest noted above, may not arise in the UN since the UN organs cannot be parties to any contentious proceedings before the ICJ. It may, however, arise in the SADC context as any of the institutions of SADC are potential litigants before the Tribunal. Nevertheless, the ICJ has dealt with many requests for opinions and its experience in this area could prove useful to the Tribunal. The provisions of the Treaty and Protocol, as contrasted to the experience of the ICJ, are fully considered in Chapter 3.

The Court of Justice of the AU, which is discussed in the last section of this chapter, has similar advisory jurisdiction[304].

2.5.7 Interim measures

The Tribunal or its President is empowered by Article 28 of the Protocol, on good cause shown, to order the suspension of an act challenged before the Tribunal and may take

[302] Article 65 Statute of the ICJ, see also discussion in section on the Court of the Justice of the AU *infra*.
[303] Article 96 UN Charter and Article 65 Statute of the ICJ.
[304] Under Article 18.3(b) of the AEC Treaty the CJ can give advisory opinion on request by the Assembly or Council of the AU. The CJ can also give advisory opinion under Article 44 of the CJ Protocol on request by the Assembly or Council of the AU or by an organ of the AU authorised to seek the opinion by the Council or by a regional economic community.

other interim measures as are necessary. The circumstances under which such measures can be invoked are not spelt out in the Protocol, but the procedure to be used is spelt out in Part IX of the Rules. It can only be assumed that such an application can be made in urgent cases only where the applicant can establish that failure to grant such order could result in irreparable harm or loss. The Tribunal has had occasion to grant interim relief in the *Campbell* case[305]. In that case the criteria for the grant of an interim order were raised by the applicant and were not contested by the respondent. They are as follows:

a) a *prima facie* right that is sought to be protected;
b) an anticipated or threatened interference with that right;
c) an absence of any alternative remedy;
d) the balance of convenience in favour of the applicant, or a discretionary decision in favour of the applicant that an interdict is the appropriate relief in the circumstances[306].

Because the respondent did not oppose the above criteria, the Tribunal was left with little choice but to approve them[307]. It is rather unfortunate that the application for the relief sought was not opposed and that the Tribunal did not, therefore, have occasion to scrutinize the above criteria and determine whether they were suitable for application at regional level as opposed to national level[308]. However, the ICJ is also empowered by its Statute to indicate provisional measures of protection and it has exercised such powers on many occasions[309]. It has in turn accumulated some jurisprudence which can be used by the Tribunal in similar instances. This jurisprudence is examined in Chapters 3.

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[305] *Campbell* case (Ruling) op cit.
[306] Ibid 6.
[307] The Tribunal stated "We observed above that the respondent did not oppose the present application. We have also alluded to the criteria advanced by the applicants' agent which should be applied in determining applications of this nature. We agree with the criteria."
[308] The criteria appear to have a national flavour judging by the use of national terminology such as 'interdict' which is peculiar to legal systems based on the Roman Dutch law while those based on the English common law would have perhaps used the term 'injunction'. The Protocol itself and the Rules use the term "interim measures' which is used in Article 279 TFEU while Article 41 of the Statute of the ICJ uses the term 'provisional measure' of protection.
[309] Article 41.1 of the ICJ Statute provides "The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party."

2.6 Sources of law for the Tribunal

The sources of law for the Tribunal are spelt out in Article 21 of the Protocol which reads:

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

This provision essentially sets out the substantive sources of law which the Tribunal may use in its functioning[310]. This is not unusual as most similar tribunals are similarly directed[311]. These sources can be conveniently discussed under the following heads: the Treaty, Protocols and other subsidiary instruments, applicable treaties, general principles of public international law, and general principles of the laws of member states. I will deal separately with each of the sources at the same time indicating the areas where the ICJ and ECJ experience could be useful.

2.6.1 The SADC Treaty

[310] This point was confirmed by the Tribunal in the *Campbell* case 24 when it referred to applicable treaties, general principles and rules of public international law as 'sources of law for the Tribunal.'

[311] Article 38.1 Statute of the ICJ sets out the sources of law to be applied by the ICJ and Article 20.1 of the CJ Protocol similarly sets out sources of law of the CJ of the AU.

The SADC Treaty is cast in broad and general terms setting out the objectives and progammes for further action[312]. Detailed matters are to be supplied by means of subsidiary laws in the form of protocols and other subsidiary legal instruments[313]. The broad manner in which the Treaty is drafted can be contrasted with the detailed way in which the EU Treaties are drafted. The EU Treaties, especially the TFEU, are very detailed setting out the broad objectives and principles on which the EU is based, as well as the activities which the EU is tasked to carry out. These broad provisions are then reinforced by detailed provisions on substantive matters such as those on the free movement of goods, free movement of workers, right of establishment, free movement of services and capital, common policies on agriculture and transport, competition policy, economic and monetary policies and many other policies[314]. The TFEU also deals in detail with the procedure to be followed by EU institutions when carrying out their tasks such as the jurisdictional matters of the ECJ, or the procedures for bringing actions against member states by the Commission (Articles 258 and 259 of the TFEU).

There is much to be said for either approach. Setting out matters of detail in the primary law of an organisation emphasizes the importance of those matters and creates legal certainty in that those subject to the primary law have no doubt about the status of their rights. The rights are derived from the primary law as opposed to secondary law which can be considered as subordinate to the primary law. This can be illustrated by the position of the SADC-PF which is not created directly as a "core" institution of SADC with the result that efforts have been made, albeit in vain, to enhance its status by amending the Treaty and concluding a protocol governing its operations. One disadvantage of having a detailed primary law is difficulties of amending the law when changes are required, even on less important matters. SADC has an advantage in that whenever detailed provisions are needed in a given policy area, this can be achieved through protocols which are optional on the part of member states and this allows for flexibility. There is no need to tamper with the primary law, the Treaty. The only hitch however, is that protocols and other legal instruments are subordinate to the Treaty and

[312] See the opening section on the scope of the Treaty.
[313] Article 10.3 and 22 Treaty.
[314] See Part Three of the TFEU titled "Union Policies and Internal Actions".

are subject to annulment by the Tribunal under Article 14(b) of the Protocol leaving scope for uncertainty about rights or obligations.

This aside, there is no doubt that the Tribunal will be largely involved in the interpretation of the Treaty itself, and in determining whether any subsidiary laws are in line with it. One important issue which will arise is the status of SADC law in relation to the national laws of member states. The second issue is the effect of the provisions of the Treaty on the legal systems of member states. As these issues are not specifically addressed in the Treaty they fall for interpretation and need consideration in this study.

2.6.1.1 Status of the Treaty

The Treaty is part of international law and the status of international law in domestic legal systems largely depends on the domestic law of a state[315]. By status here I mean which law prevails in the event of a conflict between international law and domestic law. The Treaty is however silent on which law must be given priority if there is a conflict between SADC law and the national laws of member states. In the case of the TFEU (former EC Treaty), which is also silent on the question of priorities, Steiner and Woods[316] have this to say:

> "..Perhaps this was a diplomatic omission; [the failure to state which law must be given priority] perhaps it was not thought necessary to make the matter explicit, since the extent to which Community law might be directly effective was not envisaged at the time of signing of the Treaty. In the absence of guidance, the matter has been left to be decided by the courts of the member states, assisted by the Court of Justice in its jurisdiction under Article 234…
>
> The question of priorities between directly effective international law and domestic law is normally seen as a matter of national law, to be determined

[315] See Ndulo op cit and the discussion on the scope and purpose of the Treaty above.
[316] Steiner and Woods op cit Chap 4.

> according to the constitutional rules of the state concerned. It will depend on a number of factors. Primarily it will depend on the terms on which international law has been incorporated into domestic law. This will in turn depend on whether the State is monist or dualist in its approach to international law."[317]

The observations made above apply equally in the SADC context. The practice of states differs in this respect with some states especially the civil law countries, giving priority to international law, while most common law countries tend to give priority to domestic law unless domestic law specifically gives priority to international law[318]. The SADC countries do not all follow the same approach and it will be necessary to develop principles which ensure that the Treaty provisions are given the same status in all member states because to do otherwise, would undermine the whole objective of SADC. The Tribunal had an opportunity to deal with the issue in the *Campbell* case although it was not raised directly as an issue for determination. The Tribunal had to decide whether Amendment No. 17 to the Zimbabwe Constitution was in breach of the Treaty in that its effect was to deny the applicants access to the national courts and that it discriminated against applicants on the basis of their race. The Tribunal found on both issues that the amendment violated the Treaty but what has not been resolved is the effect of those findings in the legal systems of the member states[319].

What the Tribunal did not spell out, is what should happen in cases where the national laws of a member state give priority to national law if there is a conflict between such law and international law such as the ruling of the Tribunal. It is hoped that in future the Tribunal would have to tackle this issue if the issue is raised before it, but as for now it would appear that following the traditional approach if the national law of the state concerned gives priority to national law over international law then the judgment of the Tribunal can be disregarded by that state. This unsatisfactory situation will prevail until such time that the Tribunal specifically declares the supremacy of SADC law over the

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[317] Ibid 64.
[318] Shaw op cit Chap 4 and Steiner and Woods op cit.
[319] The Tribunal unanimously ordered that the respondent government must all necessary steps to give effect to the judgment and that the respondent pay fair compensation to the applicants for their land which was illegally acquired *Campbell* case op cit 58 main judgment.

national laws of states as was is the case in the EU. Much experience should be gained from the experience of the EU whose ECJ has had to deal with similar problems. As we shall see the ECJ has developed the doctrine of the supremacy of EU law in the member states to overcome this obstacle. These issues are discussed in Chapter 4.

2.6.1.2 Effect of the Treaty[320]

The second question concerns the issue of whether the Treaty is capable of having direct effect in its application, i.e. whether private persons can rely on it in the national courts of the member states, without the need for national legislation giving effect to the Treaty[321]. The question of what effect a treaty has in national legal systems of states is a matter for national constitutional law and equally is the question of whether a treaty has direct effect or is 'self executing' as this type of treaty is sometimes called. It is submitted once again, as in case of priority between the Treaty and national laws of member states, that the aspect of the effect of Treaty provisions in domestic laws should not be left to be determined by the domestic law of states otherwise the whole purpose of a community will be defeated. The Tribunal should develop principles aimed at ensuring that the Treaty has the same effect in the domestic laws of member states to ensure uniform application of the Treaty.

This question of the effect of international law in the national law of states has vexed international law for a long time with the practice of states differing[322]. For example in the USA, the US Supreme Court has attempted to draw a distinction between what are termed 'self-executing treaties' and 'non self-executing treaties' with great difficulty. The former are able to operate automatically within the domestic sphere without the need for

[320] See Moyo op cit 53-54 on the relationship between SADC law (the Treaty) and the national law of member states.

[321] The issue of 'direct effect' can be equated to the concept of 'self executing' treaties which is a somewhat controversial and hence unsettled in both national and international law. See Ngolele op cit 141-172.

[322] Ngolele op cit 157-158 asserts that the term self-executing has a dual meaning namely, in the first sense it means 'a principle of the particular system of national law that certain rules of international law do not need incorporation in order to have domestic effect' and secondly the term describes the character of the rules themselves.

domestic legislation to give effect to them, while the latter need enabling acts before they become the law of the land. The former type of treaties apply directly in the US as part of the supreme law of the land. In 1952 the Supreme Court had to deal with this distinction in the case *Sei Fuji v California*[323]. The plaintiff a Japanese national bought property in California contrary to legislation which prohibited aliens from buying property. To prevent seizure of the land by the state, the plaintiff argued that such legislation was contrary to the United Nations Charter which called for the promotion of human rights without racial discrimination. The issue was whether the UN Charter was a self-executing treaty or not. After a survey of all the circumstances the Court concluded that the Charter was not intended to be self-executing because it laid down various principles and objectives of the UN, but did not impose legal obligations on member states or create rights for private persons.

The position is, however, far from clear as Steiner and Woods[324] have observed in relation to the TFEU:

> "Provisions of international law which are found to be capable of application by national courts at the suit of individuals are also termed 'directly applicable'. This ambiguity (the same ambiguity is found in the alternative expression 'self-executing') has given rise to much uncertainty in the context of EC law.."

The writers further make these observations on the effect of international law in the national legal system:

> "Not all provisions of directly applicable international law are capable of direct effects. Some provisions are regarded as binding on, and enforceable by States alone, others are too vague to form the basis of rights or obligations for individuals, others are too incomplete and require further measures of implementation before they can be fully effective in law. Whether a particular

[323] 38 Cal (2d) 718 (1952).
[324] Steiner and Woods op cit Chap 5 88.

> provision is directly effective is a matter for construction depending on its language and purpose as well as the terms on which the Treaty has been incorporated into domestic law."[325]

The concerns raised by the writers can equally apply to the SADC Treaty since it is part of international law and its effect on private persons in the domestic law will have to be determined by the Tribunal. Fortunately for the EU, these ambiguities and doubts in relation to the TFEU were removed by the ECJ which has interpreted numerous provisions of the TFEU to be directly effective and hence capable of conferring rights and imposing obligations on private persons without the need for further action on the part of the EU or member states such as the enactment of implementing legislation by member states[326]. The issue of direct effect or 'self-execution' arose in the *Campbell* case but unfortunately the Tribunal did not directly address the issue. The Tribunal's approach seemed to have been premised on the assumption that Treaty provisions have direct effect in the national legal systems of the member states because it made specific findings of breaches of the Treaty and gave specific orders which are to be complied with by the respondent government. What is not resolved is whether all the provisions of the Treaty have direct effect in the national legal systems of member states and whether the judgment of the Tribunal can be enforced in the national courts without the need for legislation to give effect to the judgment.

It is trite that if the Zimbabwe Government does not comply with the ruling of the Tribunal which is part of international law, it will be in breach of its international obligations and liable at the international level. But can a private person, such as the applicants in the case, enforce the judgment of the Tribunal before Zimbabwean courts in the absence of national legislation? The Tribunal did not address this point because it was not raised before it, but once again following the traditional approach the national laws of the states determine whether private persons can enforce rights derived from international law before the national courts without the need for national law permitting such

[325] Ibid 89.
[326] See discussion in Chap 4.

enforcement. For example, in the case of the Zimbabwe Constitution which provides that international conventions shall not form part of national law unless incorporated into law by an Act of Parliament[327], it can be argued that a judgment emanating from the Tribunal cannot be enforced in the courts of Zimbabwe unless it is incorporated into national legislation or there is national legislation which enables judgments of the Tribunal to be enforced in the national courts. We shall see that the ECJ overcome these problems by declaring that some provisions of the TFEU have direct effect in the national legal systems such that private persons can enforce them in the national courts without the need for national legislation. The Tribunal could overcome the same problems by declaring that some provisions of the Treaty and other SADC legal instruments have direct effect in the legal systems of member states such that they are enforceable before national courts of member states without need for national legislation. The difficulty would lie in identifying which provisions of the Treaty should be given such effect.

The ECJ imposed two conditions which must be met before an TFEU provision can be said to have direct effect[328]. The provision in question must be sufficiently precise and unconditional for it to have direct effect. A provision is sufficiently precise even if some aspect forming part of it may still need to be determined by the court, for example a provision which refers to 'worker' is sufficiently precise even though a court will have to determine the scope of the word 'worker'. A provision is unconditional where it is not subject, in its implementation or effects, to any additional measure by either EU institutions or member states. It matters not that a negative obligation is imposed on states such as an obligation to refrain from doing something.

Applying these principles to the Treaty one may find that most of the provisions of that Treaty would not meet the test. I have considered Article 6 of the Treaty and noted that its provisions can be interpreted so as to have direct effect[329]. But on closer scrutiny it can be argued that some of the provisions of that article fail the test. For example, is the

[327] See Article 111B of the Constitution of Zimbabwe which was published as a Schedule to the Zimbabwe Constitution Order 1979 (S.I 1979/1600 of the United Kingdom).
[328] See Fairhurst op cit 236 and discussion in Chap 4 section on the direct and indirect effect of EU Treaty provisions.
[329] See discussion of scope and purpose of SADC Treaty above.

obligation under Article 6.1 of the Treaty to adopt measures to promote the achievement of the objectives of SADC, sufficiently precise and unconditional to meet the ECJ criteria? On the face of it, the very need to "adopt measures" implies that it is not directly effective. However, it can be argued that the provision is sufficiently precise in that there is a positive duty on the state to adopt measures provided that they have been specified by SADC itself. The objectives of SADC are listed in Article 5.1 of the Treaty. Yet the achievement of these objectives is dependent upon action being taken by SADC itself under Article 5.2 of the Treaty. For example, member states can only be excepted to take measures to achieve SADC objectives after SADC itself has taken action under Article 5.2 of the Treaty by say, developing policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services[330]. To this extent the second condition of unconditionality set by the ECJ, will not have been met until SADC has taken action such as concluding a protocol on the free movement of the things mentioned in Article 5.2 of the Treaty[331].

Article 6.2 of the Treaty prohibits SADC and member states from discriminating against any person on the basis of matters listed in that provision. Does this provision meet the ECJ conditions so as to be capable of conferring rights directly on individuals? The provision appears to be sufficiently precise in that it imposes a positive duty on SADC and member states not to discriminate against persons on the listed grounds[332]. Is the

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[330] Article 5.2(d) Treaty.

[331] For example SADC has concluded the Trade Protocol which contains provisions which are capable of direct effect see discussion *infra.*

[332] This proposition is supported by the finding of the Tribunal in the *Campbell* case op cit 52-53 that the respondent state was in breach of its obligations under Article 6.2 by enacting Amendment No. 17 which had the effect of discriminating against the applicants on the basis of their race. However in my view this finding is correct in principle but it is arguable whether the finding is justifiable on the facts of the case. The Tribunal reasoned that implementation of the land reform programme in Zimbabwe would have been legitimate if it had not been arbitrary and was reasonable and objective. In the case, the programme would have been legitimate if it was meant to benefit the poor but, according to the Tribunal, the programme was not meant to benefit that group. It relied on a 2001 judgment of the Zimbabwe Supreme Court to hold that the programme was meant to benefit Zimbabwe's ruling party adherents. In my view the Tribunal should have sought further evidence whether indeed no actual poor persons benefited from the programme and whether only ruling party adherents benefited. The Tribunal was dealing with a highly politically sensitive matter and it would have been prudent to have a thorough investigation carried out in order to ensure that its judgment cannot be questioned on the basis of bias. It was not enough to simply rely on a finding of the Supreme Court in a judgment given in a highly politically polarized society such as Zimbabwe and submissions made by the parties in the case. An objective assessment of the factual situation would have done justice to the case.

provision also unconditional? The provision also appears to be unconditional in that no further action is expected on the part of SADC or member states to ensure its implementation. There is no requirement that SADC or member states implement measures to ensure compliance with the provision; once a state discriminates against a person on the stated grounds, the provision is breached. The same can be said of the rest of the provisions of Article 6 of the Treaty, which all appear to be sufficiently precise and unconditional to be capable of having direct effect.

Article 6.3 of the Treaty addresses the question of discrimination by SADC against any member states of SADC which is prohibited. In this case the question of direct effect would not apply since there is no private person involved to trigger the issue of self-execution or direct effect of the provision in question. While these provisions of the Treaty are capable of direct effect the question of their supremacy over conflicting provisions of national law still needs to be addressed. We have noted that the ECJ has taken a robust approach by declaring that EU law reigns supreme over the national laws of member states and if there is a conflict, EU law prevails. We have yet to see whether the Tribunal is prepared to do the same in the absence of Treaty provisions to that effect.

Article 4 of the Treaty, which was relied on by the Tribunal in the *Campbell* case[333], seems to be more problematic. The article sets out the principles according to which SADC and its member states shall act. The question then is are these principles capable of having direct effect such that private persons can rely on them to enforce rights before the Tribunal or in the national courts? In other words, do these provisions meet the two conditions set by the ECJ of being sufficiently precise and unconditional? Are the concepts stated in that article sufficiently precise to the extent they need no further elaboration by SADC institutions, member states, or the Tribunal?

It is arguable that some of the provisions contained in Article 4 of the Treaty may meet the criteria set by the ECJ. For example, the principles of sovereign equality of all member states and peaceful settlement of disputes may, on proper construction, be

[333] *Campbell* case op cit.

capable of direct effect[334]. If one member state, in violation of the principle of territorial integrity of sovereign states, enters the territory of another state and forcibly removes a person who is wanted in the first state, the person abducted can possibly bring an action before the Tribunal for failure to respect the principle of sovereign equality of member states. The same could be the case if say agents of a member state forcibly take property belonging to private persons and the state for whom they are acting refuses to appear before the courts and threatens to use violence when challenged. The forcible taking of property, refusal to have the matter resolved by the courts, and the threats of violence can surely not constitute peaceful settlement of disputes, hence the persons affected can bring the case before the Tribunal.

With regard to human rights, democracy and the rule of law[335] my view is that the contents of some of these concepts are sufficiently precise and unconditional to be capable of having direct effect. In the *Campbell* case the Tribunal dealt with the concept of the rule of law and held that the respondent state had violated Article 4(c) of the Treaty by enacting Amendment No. 17 which had the effect of denying the applicants access to the courts and the right to a fair hearing. This, the Tribunal ruled, was in conflict with the principle of the rule of law which incorporated both concepts. This ruling, which was correctly supported by relevant authorities on the matter appears to be sound in principle[336].

It is submitted, however, that the concept of "democracy" is vague and incapable of precise legal verification as it may mean different things to different societies. At most it is a political concept on which the Tribunal is not well suited to adjudicate.

As for human rights, while it is accepted that some rights have received universal recognition as part of customary international law, there is uncertainty with regard to the

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[334] Article 4 (a) and (e) Treaty.

[335] See Hood Phillips & Jackson op cit Chap 2 29 -36 on the different ways in which the concept of rule of law can be understood.

[336] Among other authorities, the Tribunal cited writers on administrative law, cases from the European Human Rights Court, Inter-American Court of Human Rights and the African Human Rights Commission as well cases from South African Courts 26-41.

identity of other rights which need protection[337]. This can differ from state to state with some states placing emphasis in their laws on economic rights while others emphasize respect for social and political rights[338]. The precise scope of the rights sought to be protected in the SADC context requires further action by either SADC, for example, enacting a bill of rights specially for the region[339], or member states, harmonizing the human rights provisions in their constitutions with those contained in international instruments such as the African Convention on Human and Peoples' Rights. To this extent the concept of human rights appears not to be entirely unconditional since further action may be required by SADC or member states and to that extent, these rights fail the ECJ criteria. The Tribunal appears to have taken a superficial view of this issue as when referring to Article 4(d) it stated:

> "This means that SADC as a collectivity and as individual member States are under a legal obligation to respect and protect human rights of SADC citizens. They also have to ensure that there is democracy and the rule of law within the region. The matter before the Tribunal involves an agricultural land, which the applicants allege that it has been acquired and that their property rights over that piece of land have thereby been infringed. This is a matter that requires interpretation and application of the Treaty thus conferring jurisdiction on the Tribunal."[340]

The Tribunal was concerned with the issue of whether it had jurisdiction over the matter so as to enable it to grant interim relief. It was not at that stage concerned with the effect which the Treaty provisions have in the legal systems of the member states. But what is

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[337] For example rights such as the prohibition on torture, genocide and slavery and the principle on non-discrimination are considered as having attained the status of customary international law and as binding in international law. See Shaw op cit 257.

[338] Shaw op cit Chap 6 states "While there is widespread acceptance of the importance of human rights in the international structure, there is considerable confusion as to their precise nature and role in international law. The question of what is meant by a "right" is itself controversial and the subject of intense jurisprudential debate."

[339] It would be desirable to have a SADC bill of rights specifically dealing with issues peculiar to the region such as matters arising from application of the Treaty or protocols for example the right to import goods within the region free from obstacles as set out in the Trade Protocol. The ACHPR deals with the issue of human rights generally at a continental level and does not address regional issues.

[340] *Campbell* case Ruling op cit 3-4.

most worrying is the Tribunal's casual reference to the concepts of 'human rights' 'democracy' and the 'rule of law' as if there was consensus as to the precise meaning and scope of these concepts. However, in the judgment on the merits, the Tribunal appears to have proceeded on the assumption that Article 4(c) of the Treaty which refers to human rights, democracy, and the rule of law are binding on member states without the need for a separate protocol expanding on the principles contained in that article[341]. However, the Tribunal incorrectly asserted that Article 4(c) of the Treaty was the basis of its jurisdiction[342] when in fact that provision does not confer jurisdiction on the Tribunal[343]. The remaining principles in Article 4 of the Treaty, it is submitted, are equally vague and not capable of having direct effect[344].

Article 17 of the Treaty sets out specific undertakings by member states to respect the international character of SADC institutions and to refrain from interfering with their work. The same provision specifically asserts the independent character of selected institutions of SADC namely the Tribunal, the Executive Secretary, and SADC staff [345]. The latter case appears to be an attempt to establish a supranational executive authority for SADC which can be likened to the Commission of the EU discussed in Chapter 4. Of course, with the Tribunal it is understandable that it should not be accountable to anyone but to the SADC Treaty alone in its functions. Whether the same can be said for the Secretary, is open to debate. All these principles have in one way or the other received the attention of the ECJ in similar circumstances which will be examined later. These provisions clearly impose clear obligations on those to whom they are addressed, are sufficiently precise, and are not conditional on any further action on the part of SADC or member states. To that extent they are capable of having direct effect.

Finally, on the issue of the effect of Treaty provisions in the national legal systems of member states, there is need to consider whether the effect is vertical or horizontal.

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[341] *Campbell* case Judgment op cit 24.
[342] Ibid 25. The Court said: "It is clear to us that the Tribunal has jurisdiction in respect of any dispute concerning human rights, democracy and the rule of law, which are the very issues raised in the present application."
[343] The jurisdiction of the Tribunal is governed by Article 14 of the Protocol.
[344] Article 4 (b) and (d) Treaty.
[345] Article 17.2 Treaty.

Vertical effect means that the provision is effective as between states or SADC institutions and private persons, while horizontal effect means that the provision is effective as between private persons and other private persons. The ECJ has held that some TFEU provisions have both vertical and horizontal effect, hence they can be enforced against both the member states and private persons alike[346]. The Tribunal may follow a similar approach.

2.6.2 Protocols and other subsidiary instruments

The Protocol provides that in addition to the Treaty, the Tribunal shall apply the Protocol, other protocols that form part of the Treaty, and all subsidiary instruments adopted by Summit, Council or other organs of SADC pursuant to the Treaty[347]. These sources of law constitute the substantive law of SADC and there can be no doubt that questions of status and effect of these laws in the national systems will arise in the Tribunal. In particular, we have noted that the Treaty is the basic or primary law of SADC, and all other laws which derive from it must be consistent with the Treaty otherwise they can be declared invalid pursuant to Article 14 of the Protocol. Apart from questions of invalidity as against the Treaty, what is their status and effect? Could they also be considered as supreme in relation to national laws, and could they have direct effect as with the Treaty? The ECJ has provided some answers to some of these questions in relation to secondary legislation[348] made under authority of the TFEU, and some guidelines can be drawn for the Tribunal. The ECJ has held that both regulations and directives made or issued under Article 288 of the TFEU are capable of having direct effect if they fulfill the conditions of being sufficiently precise and unconditional[349]. In the case of directives which are not directly applicable *per se* as regulations, the ECJ has developed a further principle of indirect effect. This principle requires national courts to interpret their national law in the

[346] See Chap 4 section on the principle of direct effect and its application to EU Treaty provisions.
[347] Article 21(a) Protocol.
[348] Article 288 TFEU (249 EC Treaty) sets out the different types of secondary legislation of the EU which are regulations, directives, decisions and recommendations and their effect. These are discussed in Chap 4.
[349] See Chap 4 *infra.*

light of the wording and purposes of a directive in order to achieve the objectives of the Treaties[350].

SADC has developed some twenty-three protocols and other subsidiary instruments listed in the Appendix. Protocols, we have noted, with the exception of the Protocol on the Tribunal, bind only states which are party to them[351]. The effect of each of these protocols on the legal systems of the member states varies depending on the nature and wording of the protocol. If the Tribunal were to apply the ECJ criteria, then a protocol which satisfies these criteria would be given direct effect. For purpose of this study I have examined some of the protocols and have classified them into three broad categories: those that are potentially capable of having direct effect, those which require further action on part of states to make them directly effective, and those that relate to mere intergovernmental cooperation.

In the first category fall the following protocols:

2.6.2.1 The Protocol

The Protocol on the Tribunal itself is a clear example of protocols which confer rights directly on private persons. We have noted that individuals and legal persons have the right of direct access to the Tribunal[352]. It is submitted that this provision is sufficiently precise and does not require national measures to implement it into domestic law.

2.6.2.2 Protocol on Immunities and Privileges

This protocol, which entered into force in 1993, obliges member states to grant immunities to SADC, its property and assets[353], tax exemptions to SADC income and

[350] See *Von Colson* Case 14/83 and *Harz v Deutsche Tradax* Case 79/83.
[351] Article 22.9 Treaty.
[352] Article 15 Protocol.
[353] Article 1 Protocol on Immunities and Privileges.

property[354], grants immunity to SADC officials, representatives of member states to SADC institutions and conferences, and experts on SADC missions[355]. The protocol also provides for the settlement of disputes between member states on its interpretation or application to be referred to the Tribunal[356]. The provisions of this protocol are capable of direct effect in that persons entitled to the immunities and privileges granted by them derive rights which can be enforced in the Tribunal, or even in the national courts of the member states concerned. The rights granted are sufficiently precise and unconditional.

2.6.2.3 Protocol on Transport, Communication and Meteorology

This protocol, which came into force in July 1998, details the SADC framework on policy, legal, regulatory, institutional, operational, administrative and other aspects on transport, communication and meteorology in the region[357]. The protocol sets the goals to be achieved in those sectors and requires member states to cooperate in numerous ways in order to achieve these goals[358]. Of relevance to this study is Article 3.2.2 which sets out the principles which shall be applied by member states in the transport sector. These include the right of freedom of transit for persons and goods, the right of landlocked member states to unimpeded access to and from the sea, the equality of treatment of the nationals and passenger service providers of member states with regard to the provision, access and use of infrastructure, and immigration and clearance procedures. The manner in which these provisions are worded, seems not to allow leeway to states. If a state breaches the principles, a person whose rights are affected could approach the Tribunal or a national court for relief. There is no need for further action on the part of member states, the aggrieved person ought to be entitled to enforce his rights in the national courts of the defaulting state or the Tribunal.

2.6.2.4 Protocol on Extradition

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[354] Article 3 op cit.
[355] Articles 5, 6 and 7 op cit.
[356] Article 9 op cit.
[357] Article 2.1 Protocol on Transport, Communication and Meteorology.
[358] Articles 3.3, 5.9,7.3, 10.2, and 12.1 Protocol on Transport, Communication and Meteorology for example specify the actions to be taken by member states to achieve the objectives of the protocol.

This protocol, which was signed in October 2002 is not yet in force. In terms of that protocol member states agree to extradite to the other state party, in accordance with its provisions and national law, any person within its territory who is wanted for prosecution or punishment in the requesting state for an extraditable offence[359]. The protocol then defines what extraditable offences are[360], lists the mandatory and optional grounds for extradition[361], the procedure for extradition[362] and other matters. These provisions are capable of direct effect without the need for national legislation of member states. For example, a person who is to be extradited can rely on any of the grounds stated in Article 4 of the protocol to resist the extradition. He need not go to the national law of the state where he is to be extradited from because the grounds for refusal set out in the article are sufficiently precise and not conditional on action on the part of states. For example, the person should be able to raise the defence of offence of a political nature which is contained in the protocol. This, it is submitted, should be possible even where national laws of both the requesting and requested state do not provide for such a ground for refusal of extradition. The person could resist the extradition by bringing the matter before the Tribunal which could order that the person not be extradited in line with the protocol. To this extent, despite the fact that the member state has a discretion to extradite or not, the provision of the protocol could be given direct effect.

Before discussing the Trade Protocol I must consider other protocols of SADC which either require action on the part of SADC member states before they can have direct effect, or which are mainly concerned with intergovernmental cooperation. Examples of the former are the Protocol on Wildlife Conservation and Law Enforcement which requires member states to implement the protocol by taking policy, administrative and legal measures as appropriate to ensure the conversation and sustainable use of wildlife[363] the Protocol on the Control of Firearms, Ammunition and other Related Materials which

[359] Article 2 Protocol on Extradition.
[360] Ibid Article 3.
[361] Ibid Articles 4 and 5.
[362] Ibid Articles 6 to 17.
[363] Article 3.3(a) and (b) Protocol on Wildlife Conservation and Law Enforcement which came into force in November 2003.

requires member states to enact legislation and take other measures to establish as criminal offences under national law to prevent, combat and eradicate the illicit manufacturing of firearms, ammunition and other related materials[364], and the Protocol on Combating Illicit Drugs which requires member states to enact domestic legislation to satisfy international conventions listed in that protocol[365]. Examples of the latter category of protocols include the Protocol on Health[366] which simply requires member states to cooperate in addressing health problems and challenges through regional collaboration and mutual support in order to attain the objectives of the protocol, and the Protocol on Energy[367] which requires member states to cooperate in the energy sector.

2.6.2.5 Protocol on Trade

The Trade Protocol was signed by member states in August 1996 and came into force in 2000, and is currently in the process of being implemented[368]. Its objective is to further liberalise intra-regional trade in goods and services on the basis of mutual benefit to all the member states and to ensure efficient production in the region, to enhance cross-border and foreign investment and economic development, and lastly to establish a free trade area in the SADC region[369]. The Trade Protocol does not currently provide for a common customs union based on a common external tariff levied on goods from third countries. Some of its provisions are capable of direct effect especially those on the elimination of import and export duties[370], the prohibition on quantitative restrictions on imports and exports[371], and national treatment[372]. Most of the provisions of the Trade Protocol are also considered in this section because they are in many ways identical to

[364] Article 5 Protocol on the Control of Firearms, Ammunition and other Related Materials.
[365] Article 4 Protocol on Combating Illicit Drugs.
[366] Article 3 Protocol on Health.
[367] Article 3 Protocol on Energy.
[368] The SADC Free Trade Area was launched at a SADC Summit held in South Africa on 17 August 2008. Angola and the DRC have not ratified the protocol and hence are not part of the FTA as well as Seychelles which rejoined www.sadc.int.fta (visited 18 February 2009).
[369] Article 2 Trade Protocol.
[370] Ibid Articles 3, 4 and 5.
[371] Ibid Articles 6, 7, 8, 9 and 10.
[372] Ibid Article 11.

those of the TFEU[373] which form the basic law of the EU common market. The TFEU provisions on the customs union may not be directly relevant to SADC now, but certainly those pertaining to the common market are relevant as they form a stepping stone towards the creation of a customs union.

The creation of the free trade area is premised on two main aspects; namely the elimination of barriers to trade in goods based on the provisions of the Trade Protocol, and the liberalization of trade in services[374] based on the Agreement on Trade in Services of the World Trade Organisation[375]. The TFEU contains similar provisions on trade in goods as well as provisions on the right of establishment and the right to provide services in member states of the EU. The Trade Protocol also deals with other matters relating to investment[376], intellectual property[377], and competition[378] which are similarly dealt with by the TFEU. However, discussion of the provisions of the Trade Protocol will be limited to trade in goods as it is the area on which SADC has made some strides, and where experience gained in the EU is abundant.

Part Two of the Trade Protocol deals with the substantive matters in the trade in goods. Article 2 of the Trade Protocol provides that the process and modalities for the phased elimination of tariffs and non-tariff barriers to trade shall be determined by the Committee of Ministers responsible for trade matters, taking into account specified matters which are: existing preferential trade arrangements, the time frame of eight years from entry into force of the protocol, the granting of grace periods on application by member states which are adversely affected by the removal of the tariffs and barriers, and

[373] Articles 28 to 36 TFEU. These provisions on elimination of customs duties and prohibition on quantitative restrictions also resemble those of the AEC Treaty Articles 29, 30 and 31 which are discussed in the next section on the AU.
[374] Article 23 Trade Protocol.
[375] The World Trade Organisation (WTO) was established by the Agreement Establishing the WTO which came into force in 1994. There are numerous agreements regulating international trade which are part of the WTO system the most notable being the General Agreement on Tariffs and Trade (GATT) the predecessor to the WTO and the other being the agreement on Trade in Services which came into force in January 1995.
[376] Article 22 Trade Protocol.
[377] Ibid Article 24.
[378] Ibid Article 25.

the application of different tariff lines for different products[379]. These modalities will be negotiated in the Trade Negotiating Forum and once adopted form an integral part of the Trade Protocol[380].

Article 4 of the Trade Protocol provides for the phased reduction and eventual elimination of tariffs and prohibits the raising of import duties on goods originating in member states beyond those current at the time of entry into force of the Trade Protocol. Exemptions are made for the imposition of across the board internal charges and fees and charges proportional to services rendered[381]. The term "import duty" is defined in the Trade Protocol as "any customs duties or charges of equivalent effect imposed on or in connection with the importation of goods consigned from any member state to a consignee in another member state"[382]. Similar provisions exist in the TFEU[383] and the ECJ has dealt with cases involving the interpretation of what amounts to "charges of equivalent effect" and the jurisprudence which it has developed in that regard is relevant. Such issues are likely to arise before the Tribunal, as well as issues relating to internal charges and charges levied for services rendered. The distinction between the latter charges and import duties can be subtle as we shall see in Chapter 4.

Article 5 of the Trade Protocol prohibits the imposition of export duties on goods exported to other member states with an exception in respect of exports to third states provided that the third states are not treated more favourably than member states. "Export duty" is again defined[384] in the Trade Protocol as "any duty or charges of equivalent effect" and a similar provision in the TFEU has received the attention of the ECJ[385].

Articles 6 to 8 of the Trade Protocol require member states to take measures to eliminate all existing forms of non-tariff barriers to intra-SADC trade, and prohibit member states

[379] Ibid Article 3.1.
[380] Ibid Article 3.2.
[381] Ibid Article 4.5 and 6.
[382] Ibid Article 1.
[383] Articles 28-36 TFEU, see also Chapter 4 section on the elimination of customs duties and other fiscal charges.
[384] Article 1 Trade Protocol.
[385] Article 30 TFEU.

from imposing any new non-tariff barriers to trade. These non-tariff barriers could either be in the form of quantitative restrictions on imports originating in member states, or export of goods to other member states. The expression "quantitative restrictions" is defined[386] as "any prohibitions or restrictions of imports or exports made effective through quotas, import licences, foreign currency allocations or other measures or requirements restricting imports or exports". In both cases there are exceptions[387] but, as we shall see, the interpretation of similar provisions in the TFEU has led to a great deal of case law which may assist in the interpretation of these provisions by the Tribunal.

Article 9 of the Trade Protocol contains general exceptions to all the preceding provisions provided the measures taken by the member states in line with the exception, does not constitute arbitrary or unjustifiable discrimination between member states, or a disguised restriction on intra-SADC trade. Similar provisions on exceptions are found in the TFEU[388], as well as provisions on discrimination and disguised restrictions to trade. Here, too, the ECJ has developed substantial jurisprudence. There is a special exception in Article 10 of the Trade Protocol dealing with security, while Article 11 of the Trade Protocol obliges member states to a apply the national treatment principle. Disputes arising out of the interpretation or application of the protocol are to be resolved under Article 32 of the Trade Protocol. The article provides for diplomatic means, arbitration and resort to the Tribunal as ways of resolving the disputes. Diplomatic means require consultation and co-operation among member states, while arbitration entails use of a panel of experts to be established under the Trade Protocol. In such a rule based atmosphere one would expect disputes to be referred to the Tribunal, and as earlier noted, the ECJ has dealt with similar provisions which will be used as examples in Chapter 4.

2.6.3 Development of Community jurisprudence based on applicable treaties, general principles and rules of public international law, and any principles and rules of the law of states

[386] Article 1 Trade Protocol.
[387] Ibid Article 9.
[388] Article 36 TFEU.

The Protocol envisages a major role for the Tribunal in the development of SADC law. Article 21 (b) provides that the Tribunal "…shall develop its own Community jurisprudence having regard to applicable treaties, general principles and rules of public international law and any rules and principles of the law of states". This provision is a wide enough mandate for the Tribunal to have recourse to any other possible source of law and the Tribunal made reference to this in the *Campbell* case, although it erroneously used it as the basis for its jurisdiction[389]. It can be contrasted with Article 38 of the Statute of the ICJ which, as we shall see, gives the ICJ a mandate to decide cases brought before it on the basis of treaties, customary international law, general principles of the law of civilised nations, and judicial decisions and opinions of writers as subsidiary sources of law. The ICJ has made extensive use of these sources and its jurisprudence certainly qualifies as general principles of public international law referred to in the Protocol. The ECJ, however, is not given so broad a mandate to apply the various sources of law but is simply enjoined by the TEU to "ensure that in the interpretation and application of the Treaties the law is observed."[390] We shall see that court has used this particular provision, and other similarly broadly worded provisions of the TFEU, to create an arsenal of jurisprudence on EU law. This apparent creativity on the part of the ECJ has attracted widespread criticism, in some instances being described as "naked law-making" but nonetheless the court has persevered and arguably succeeded in giving direction to EU Treaty objectives[391].

2.6.3.1 Applicable treaties

There is no doubt that the word "treaty" here is used in a wide sense to include those treaties to which member states are or SADC is party, including the Treaty itself and other international treaties in general. One can think of multilateral, regional and bilateral treaties, all of which also fall within the ambit of the ICJ. Questions which are likely to arise relate to the interpretation of treaties in general, the competency of SADC to enter

[389] *Campbell* case op cit 24.
[390] Article 19.1 TEU.
[391] See Wyatt and Dashwood op cit 388 for discussion on the criticisms which the ECJ has endured and Steiner and Woods op cit 154. See also Chap 4 *infra*.

into treaties on behalf of its members, the competency of member states to enter into treaties outside of SADC in matters covered by the Treaty, and finally the issue of a member state's potentially conflicting obligations arising from their being members of SADC and other organisations such as the Southern African Customs Union (SACU), or the Common Market for Eastern and Southern Africa (COMESA), or possibly international groupings such as the World Trade Organisation (WTO). The latter potential for conflict is real as some members of SADC are also members of both SACU and COMESA, while others are not members of some or all the groupings, increasing the potential for conflict especially on matters relating to trade[392]. These conflicts are likely to end up before the Tribunal as disputes. On the interpretation of treaties, the Vienna Convention on the Law of Treaties[393] which is discussed in Chapter 3, is likely to be of assistance. It codifies customary international law on treaties and has provisions for the interpretation of treaties. Article 31 of the Vienna Convention provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the treaty's object and purpose. The context of the treaty for the purpose of its interpretation comprises, in addition to the text, including its preamble and annexes:

a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty[394].

When interpreting a treaty there shall be taken into account, together with the context:

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[392] Two Ministerial consultative meetings on the rationalization of RECs were held in Accra, Ghana in 2005 and Lusaka, Zambia in 2006 and subsequently all AU Ministers met in Burkina Faso in 2006. They issued a declaration recognising only eight existing RECs and halting further creation of RECs in Africa and called for the finalization of the Protocol on Relations between the AU and RECs. The Protocol has not been adopted by the AU. Reports on the meetings and declaration are accessible on the AU website www.africa-union.org (visited 27/09/10).

[393] The Vienna Convention on the Law of Treaties was adopted under the auspices of the United Nations in 1969 and entered into force in 1980 United Nations, Treaty Series, vol. 1155, 331.

[394] Article 31.2 Vienna Convention.

a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

c) any relevant rules of international law applicable in the relations between the parties[395].

The treaty also provides that a special meaning shall be given to a term if it is established that the parties so intended. Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

a) leaves the meaning ambiguous or obscure; or

b) leads to a result which is manifestly absurd or unreasonable.

Article 33.1 provides that when a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail. Article 33.2 further provides that a version of the treaty in a language other than one of those in which the text was authenticated, shall be considered an authentic text only if the treaty so provides or the parties so agree. By Article 33.3 the terms of the treaty are presumed to have the same meaning in each authentic text. Article 33.4 provides that, except where a particular text prevails in accordance with Article 33.1, when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

[395] Ibid Article 31.3.

All these provisions of the Vienna Convention which derive from customary international law will have to be considered and applied by the Tribunal either because some SADC member states are state parties to the convention[396] or the relevant provisions of the convention are binding as customary international law. The provisions of the Vienna Convention dealing with languages could prove to be useful to the Tribunal. SADC has three working languages which are English, French and Portuguese but the Council may determine that other languages be used.[397] Both the Treaty and the Protocol are silent on which language should be given priority in the event of a divergence in meaning among the prescribed languages. This should be left to the Tribunal to decide the version which must be taken having regard to Article 33 of the Vienna Convention which requires all languages to be given equal status and, if there is a conflict, the meaning which best reconciles the texts to be adopted. The experience of the EU in the area of languages is not of much assistance to the Tribunal. The languages to be used by the institutions of the EU are to be determined by the EU Council acting unanimously, except for the language to be used in the ECJ which is prescribed in the Rules of Procedure of that Court[398]. Currently twenty-one languages may be used in the ECJ and this multiplicity of languages has posed difficulties for the ECJ in some cases. In particular it has restricted the use of the literal approach in the interpretation of EU legislation[399]. This is so despite the fact that the ECJ treats all language versions as having the same weight, regardless of the size of the member state where the language is spoken[400].

2.6.3.2 General rules and principles of public international law

Under this limb we are likely to find the application of customary international law, the general principles of international law, as well as judicial decisions of national and

[396] Of the SADC member states only the Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mozambique and Zambia have ratified the Vienna Convention 1969 source UN website www.un.org/ (visited 30/11/09.
[397] Article 37 Treaty and Article 22 Protocol.
[398] Article 342 TFEU.
[399] Wyatt and Dashwood op cit 404-405.
[400] See Case C-296/95 *The Queen v Commissioners of Customs and Excise, ext parte EMU Tabac* [1998] ECR 1-1605.

international courts or tribunals[401] and the opinions of renowned writers[402]. The ICJ has developed a large amount of jurisprudence in this area while applying Article 38 of the Statute of the ICJ. The use of customary international law as a source of international law has been accompanied by problems, especially on matters relating to the formation of customary law and the elements of customary international law. Of particular interest to the Tribunal is the formation of local or regional customary law, an issue which is likely to develop in the context of SADC when matters of regional customs as opposed to general customs, are raised before the Tribunal. The relationship between customary international law and treaty law is another area of difficulty and we shall see that the ICJ has not been able satisfactorily to resolve the issue of conflict between customs appearing or purporting to supersede areas of covered by treaty law, and treaty law. In the context of customary law, the significance of resolutions of international organizations such as the UN has also received the attention of international courts such as the ICJ. Issues which may arise before the Tribunal are whether those resolutions have legal force, for example the impact on SADC law of resolutions of the UN such as the Universal Declaration of Human Rights which was approved by the General Assembly of the UN on 10 December 1948[403].

Matters of human rights law in general, will also be raised before the Tribunal in the context of international legal instruments on human rights to which member states of SADC are party. Good examples are international instruments such as the International

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[401] See Chapter 3 for a discussion of what the concept of 'general principles of law recognized by civilized nations' is said to consist of.

[402] The Tribunal has recourse to some of these sources of law in the *Campbell* case. It cited decisions of national and international courts as well writings from renowned writers.

[403] The status of this UN Declaration was in issue in *the South West Africa Cases Second Phase* ICJ Reports 1966 6 169-170 where in a separate opinion the SA appointed judge held that the principle of prohibition on racial discrimination had not yet attained the status of customary law. However, today, the dissenting opinion of Judge Tanaka, in favour of the existence of such a customary rule is now widely accepted. In that case, the judge, after citing the Universal Declaration and other UN resolutions concluded: "From what has been said above, we consider that the norm of nondiscrimination or non-separation on the basis of race has become a rule of customary international law as is contended by the Applicants, and as a result, the Respondent's obligations as Mandatory are governed by this legal norm in its capacity as a member of the United Nations either directly or at least by way of interpretation of Article 2, paragraph 2." 293. Contrast the approach of the US Supreme Court *in Filartiga v Pen-Irala* 630 F 2d 876 (1980) when it relied on the 1948 Declaration to support the existence of a customary rule prohibiting state torture. See Dugard op cit 34-37. The Tribunal referred to the declaration in the *Campbell* case op cit 45-46 in support of the principle on prohibition on discrimination on the basis of race.

Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) both adopted under the auspices of the UN in 1966[404]. At the regional level one might think of the African Charter on Human and Peoples' Rights[405], to which all members of SADC are party. What is the effect of these legal instruments on the work of the Tribunal? It is submitted that these instruments will only be applicable to the extent that they cover matters that are within the ambit of SADC law. This means that the legal instrument can only be applied by the Tribunal if the subject matter dealt with by the instrument involves SADC law. For example, the Tribunal could not question conformity of a SADC member state's criminal process with the right to a fair trial enshrined in international legal instruments if the criminal case at issue does not involve a matter covered by SADC law. The Tribunal would be acting beyond its powers since its remit is to determine disputes which fall within the ambit of Article 14 of the Protocol. Hence if a question of human rights violation arises within the context of a matter covered in Article 14 such as the interpretation of the Treaty or a protocol, then the Tribunal can apply the relevant international instrument.

The experience of the ECJ in the application of international and national human rights provisions is pertinent. We shall see that the ECJ was proactive in this area and has managed through its case law[406] to incorporate principles of fundamental rights into EU law by the infusion of international human rights instruments and human rights provisions found in the national legal systems of member states. Ultimately, the EU has incorporated the main regional legal instrument in that area, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), into EU law and it is now part of the general principles of law applied by the ECJ[407].These principles are not applied wholesale by the ECJ, they only apply in matters governed by EU law[408].

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[404] The Tribunal referred to both these legal instruments in the *Campbell* case op cit 46-48.

[405] African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 *I.L.M*. 58 (1982), entered into force October 21, 1986.

[406] In the early case *Stauder* case 29/69 the Court declared that 'fundamental human rights are enshrined in the general principles of Community law and protected by the Court' and the *ERT* case (Case C-260/89) the Court said 'the Court draws inspiration from the constitutional traditions common to Member States and from guidelines supplied by international treaties for the protection of human rights on which Member States have collaborated or of which they are signatories.'

[407] The ECHR was incorporated into EU law by the TEU Article 6.3 (former Article 6(2) TEU) of which reads: "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights

In so far as judicial decisions and opinions of jurists are concerned, the experience of the ICJ in the application of these sources of law will offer some guidance to the Tribunal. For example we shall see that while there is no formal doctrine of precedent applicable in the ICJ[409], that Court tends to follow either its previous case law or at least the principles established in the case law. The ECJ, which is not similarly bound by precedent has adopted a similar approach and usually follows its previous case law for the sake of legal certainty but may depart from it when necessary[410].

The opinion of writers as a source of law has lost much of its relevance in the case of the ICJ and other courts but may be relevant to the Tribunal when the opinion covers areas not covered by treaty or case law. This may include works on indigenous law which co-exists with other types of law in most SADC states or religious law which may fall outside the scope of the formal legal structures of states.

2.6.3.4 General principles of the law of States

This source of law for the Tribunal appears to be somewhat limited to the law of the member states of SADC since the term "State" itself is defined in the Protocol as referring to member states of the Community[411]. This can be compared the concept of "general principles of the laws of civilized nations" used in the Statute of the ICJ which appears to be wider in scope[412]. This has been interpreted to encompass both principles of international and national law which are common to states[413]. A similar approach has

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and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of Union law." In addition, the EU shall accede to the Convention after the entry into force of the Lisbon Treaty.

[408] See Article 6.1 second para and 6.2 which provide that the provisions of the Charter on Fundamental Rights and the ECHR shall not extend in any way the competences of the EU beyond the Treaties.

[409] Article 59 of the Statute of the ICJ provides that the decisions of the Court are binding on parties to the dispute and in relation to that particular case. Article 32.3 Protocol is similarly worded.

[410] See Fairhurst op cit 157-162 and Brown and Jacobs *"The Court of Justice of the European Communities* (2000) Chap 6. See also Chap 4 section on methods of interpretation and precedence in the ICJ.

[411] Article 1 Protocol but the *Campbell* case the Tribunal referred to cases from two SADC states as well as cases from other jurisdiction such as English cases.

[412] Article 38(1)(c) Statute of the ICJ.

[413] See Chap 3 *infra.*

been followed by the ECJ where that court, in the absence of a specific directive in the TFEU, has developed its own conception of general principles of law based on the European experience. That ECJ also considers the concept to include principles of both international and national law[414]. In the SADC context, we have already noted that the concept appears to be limited to the law of member states. However, the issues which are likely to arise before the Tribunal are the identification of those principles which can be applied and the criteria to be used in the process. This is likely to pose serious problems considering that the legal systems of SADC states are not based on the same principles. SADC states exhibit diverse legal systems[415] which can broadly be categorized into three groups namely those based on common law, those based on civil law and mixed systems.

Classification of legal systems is problematic as observed by Church, Schulze and Strydom when they state that the notions of 'legal system', 'legal culture', 'legal tradition' and 'legal family' are often used interchangeably thus causing confusion[416]. The authors attempt to draw a distinction between these various concepts but for purposes of this study the relationship between legal system[417] and legal family is pertinent. Citing other authors the above authors note that the concept of legal families or groups of laws denotes the smaller number of archetypes by which legal systems of the world are classified or categorized on the basis of their shared and distinctive traditions and cultural connections[418]. They then consider classification of these families in terms of common ancestors namely those falling under the common law (derived from English legal system) and civil law (derived from Roman law).

A thorough comparative survey of the various systems of the laws of the SADC member states is beyond the scope of this study, but broadly speaking the legal systems of SADC

[414] See Wyatt and Dashwood op cit Chap 7 for discussion of general principles of law within the context of EU law.
[415] See Church, Schulze and Strydom *Human Rights from a Comparative and International Perspective*, (2007) Chaps 2-4 for a discussion of the classification of legal systems, methodology of classification and discussion of the South Africa mixed system.
[416] Church, Schulze and Strydom op cit 25.
[417] The concept of legal system within a legal culture is the described as a ' more or less closed and more or less coherent body of legal principles, institutions and rules prevailing as the cogent law within the territory of a national state'. Ibid 25.
[418] Church, Schulze and Strydom op cit 27.

countries have their ancestry in two of the legal families identified above. There is another legal family referred to as the mixed to which some of the SADC states' systems belong[419].

The common law based systems put great emphasis on judge-made law in the form of precedents. This simply means that in a common law context, inferior courts are obliged to comply with decisions of higher courts, while the higher courts themselves usually follow previous decisions of their predecessors in similar cases. The system has the obvious advantage that it ensures certainty in the law. People will have a fair idea of how a particular dispute is likely to be resolved by a court as their advisors will take cognizance of previous binding decisions. The common law group broadly comprises legal systems originating from English or Roman Dutch common law traditions, and these include Botswana (mixed English and Roman Dutch), Lesotho (mixed English and Roman Dutch), Malawi (English), Namibia (mixed English and Roman Dutch), South Africa (English and Roman Dutch), Swaziland (mixed English and Roman Dutch), Tanzania (English), Zambia (English), Zimbabwe (mixed English and Roman Dutch)[420].

The civil law group is based on the codification of law practices of continental Europe which developed primarily from Napoleon's Code. The essence here is that law is made by legislators in the form of codes such as the civil or penal code. The judges here are not expected to play an active role in law-making, but are rather confined to applying the law as found in the codes. There is no room for binding precedents as in common law.

The civil law group comprises states whose legal systems are based on the civil law system of continental law and these are Angola (Portuguese), Democratic Republic of

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[419] See Bogdan *The Law of Mauritius and Seychelles: A Study of Two Small Mixed Legal Systems* (1989) Chap 1 for a discussion on the main characteristics of the major legal systems of the world including the common law, civil law and mixed systems and Church op cit Chap 4 where it is suggested that most legal systems are "mixed" in the sense that they may incorporate the civil and common law traditions as well as indigenous laws such as that of South Africa which embraces all families. The authors also suggest the "mix" as a possible legal family on its own. 48-51.

[420] Information on the different legal systems of some of these countries can be accessed from the various articles found on the web site http://www.nyulawglobal.org/globalex (visited 28/1/09).

Congo (Belgian), Madagascar (French) and Mozambique (Portuguese)[421]. The last groups consist of Mauritius and Seychelles whose legal systems are a mixture of both common and civil law traditions[422]. It must be pointed out that the above groupings broadly follow the historical realities in that the states involved inherited the legal systems of their former colonial masters.

The significance of these diverse systems to this study is the fact that the Tribunal would have to try and blend these systems and come up with some general principles of law common to all the states. To compound this, the fact that apart from the common law or civil law, there also exists, in almost all these states another body of law based on the indigenous customs and traditions of the inhabitants of these states. This law is generally referred to as customary law and it must also be noted that this legal regime was left intact by the colonial states when introducing their own blend of laws and the situation appears to remain so. The obvious difficulty posed might be the existence in some SADC states of differing customs in the different spheres of human activity. It must also be stated that while customary law dealt mainly with matters of private law, statute law, and to some extent, common or civil law covered areas of public law, commerce and external relations. In some states customary law has been fused into the general system to the extent that it may be difficult to differentiate. To that extent, it is conceivable that disputes with both a commercial and customary law may develop between private persons and end up before the Tribunal.

As to the common law/civil law divergence, it must be noted that the EU had a similar experience since member states' systems are also based on the common law and civil traditions. As we shall see in Chapter 4, the ECJ has done a lot in this area coming up with some principles of law common to Europe.

2.7 Enforcement

[421] Information on the different legal systems of these countries can be accessed from the various articles found on the web site http://www.nyulawglobal.org/globalex (visited 28/1/09).
[422] See Bogdan op cit.

The Protocol on the Tribunal envisages a situation where SADC law could be enforced in the Tribunal as well as in the national courts of member States[423]. We have noted also that SADC law is enforceable before the Tribunal by member states, SADC institutions, individuals, as well as legal entities. As for enforcement in the national courts the preliminary rulings procedure is meant to ensure that disputes involving SADC law arising before those courts can be referred to the Tribunal for preliminary ruling. Similar aspects of the jurisdiction of the ECJ have been the subject of extensive cases.

The other aspect of enforcement relates to the actual enforcement of a specific judgment given by a judicial body. In national legal systems, enforcement is not usually problematic because the courts usually have power to enforce their judgments or orders with assistance from the executive organs of the state such as court officials and the police. Article 32 of the Protocol addresses the issue of enforcement. It provides that the Tribunal's judgments are enforceable in the national courts in the same way as foreign judgments may be enforced. Member states are also directed to take measures to ensure execution of decisions of the Tribunal. In the case of states, if there is failure to comply with a decision of the Tribunal, the matter must be referred back to the Tribunal. If the Tribunal establishes a failure then the matter will be referred the highest political organ of SADC which is the Summit for action.

Under Article 33 of the Treaty, the Summit has the power to impose sanctions on a member state which fails to fulfill its obligations under the Treaty. Here the Summit has a wide discretion, and it can be assumed that this might include suspension of membership or in extreme cases, expulsion from SADC. These sanctions are of course political and their effectiveness will certainly depend on the political climate prevailing in SADC at the relevant time. This could pose difficulties for private persons who may have obtained judgment against a particular state which then fails to comply with the judgment even when political pressure is applied at the political level: there is no method of compulsory judicial enforcement. Currently SADC is sitting with non-compliance with the Tribunal's

[423] The preliminary rulings procedure in Article 16 Protocol envisage that matters on SADC law may originate in the national courts and then be referred to the Tribunal for ruling.

judgment by Zimbabwe following the judgment in the *Campbell* case. The government in that country has failed to comply with the judgment and has raised the question of the legitimacy of the Tribunal itself[424] and the matter has been referred to the SADC Summit for further action.

This position in SADC can be compared to the position in the ICJ. We shall see that a similar mechanism exists where enforcement of judgments against recalcitrant states is referred to the political organs of the UN namely, the Security Council[425]. As we shall see, the ICJ's experience has not been very propitious in this area seriously compromising the authority and status of the court. The EU position was until recently, basically the same as with the other two courts. There was no machinery for compelling a state to comply with the judgments of the ECJ, but now the ECJ is empowered by the TFEU to impose financial penalties on recalcitrant states[426]. Prior to this development, the ECJ had developed jurisprudence which was aimed at inducing member states to comply with their treaty obligations. It did this by creating an action by which an aggrieved party could claim damages in the national courts if damage or loss had been suffered as a result of non-compliance by a state with TFEU obligations. We shall see that this has been an innovative move by the ECJ from which the Tribunal might also draw lessons from.

2.8 The Tribunal and other African Courts

SADC, being an African regional economic community (REC), operates within the African continent where there are communities of a similar nature. In fact, it is rather unfortunate that there exist quite a number of these communities in Africa and their proliferation raises the complex question of dual membership by some states[427]. In the

[424] Zimbabwean government officials were quoted by various media as having stated that the Tribunal was improperly constituted because the Protocol and an amendment to the Treaty (which made the Protocol an integral part of the Treaty) had not come into force due to non-ratification by the requisite number of states of states.
[425] Under Article 94 UN Charter member states undertake to comply with the decision of the ICJ if they fail the matter may be referred to the Security Council for action.
[426] Article 340 TFEU.
[427] For efforts to rationalize RECs see discussion on applicable treaties *supra*.

SADC context, there are three other organisations to which member states can have dual membership. There is the Southern African Customs Union (SACU)[428] which consists of five member states all of which are also member states of SADC. There is the Common Market for Eastern and Southern Africa (COMESA)[429] which consists of nineteen members some of whom are both SADC and SACU members[430]. There is also the East African Community (EAC)[431] which comprises five member states one of whom is a SADC member state and some are member states of COMESA. Other regional economic groupings exist in the rest of Africa and these include the Arab Maghreb Union (AMU)[432], the Economic Community of Central African States (ECCAS)[433], the Economic Community of West African States (ECOWAS)[434] and the Intergovernmental Authority on Development(IGAD)[435].

When discussing applicable treaties as a source of law for the Tribunal I alluded to the issue of possible conflict of obligations because of dual membership to several organisations[436]. Realizing this potential for conflict of obligations and possibly policies, in 1991 the heads of states or governments of African countries decided to establish an

[428] SACU was established by the Treaty establishing SACU as revised in 2004. Its members are Botswana, Lesotho, Namibia, South Africa and Swaziland.
[429] COMESA was established by the Treaty establishing the Common Market For Eastern and Southern Africa signed on 8 December 1994.
[430] SADC member states which are also member states of COMESA are D.R. Congo, Madagascar, Malawi, Mauritius, Swaziland, Zambia and Zimbabwe and Swaziland is the only SACU member state which is also a member state of COMESA.
[431] The EAC was established by the Treaty Establishing the East African Community which entered into force in July 2000. Member states of the EAC are Burundi, Kenya, Tanzania, Rwanda and Uganda. Tanzania is also a member state of SADC while all the other states except for Tanzania are all members of COMESA.
[432] On 17 February 1989 the treaty creating the Union of the Arab Maghreb (UAM) was signed in Marrakesh, Morocco, by the leaders of Algeria, Libya, Mauritania, Morocco and Tunisia.
[433] ECCAS was established in October 1983 by the Treaty Establishing the Economic Community of Central African States. Member states are Angola (SADC member state), Burundi, Cameroon, Central African Republic, Chad, D. R. Congo (SADC member), Republic of Congo, Equatorial Guinea, Gabon, Rwanda and Sao Tome and Principe.
[434] ECOWAS was established by the treaty for an Economic Community of West African States (Treaty of Lagos) signed on 28 May 1975.
[435] The IGAD was established by the Agreement Establishing Intergovernmental Authority on Development signed on 21 March 1996. It consists of six member states which are Djibouti, Ethiopia, Kenya, Somalia, Sudan and Uganda. Eritrea another member state suspended itself in 2007.
[436] See section on sources of law for the Tribunal: Development of Community jurisprudence based on applicable treaties etc *supra.*

all-Africa community known as the African Economic Community (AEC)[437]. This community which has now been subsumed into the African Union (AU) is established mainly through the coordination, harmonization and progressive integration of the activities of the regional economic communities some of which are mentioned above[438]. In other words, the RECs are the building blocks or pillars of the AU. It is not possible in this study to consider in depth each of these RECs and their respective institutions. I therefore feel that a consideration of the continental body the AU- and its Court of Justice (CJ), will suffice for purposes of this study. The objective is to attempt to find the relationship if any, which may exist in particular between the CJ and the Tribunal, the subject of this study.

2.8.1 The African Union (AU) and its Court of Justice (CJ)[439]

2.8.1.1 Overview of the AU and the African Economic Community (AEC)

The African Union (AU), is a supranational union consisting of all fifty-three African states with the exclusion of Morocco. Established by the Constitutive Act of the AU[440] in 2001, the AU was formed as a successor to the amalgamated African Economic Community (AEC)[441] and the Organization of African Unity (OAU)[442]. The Charter of the OAU was replaced by the Constitutive Act[443], while the Treaty of the AEC (AEC Treaty) was subsumed under the Constitutive Act. The AEC Treaty still subsists but must now be read subject to the Constitutive Act which provides that the provisions of the Constitutive Act shall take precedence over and supersede any inconsistent or contrary

[437] The AEC was established by the Treaty establishing the African Economic Community which was signed by African Heads of State and Governments on 3 June 1991 and came into force on 12 May 1994.
[438] Article 88 AEC Treaty.
[439] See Dugard op cit Chap 25 546-568 for a discussion on the AU.
[440] Constitutive Act of the AU was adopted at Lome, Togo on 11 July 2000 and entered into force on 25 October 2001. The AU was formally launched on 9 July 2002.
[441] The AEC was established by the Treaty establishing the African Economic Community which was signed by African Heads of State and Governments on 3 June 1991 and came into force on 12 May 1994.
[442] The OAU was created by the OAU Charter signed on 25 May 1963.
[443] Article 33 of the Act reads: " This Act shall replace the Charter of the Organisation of African Unity" This is followed by a transitional period of one year enabling the OAU/AEC to devolve its assets and liabilities to the AU.

provision in the AEC Treaty[444]. It is therefore necessary to outline the objectives and envisaged programmes of action of both the AEC and the AU as they co-exist to the extent that they are consistent.

The aims and objectives of the AU are set out in both the Constitutive Act and the AEC Treaty[445]. Article 3 of the Constitutive Act is broader in that it sets political, social and economic objectives for the AU. These are unity and solidarity between countries and peoples, defence of sovereignty, integrity and independence, political and socio-economic integration, encouragement of international cooperation, promotion of peace, security and stability, promotion of democracy, promotion and protection of human and peoples' rights, promotion of sustainable development and integration of African economies, promotion of cooperation in all fields of human development, coordination and harmonization of policies between regional economic communities (RECs), advancement of research in the fields of science and technology, and eradication of diseases and promotion of good health. Article 4 of the AEC Treaty on the other hand is more restricted to socio-economic matters. The objectives of the AEC include the promotion of socio-economic and cultural development and the integration of African economies, the establishment of a framework for development, mobilization and use of human and material resources, the promotion of cooperation in fields of human endeavour in order to ensure the integration of economies, and the coordination and harmonization of policies of existing and future economic communities[446]. There is an overlap is these objectives, especially in the economic development areas and to this extent, the provisions of the Constitutive Act take precedence if there is conflict. Apart from these objectives, the AU is also premised on numerous principles which are listed in the Constitutive Act and the AEC Treaty. Those listed in the Constitutive Act include many traditional principles of international law such as sovereign equality of states, respect for existing borders after attainment of independence, peaceful resolution of conflicts, prohibition on the use or threat of the use of force, non-interference with the internal affairs of other states, respect for democratic principles, human rights, the rule of

[444] Article 33.3 Constitutive Act.
[445] Article 3 Constitutive Act and Article 4 AEC Treaty.
[446] Article 4.1 AEC Treaty.

law and governance, and others such as the rejection of impunity and political assassinations, acts of terrorism and subversive activities and unconstitutional changes of governments and the promotion of gender equality[447]. The principles set out in the AEC Treaty include equality and interdependence of states, collective self-reliance, inter-state cooperation, harmonious development of economic activities, peaceful settlement of disputes, and protection of human and peoples' rights[448]. Again, there is an overlap in the principles and the principle that the Constitutive Act prevails also applies in case of conflicting principles.

In the economic area, the AEC Treaty sets out a very ambitious scheme for the establishment of an African economic community and, in general terms, one can say that this scheme is largely modeled on the European Union which is discussed in Chapter 4. Article 4.2 sets out the activities which are to be carried out by the AEC in order to attain its objectives. These activities, which are to be carried out in stages, are wide-ranging covering diverse matters such as strengthening existing RECs, promotion of joint investments, liberalization of trade, harmonization of economic policies in specified sectors, establishment of a common trade policy, establishment of a common market and common external tariff, removal of obstacles to free movement of people, goods, services and capital, and the promotion of business entities and trade in general[449]. Of particular relevance to the SADC region, and to this study, are the provisions relating to the liberalization of trade and the creation of free trade areas in the RECs, and the establishment of a common external tariff (customs union) and a common market at continental level. These provisions assume importance because they resemble SADC objectives which are to liberalize trade through the creation of a free trade area, a customs union and ultimately, a common market. In addition, the scheme introduced by the AEC Treaty lays strong emphasis on strengthening the role of RECs in the whole process of African economic integration[450]. The provisions of the AEC Treaty on trade liberalization resemble the objectives of the EU which were originally the creation of a customs union

[447] Article 4 Constitutive Act.
[448] Article 3 AEC Treaty.
[449] Article 4.2 AEC Treaty.
[450] Articles 6 and 88 AEC Treaty.

and a common market (now internal market). The provisions of the AEC Treaty on trade liberalization also resemble those of SADC which are contained in the Treaty and the Trade Protocol[451]. The AEC Treaty goes further than the Treaty to deal with other diverse matters such as free movement of persons, rights of residence and establishment, movement of capital, common food and agricultural policy, policies on industry, science, technology, natural resources and environment, transport, communication and tourism, standardization systems, policies on education and culture, and various other matters of a socio-economic nature[452]. To a very large extent the general scheme introduced by the AEC Treaty resembles the EU scheme which is contained in the Treaty on European Union and the Treaty on the Functioning of the European Union which are discussed in Chapter 4.

The modalities for the establishment of the AEC are outlined in Article 6 of the AEC Treaty, and set out in more detail in Chapter V of the AEC Treaty titled "Customs Union and Liberalization of Trade." The AEC Treaty envisages the gradual establishment of an AEC in six stages over a period of thirty-four years from the entry into force of the AEC Treaty[453]. The first stage which was expected to take five years involves the strengthening of existing RECs and establishing new RECs where they do not exist[454]. The second stage which is to last for not more than eight years involves the stabilization of tariff and non-tariff barriers to trade, customs duties and internal taxes at existing levels as at entry into force of the AEC Treaty[455]. During this stage, a timetable for the gradual removal of fiscal and non-fiscal barriers to trade and harmonization of customs duties in relation to third states shall be prepared, while sectoral integration in areas of trade, agriculture and finance shall be strengthened at regional and continental level and harmonization of activities of RECs continues[456]. The third stage, which is expected to last ten years, involves the establishment of a free trade area through the gradual

[451] See section on sources of law for the Tribunal: protocols and other subsidiary legal instruments for discussion of the Trade Protocol.
[452] Chapters VI-XVI AEC Treaty.
[453] The AEC Treaty entered into force on 12 May 1994.
[454] Article 6.2(a) AEC Treaty.
[455] Ibid Article 6.2(b) AEC.
[456] Ibid.

liberalization of trade and establishment of custom unions at regional level[457]. The fourth stage, which is to last two years, involves the coordination and harmonization of tariff and non-tariff systems among the RECs with a view to the establishment of a customs union at continental level through the adoption of a common external tariff[458]. The fifth stage, which is to last four years, aims at establishment of an African common market through the adoption of a common policy in areas such as agriculture, transport and communications, industry and scientific research, the harmonisation of monetary policies, and the application of the principle of free movement of persons as well as the rights of residence and establishment[459]. The sixth stage, which is the last, is to last for five years and involves the consolidation and strengthening of the African common market, integration of all sectors for the establishment of a single domestic market and an economic and monetary union, establishment of an African Central bank and a single African currency, setting up of the Pan-African Parliament[460], finalization of harmonizing of RECs, setting up of multi-national enterprises, and final implementation of the setting up of executive organs of the AEC. The transition from one stage to the next shall be determined when the AU Assembly declares that the commitments under a particular stage have been fulfilled[461]. The AU gives itself a cumulative maximum period of forty years to complete the establishment of the AEC[462]. These are indeed ambitious objectives and calculating from the entry into force of the AEC Treaty in 1994, the whole integration process is due for completion in 2028.

Detailed matters regarding the liberalization of trade and establishment of an African customs union are set out in Chapter V of the AEC Treaty. In Article 29, member states of RECs undertake to progressively eliminate, among themselves, customs duties, quota restrictions, other restrictions or prohibitions and administrative trade barriers, as well as all other non-tariff barriers, and to adopt a common external customs tariff during the transitional period. During the second stage, member states of RECs shall refrain from

[457] Ibid Article 6.2(c).
[458] Ibid Article 6.2(d).
[459] Ibid Article 6.2(e).
[460] The Protocol on the PAP was signed in 2001 and came into force in 2003 and this was followed by the inauguration of the PAP which is based in South Africa.
[461] Ibid Article 6.4.
[462] Ibid Article 6.5.

establishing, among themselves, new customs duties or increasing existing ones[463]. During the third stage, member states of RECs shall progressively reduce and eliminate, among themselves, customs duties in accordance with agreed modalities[464]. With regard to non-tariff barriers to trade, on entry into force of the AEC Treaty, each member state of an REC shall progressively relax and ultimately remove quota restrictions, and all other non-tariff barriers and prohibitions which apply to exports to that State, of goods originating in the other member states, at the latest, by the end of the third stage[465]. Further, the member states shall refrain from imposing new non-tariff barriers to trade during the same period[466]. In this regard, each REC shall, at the latest by the third stage, adopt a programme for the relaxation and ultimate elimination of all non-tariff barriers on imports originating in the other member states[467].

During the third stage, member states at REC level, agree to gradually establish a common external tariff to goods originating from third states and imported into member states[468]. During the fourth stage, RECs shall eliminate differences between their respective external customs tariff in accordance with an agreed programme[469]. At the end of the third stage, no member state shall at REC level, levy customs duties on goods originating in one member state and imported into another member state or on goods in free circulation in member states and are imported from one state into another[470]. The rules governing goods originating from third states which are in free circulation are to be provided for in a protocol on the rules of origin[471]. Goods in free circulation are regarded as such, if import formalities have been completed, customs duties have been paid in the member state and the goods have not benefited from total or partial exemption from customs duties[472]. Article 34.1 of the AEC Treaty prohibits member states from levying, directly or indirectly, on goods originating from member states and imported into

[463] Ibid Article 30.1.
[464] Ibid Article 30.2.
[465] Ibid Article 31.1.
[466] Ibid.
[467] Ibid Article 31.2.
[468] Ibid Article 32.1.
[469] Ibid Article 32.2.
[470] Ibid Article 33.1.
[471] Ibid Article 33.2.
[472] Ibid Article 33.3.

member sates, internal taxes in excess of those levied on similar domestic goods. Member states are also obliged to eliminate any internal taxes intended for the protection of domestic products[473].

Like most other international legal instruments on trade, the AEC Treaty makes provision for other matters related to trade. Article 35 sets out exceptions to the general obligations set out in the AEC Treaty[474] and safeguard measures. The exceptions relate to matters of security, arms and ammunition control, protection of human, animal or plant health or life or public morality, export of strategic minerals, protection of national treasures, control of hazardous substances, protection of infant industries, and control of strategic products. A member state may be allowed by a competent organ of the AU to derogate from its obligation where it has encountered balance-of-payments difficulties or for purposes of protection of an infant or strategic industry for periods determined by the organ[475]. Again, where imports of a particular product from another member state causes or are likely to cause serious damage to the economy of the importing state, safeguard measures may be applied with the permission of an organ of the AU[476]. Dumping which is defined in Article 36 of the AEC Treaty is prohibited, while the principle of the most-favoured-nation treatment is also applicable in the AU[477]. The latter principle is to the effect that a concession or favour granted to one member state of the AU must also be granted to all member states of the AU. The AEC Treaty also provides for other ancillary matters such as re-export of goods, cooperation in customs matters, harmonization of trade documents, and promotion of trade[478].

The other Chapters[479] of the AEC Treaty deal with the free movement of persons, rights of residence and establishment, movement of capital, cooperation in various economic

[473] Ibid Article 34.2.
[474] See Articles 9 and 10 Trade Protocol and Article 36 TFEU which contain exceptions to the obligations assumed under the respective legal instruments. See also Article XX of the General Agreement on Tariffs and Trade (part of the WTO Agreements of 1994) which contains exceptions to the obligations assumed under the GATT.
[475] Article 35.3 and 4 AEC Treaty.
[476] Ibid Article 35.5.
[477] Ibid Article 37. See also Article 28 of the Trade Protocol.
[478] Ibid Articles 38, 39, 40 and 42.
[479] Ibid Chapters VI-XVI.

sectors, such as agriculture, industry, technology, natural resources and environment, transport, communication and tourism, standardization systems, education and culture, human resources, social welfare and health and any other fields. In all these areas of cooperation member states agree to provide for more detailed matters in protocols to be concluded among them.

Of relevance to this study are the provisions on the settlement of disputes arising from the interpretation or application of the AEC Treaty[480]. These are to be settled amicably through agreement by the parties, failing which, either party may refer the dispute to the Court of Justice (CJ) of the AU[481]. The decision of the CJ shall be final and not subject to appeal[482].

2.8.1.2 AU institutions

Although the AEC was an integral part of the OAU, it had its own organs which were responsible for policy making, implementation of its programmes, and settlement of disputes[483]. These organs by virtue of Article 33 of the Constitutive Act are superseded by the organs created by the Constitutive Act in all respects and where there are inconsistencies the Constitutive Act prevails. With the establishment of the AU by the Constitutive Act, the AEC now becomes an integral part of the AU and for all intents, the AU is now the legal person in place of both the OAU and the AEC[484]. However, despite the institutional changes, the substantive provisions of the AEC Treaty dealing with trade and socio-economic matters remain intact and the competences exercisable by the AEC organs are now exercisable by institutions of the AU.

The Constitutive Act establishes the organs of the AU and these are the Assembly of the AU, the Executive Council, the Pan-African Parliament (PAP), the Court of Justice (CJ), the Commission, the Permanent Representatives Committee, the Specialised Technical

[480] Ibid Article 87.
[481] Ibid Article 87. 1.
[482] Ibid Article 87.2 AEC.
[483] Chapter III AEC Treaty provides for organs of the AEC.
[484] Article 98 AEC Treaty.

Committees, the Economic, Social and Cultural Council[485] and the Financial Institutions[486]. The Assembly may establish other organs of the AU.

The Assembly is the supreme organ of the AU and it consists of heads of state and governments, or duly accredited representatives of member states[487]. The main functions of the Assembly are to determine the common policies of the AU, receive and act on reports from other organs, consider requests for membership, adopt the budget of the AU, monitor implementation of policies and decisions of the AU and ensure compliance, and appoint judges of the CJ and members of the Commission[488]. It is curious to note that, unlike the Summit of SADC, the Assembly has no specific law-making powers. An explanation for this maybe that the legislative powers within the AU are to be exercised by the PAP according to its protocol[489]. However, it must be noted that despite the supersession of the AEC Assembly by the Assembly, the Assembly can still perform functions conferred on it by the AEC Treaty. The Assembly is empowered by Article 10 of the AEC Treaty, to act by decisions which shall bind member states, organs of the AU as well as RECs. This power to take binding decisions is quite important, especially in relation to RECs. It means that the Assembly can take decisions which bind RECs such as SADC and this arrangement might pose some problems for both the Tribunal and Court of Justice of the AU. For example, a dispute might arise between SADC and a SADC member state arising from an obligation under both the Trade Protocol and the AEC Treaty such as non-removal of non-tariff barriers when required to do so under both legal instruments. The matter can be taken to either the Tribunal or the CJ by any of the parties. The question of conflicting decisions emanating from the two courts can arise. The situation could be different if the Protocol or the Protocol of the CJ had spelt out the relationship of the two courts in such situations. For example, provision could have been

[485] Provisions on the establishment of the ESOCC are contained in Article 22 of the Constitutive Act. It shall consist of social and professional groups of member states which essentially means civil society groups commonly known as non-governmental organizations (NGOs).
[486] Article 5 Constitutive Act.
[487] Ibid Article 6.
[488] Ibid Article 9.
[489] The Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament was signed on 2 March 2001 and came into force on 14 December 2003.

made in such cases for appeals from decisions of the Tribunal to the CJ on matters covered by both SADC and AU law.

The Constitutive Act establishes the Executive Council of the AU which consists of the Ministers of foreign affairs or other authorities designated by the governments of the member states[490]. The main function of the Executive Council is to coordinate and take decisions on policies in areas of common interest to the member states, ranging from trade matters, industry, transport and communications, natural resources, science and technology, food, agriculture to immigration and social security matters[491]. The Council is accountable to the Assembly and monitors the implementation of policies formulated by the Assembly. There are Specialised Technical Committees consisting of Ministers or senior officials responsible for sectors falling within their respective areas of competence[492]. These committees are accountable to the Executive Council and their main functions are to prepare the work of the AU for submission to the Council, supervise and evaluate the implementation of decisions of the AU, and make recommendations to the Council[493].

Article 17 of the Constitutive Act provides for the establishment of the PAP whose composition, functions powers and organization shall be provided for in a protocol. The protocol on the PAP provides that the '…ultimate aim of the Pan-African Parliament shall be to evolve into an institution with full legislative powers, whose members are elected by universal suffrage'[494] and also provides that "..The Pan-African Parliament shall be vested with legislative powers defined by the Assembly..' but 'during the first term of its existence, the Pan-African Parliament shall exercise advisory and consultative powers only'[495].

[490] Article 10 Constitutive Act.
[491] Ibid Article 13.
[492] Ibid Article 14.
[493] Ibid Article 15.
[494] Article 2.2 PAP Protocol.
[495] Ibid Article 11.

The Commission, which consists of the Chairperson, deputies and other members, acts as the secretariat to the AU[496]. The Constitutive Act also establishes a Permanent Representatives Committee which is composed of Permanent Representatives to the Union and other representatives of member states[497]. The Permanent Representatives Committee is charged with the responsibility of preparing the work of the Executive Council and acting on the Executive Council's instructions[498]. The Constitutive Act also establishes the Economic, Social and Cultural Council which is an advisory organ composed of different social and professional groups of the member states of the AU[499]. The functions, powers, composition and organization of the Economic, Social and Cultural Council are determined by the Assembly.

2.8.1.3 The Court of Justice of the AU

One organ of the AU which deserves special attention for purposes of this study is the Court of Justice (CJ) of the AU[500]. This is so because the position of the CJ is identical to that of the Tribunal which is the main judicial organ of SADC. There is need to consider the questions of access to the CJ, jurisdiction, sources of law and enforcement in comparison to the Tribunal in order to determine whether there is area of common ground between the two courts. The CJ has not yet been established but provision for its establishment by a protocol is made in the Constitutive Act[501]. The Protocol establishing the Court (CJ Protocol) was adopted by the member states on 11 July 2003 but it is not yet in force. According to the CJ Protocol, the CJ shall be the principal judicial organ of the AU and it shall consist of eleven judges nationals of the member states[502]. The judges of the CJ must be impartial and independent and are elected from among persons of high moral character, who possess the necessary qualifications required in their respective countries for appointment to the highest judicial offices, or are jurists of recognised

[496] Article 20 Constitutive Act.
[497] Ibid Article 21.
[498] Ibid Article 21. 2.
[499] Ibid Article 22.
[500] Ibid Article 18.
[501] Ibid Article 18.2.
[502] Articles 2 and 3 CJ Protocol.

competence in international law[503]. The judges are elected by the Assembly from persons nominated by member states and once elected, hold office for six years. A judge may be removed from office on a unanimous resolution of the other judges. The independence of the judges shall be fully ensured in accordance with international law, although it is not clear what the reference to 'international law' means in this context[504].

The question of access to the CJ is addressed in Article 18 of the CJ Protocol. The various players are state parties to the protocol, the Assembly, the PAP and other organs of the AU authorised by the Assembly, the Commission, or a staff member of the Commission in disputes between them in matters relating to the conditions of employment and third parties under conditions determined by the Assembly, and with the consent of the state party concerned. The CJ Protocol does not define the expression "third party" so it is not clear whether this refers to states only or to private persons as well. The wording of this provision does not appear to allow for private persons to have access to the CJ. The wording of the provision in relation to third parties appears to be limited to states only because the conditions under which third parties have access to the CJ shall be laid down by the Assembly "subject to special provisions contained in treaties in force". This reference to treaties can only mean that the subjects are states, or perhaps international organisations, since only these entities can be party to treaties[505].

It is also curious to note that the Assembly and the PAP are given special mention as potential parties to proceedings before the CJ and other organs of the AU have to be authorised by the Assembly. This position can be contrasted to that of SADC where all institutions of SADC are potentially able to access the Tribunal. In the EU, we shall see that the European Council and the European Parliament have limited access to the ECJ as

[503] Ibid Article 4.
[504] Ibid Article 13.
[505] Article 2 of the Vienna Convention on the Law of Treaties defines a treaty as "an international agreement concluded between states in written form and governed by international law, whether in a single instrument or in two or more related instruments and whatever its particular designation. See also the Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations of 1986.

claimants in annulment proceedings where they seek to protect their prerogatives[506]. In the case of their acts being challenged the European Council and the European Parliament can only be brought before the ECJ where the acts in question are intended to produce legal effects for third parties[507]. Perhaps these limitations were necessitated by the nature of the function which a parliament usually performs, especially in its capacity as a legislative body. In most national systems, parliaments, usually consisting of elected members, could be hampered in their work of legislating if they were to act in constant fear of their acts being challenged. In the case of the European Council, previously it had no *locus standii* before the ECJ because it was not an institution of the EU. It became an institution of the EU by virtue of changes brought about by the Lisbon Treaty[508]. Though now an institution of the EU, the European Council continues to perform functions of a political, as opposed to legal nature[509]. That might explain why it was given the same status as the EP in terms *locus standii* before the ECJ.

Private persons are not granted a right of direct access to the CJ. This unavailability of access to the CJ is also mirrored in the African Court of Human Rights[510] which has limited jurisdiction to hear cases involving complaints of human rights violations brought by private persons. Only the Commission, states, and intergovernmental organisations have unlimited right of access to the court[511]. Non-governmental organisations with observer status, and individuals have right of direct access to that court if the state concerned has at the time of the ratification of the protocol or any time thereafter, made a declaration accepting the competence of the court to receive cases under the protocol[512]. By a decision of the Summit of the African heads of state or governments in July 2004, this court is to be merged with the CJ. This merger will be achieved by the drafting of an instrument of merger which will presumably grant private persons access to the CJ on

[506] Article 263 TFEU.
[507] Ibid.
[508] Article 13 TEU.
[509] Ibid Article 15.1.
[510] The African Court of Human Rights was established by the Protocol to the African Charter on Human Rights and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights which was adopted on 10 June 1998 and came into force on 25 January 2004.
[511] Article 5 Protocol of the African Human Rights Court.
[512] Article 34 Protocol of the African Human Rights Court.

human rights issues on the current conditions, and extend the current jurisdiction of the CJ to include issues of human rights.

Apart from human rights issues, there is also the question of the relationship between the jurisdiction of the CJ in the AEC Treaty and the CJ Protocol. Under that AEC Treaty, the CJ of the AEC has jurisdiction to settle disputes arising from the interpretation and application of that treaty. Both the AEC Treaty and the CJ Protocol refer to actions brought by states or the Assembly, but make provision for the Assembly to extend the jurisdiction of the Court to disputes other than those stated[513]. This provision could be interpreted as empowering the Assembly to confer jurisdiction over other matters, including those brought by private persons. This must be so having regard to the nature of the AEC itself which covers social, monetary, economic and trade matters and appears to be modeled on the European Union and SADC. The AEC Treaty does not only cover matters involving states, but it also covers matters which can potentially involve private persons. If the AEC is premised to function along the same lines as SADC and the EU, then it can safely be assumed that many disputes arising from its operations would involve private persons as the main players in economic activity. The experience of the EU shows that many of the cases brought before the ECJ either as direct actions or through the preliminary rulings procedure, involve private persons. It should therefore be proper that the CJ be empowered to assume jurisdiction over disputes brought by private persons and the Assembly might assist in this regard.

I now consider the question of the jurisdiction of the CJ. The jurisdiction of the CJ is found in Article 18 of the AEC Treaty and Article 19 CJ of the Protocol. Article 18 of the AEC Treaty provides that the CJ "..shall ensure the adherence to law in the interpretation and application of this Treaty.." and shall decide on disputes submitted to it under the treaty. This provision is comparable to that of the Treaty[514] and the TFEU[515]. The ECJ

[513] Article 18 AEC Treaty and 19 CJ Protocol.
[514] Article 16.1 Treaty provides that the Tribunal " shall be constituted to ensure adherence to and the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it."
[515] Article 19.1 TEU provides that the ECJ "..shall ensure that in the interpretation and application of the Treaties the law is observed."

has given the relevant provision a very generous interpretation and has even used it as the basis for incorporating general principles of law into EU law. What is pertinent here, is that the CJ and the Tribunal are likely to adopt the same approach when interpreting the respective provisions of the CJ Protocol and the Protocol.

Article 18 of the AEC Treaty further provides for jurisdiction of the CJ over "direct actions brought by a member state or the Assembly for violations of the provisions of this Treaty or of a decision or a regulation" or "on grounds of lack of competence or abuse of powers by an organ, an authority or a member state." Direct actions for violation of treaty provisions can be compared to direct actions under Articles 258 and 259 of the TFEU which have similar provision and the jurisprudence developed by the ECJ could be useful. It is interesting to note that the provision refers to violations of the Treaty and of "a decision or regulation" and the latter two types of act are described in the AEC Treaty and have their equivalence in regulations and decisions of the EU institutions[516].

The second limb of the provision refers to direct actions brought by member states or the Assembly "on grounds of lack of competence or abuse of powers by an organ, an authority or a Member State." This part of the paragraph, if read disjunctively from the rest of the provision discussed above, appears to give the CJ jurisdiction in cases where a member state, an authority, or an organ of the AU has exceeded its powers or authority or abused its powers. The listed grounds are similar to those which can be relied on before the ECJ to annul acts of institutions of the EU[517]. We have noted that the Protocol does not specify the grounds on which acts of the institutions of SADC may be invalidated, and that the Tribunal could apply the TFEU grounds. In the same manner it is submitted that the Tribunal can equally use the two grounds listed in Article 18 of the AEC Treaty and apply jurisprudence developed by the CJ, if any, on the interpretation and application of the provision.

[516] See Articles 10 and 13 AEC Treaty and Article 288 TFEU.
[517] Article 263 TFEU lists the grounds for annulment of an act as 'lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or any rule of law relating to their application, or misuse of powers.'

Finally, both the AEC Treaty and CJ Protocol empower the Assembly to confer additional jurisdiction on the CJ and I have already urged that this provision must be interpreted generously so as to authorise the Assembly to extend the jurisdiction of the CJ in respect of parties which may bring cases before it, as opposed to the expansion of subject matter alone.

The CJ Protocol provides that the CJ shall have jurisdiction over all disputes and applications referred in terms of the Constitutive Act and the protocol relating to the interpretation and application of the Constitutive Act, the interpretation, application or validity of AU treaties and subsidiary legal instruments adopted within the context of the AU, any question of international law, acts, decisions, regulations and directives or organs of the AU, matters provided for in agreements between states conferring jurisdiction, breaches of obligations owed to other states and the nature and extent of reparation[518]. The Assembly can confer jurisdiction over any other disputes[519]. The reference to the "validity of AU treaties" implies that the Constitutive Act is the superior law of the AU, such that all other treaties of the AU such as the AEC Treaty are subordinate to it hence their validity can be measured against the Constitutive Act.

The jurisdiction of the CJ is far wider than that conferred on the Tribunal by the Treaty in that it extends to breaches of obligations outside the scope of the Constitutive Act, and provides for determination of reparation matters which are not covered in the Protocol[520]. Any member state of the AU, including a member state of SADC, may actually refer any dispute over an alleged breach of an obligation owed to another state or any question of

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518 Article 19.1 CJ Protocol. This provision can be contrasted to Article 36(2) of the Statute of the ICJ 'the optional clause' which reads: 2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

a) the interpretation of a treaty;
b) any question of international law;
c) the existence of any fact which, if established, would constitute a breach of an international obligation;
d) the nature or extent of the reparation to be made for the breach of an international obligation.

519 Article 19.2 CJ Protocol.

520 Ibid Article 19.2 (f) and (g).

international law, and this may include disputes arising from the application of the SADC Treaty. This is so because the CJ has jurisdiction to determine disputes over any question of international law[521] or involving an alleged breach of an obligation owed to another state[522], as long as the other state is a member of the AU. This situation could give rise to the problem of "forum shopping" where a state may choose the forum to which to refer disputes and this is a cause for concern.

The sources of law for the CJ are also enumerated in the CJ Protocol and these include the Constitutive Act, international conventions, whether general or particular, establishing rules expressly recognized by the contesting parties, international custom, as evidence of a general practice accepted as law, the general principles of law recognized universally or by African states and, subject to Article 37 of the CJ Protocol, judicial decisions and the writings of the most highly qualified publicists of various nations, as well as regulations, directives and decisions of the Union, as subsidiary means for the determination of rules of law[523]. The "Act" should include the decisions of the Assembly[524] and the regulations of the Council[525] referred to in the AEC Treaty, as well as any acts, decisions, regulations and directives of organs of the AU referred to in Article 19 Protocol of the CJ. These secondary sources of AU law can be likened to similar sources of EU law which comprise regulations, directives, decisions and recommendations of the EU institutions which are listed in the TFEU[526].

A point of interest is that decisions of the Assembly "shall be binding on member states and organs of the Community (AEC), as well as regional economic communities" and regulations of the Council 'shall be binding on member states, subordinate organs of the Community (AEC) and regional economic communities after their approval by the Assembly."[527] The reference to 'regional economic communities' in these provisions must surely be reference to SADC and other RECs noted at the beginning of this section.

[521] Ibid Article 19.1(c).
[522] Ibid Article 19.1(f).
[523] Ibid Article 20.1.
[524] Article 10 AEC Treaty.
[525] Ibid Article 13.
[526] Article 288 TFEU.
[527] Articles 10 and 13 AEC Treaty.

If the decisions and regulations are binding on member states and regional economic communities, the question which might arise is how and in which court they are enforceable. There is no doubt that they can be enforced in the CJ but could they also be enforced in the courts of the regional economic communities such as the Tribunal?

This should depend on the jurisdictional provisions of the regional court itself such as for example, in SADC, the Tribunal can found jurisdiction over such matters on the basis of Article 14 of the Protocol which confers jurisdiction on the Tribunal on 'all matters specifically provided for in any other agreement that states may conclude among themselves or within the community and which confer jurisdiction on the Tribunal.' It can be argued that member states of SADC became party to the AEC Treaty both individually and as members of a regional economic community because the AEC Treaty itself recognises the existence of the RECs as forming part of the structures of the AEC and consequently of the AU[528]. This then raises the question of parallel obligations and dispute settlement mechanisms. For cases brought before the Tribunal in such a situations, it would have been more sensible if there was provision for appeal to the CJ. As matters stand, the same issue can be raised in both courts simultaneously thus creating a legal dilemma for the courts involved.

The provisions of the AEC Treaty and the CJ Protocol, are therefore important sources of secondary rules of law for the CJ and potentially for the Tribunal. These sources of law are, with minor modifications, virtually the same as those listed for the ICJ by Article 38 of the Statute of the ICJ. It stands to reason that the CJ, when operational, will certainly have recourse to the jurisprudence of the ICJ and consequently the Tribunal itself could also have recourse to the jurisprudence of the CJ if available on a given point. Article 37 of the CJ Protocol which is referred to in the sources of law, addresses the question of the binding force of decisions and is identical to Article 59 of the Statute of the ICJ and Article 32.3 of the Protocol. The CJ and the Tribunal could both share the experience of the ICJ in the application of Article 59 of the Statute of the ICJ.

[528] Articles 6 and 88 AEC Treaty and the preamble to that treaty.

The advisory jurisdiction of the CJ is contained in both the AEC Treaty[529] and the CJ Protocol[530]. Article 44 of the CJ Protocol provides that the Court 'may give an advisory opinion on any legal question at the request of the Assembly, the Parliament, the Executive Council, the Peace and Security Council, the ECOSOCC, any Financial Institutions, Regional Economic Community or such other organs of the Union as may be authorized by the Assembly.' The jurisdiction under the CJ Protocol appears to be more elaborate than provisions conferring jurisdiction on the Tribunal[531]. The reference to 'any legal question' removes the ambiguity on what matters may be referred and presumably excludes the reference of 'political questions' to the CJ. A similar distinction is not made in the Treaty or the Protocol.

It can however be likened to the jurisdiction of the ICJ under the Statute of the ICJ where the ICJ 'may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request'[532]. The ICJ has had to deal with the sometimes difficult distinction between 'political' and 'legal' questions and these matters are discussed in Chapter 3. Another matter of interest in this regard is the right given to RECs such as SADC to request an opinion. A question which might arise is which institutions of the REC can request such advice, for example, could the Tribunal request such an opinion? The mere reference to 'regional economic community' might be interpreted to include all institutions of the REC, including the courts such as the Tribunal. One other issue which may arise is the effect of an opinion of the CJ given to a REC: is it binding on the REC or not, and how should the courts of the RECs deal with it when it is presented in proceedings before them? It is submitted that in the case of the Tribunal, the opinion of the CJ on a given matter should form part of the general principles of law which the Tribunal should have regard to in terms of Article 21(b) of the Protocol.

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[529] Article 18.3. AEC Treaty which provides that the CJ shall 'At the request of the Assembly or Council, give advisory opinion.'
[530] Article 44 CJ Protocol.
[531] Both Articles 16 Treaty and Article 20 Protocol do not refer to the concept of 'any legal question'.
[532] Article 65.1 Statute of the ICJ.

The question of enforcement of AU law is addressed in both the AEC Treaty and the CJ Protocol. Article 19 of the AEC Treaty provides that decisions of the CJ shall be binding on member states and organs of the AEC, while Article 87.2 of the AEC Treaty provides that decisions of the CJ shall be final, and shall not be subject to appeal. The AEC Treaty does not address the question of how the decisions of the CJ are to be enforced except that under Article 5 of the AEC Treaty, member states make general undertakings to promote development of the AEC and to implement the treaty nationally. A state which fails to honour its general undertakings under the treaty, or fails to abide by decisions or regulations of the AEC, may be subjected to sanctions imposed by the Assembly on the recommendation of the Council[533]. It is submitted that a failure to honour obligations imposed by the AEC Treaty or regulations or decisions of the AEC, will in most cases only be established after action has been taken in the CJ against the defaulting member state. Otherwise it would be extremely difficult to establish liability, except in clear cases such as failure to make membership contributions. Sanctions may include suspension of rights and privileges of membership which may be lifted on recommendation of the Council[534].

The CJ Protocol also deals with matters relating to the enforcement of judgments of the CJ. Article 51 of the CJ Protocol provides that state parties to the protocol shall comply with the judgment in any dispute to which they are parties within the time set by the CJ and shall guarantee its execution. This provision implies that only parties to a case are bound to comply with a judgment, although the effect of the judgment could go beyond the parties to the dispute, for example in a judgment involving the demarcation of a boundary between two states all other states are bound by the judgment. The obligation to guarantee the execution of the judgment seems to place the actual execution of the judgment in the domain of national law.

[533] Article 5.3 AEC Treaty.
[534] Ibid.

We have seen that in the SADC context the rules for actual enforcement of a judgment of the Tribunal are the rules of the state in which the judgment is to be enforced[535]. This recourse to national enforcement procedures, is a departure from the procedures of other courts such as the ICJ and the ECJ. In the former case there is simply no room for enforcement of ICJ judgments in the national systems, but each member state of the UN undertakes to comply with the decision of the ICJ in any case to which it is a party[536]. Political procedures for the enforcement of ICJ judgments are provided for in Article 94.2 of the UN Charter which reads: "If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."

In the case of the ECJ, previously there was no form of enforcement action against member states failing to comply with a decision of the ECJ which was basically a declaration under Articles 258 or 259 (former 226 or 227 EC Treaty) of the TFEU that a member was in breach of is obligations. Now there is provision for the imposition of monetary penalties by the ECJ[537].

The position with regard to non-compliance with a judgment of the CJ is governed by Article 52 of the CJ Protocol which provides for reference of the matter to the Assembly for the adoption of measures to give effect to the judgment. The Assembly may decide on appropriate measures, including the imposition of sanctions under Article 23 of the Constitutive Act and, it is submitted, under Article 5 of the AEC Treaty. These solutions to non-compliance with judgments are very political and could prove to be ineffective as the experience of the ICJ has shown. We have also noted that SADC follows a similar approach in that the final decision to impose sanctions against a defaulting states lies with the supreme political body of SADC, the Summit. It is understandable that states are reluctant to take a judicial approach which could involve the actual enforcement of the judgment through sales in execution of property or attachment of bank accounts. These

[535] Article 32.1 Protocol.
[536] Article 94.1 UN Charter.
[537] Article 260 TFEU.

means of enforcement available in and suitable for national systems, would not be appropriate in the world of international relations where matters such as sovereignty of states reign supreme.

CHAPTER 3

3 THE UNITED NATIONS AND THE INTERNATIONAL COURT OF JUSTICE[538]

3.1 Introduction

This chapter discusses the United Nations and its role in the development of general principles of international law which, as we have noted, the Tribunal is mandated to apply as a source of law. Although the institutional arrangements in the UN are discussed, the main focus of the study is the International Court of Justice (ICJ) which is the principal judicial organ of the UN[539]. The ICJ is discussed with specific reference to the areas of our research namely, access to the court, basis of jurisdiction (including its advisory jurisdiction), sources of law, and methods of enforcing judgments of that court. Particular emphasis will be placed on areas where the jurisprudence of the ICJ is likely to be of use to the Tribunal. These areas include exhaustion of domestic remedies as a precondition to exercise of diplomatic protection, sources of law used by the ICJ and the advisory opinions jurisdiction of the ICJ. Where appropriate comparisons are made with the relevant institutional arrangements and treaty provisions of SADC to give a clear perspective of how the Tribunal could deal with similar issues.

3.2 UN Institutions

[538] For a comprehensive discussion on the ICJ see Rosenne *The World Court: what it is and how it works* (1994), Eyffinger *The International Court of Justice* 1946-1996 (1996) also see Dugard op cit Chap 22.

[539] See Article 92 of the UN Charter which reads "The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter."

The UN is the world's largest intergovernmental organisation which consists of virtually all the states on earth[540]. It was established by the Charter of the United Nations which was signed at San Francisco, USA on 26 June 1945. The main purposes of the UN are the maintenance of international peace and security through the taking of effective measures to prevent or remove breaches of peace and suppress acts of aggression, and to bring about by peaceful means, and in conformity with principles of justice and international law, the settlement of international disputes, the development of friendly relations among nations based on the principles of equal rights and self-determination of peoples, the achievement of international cooperation in solving international problems of an economic, social, cultural or humanitarian character and promoting respect for human rights and fundamental freedoms without discrimination based on race, sex, language or religion[541]. To achieve its objectives, the UN and its member states shall act in accordance with the principles of sovereign equality of all members, fulfillment of assumed obligations in good faith, pacific settlement of disputes, refraining from the use of force or the threat of use of force against the integrity of other states and rendering of assistance to the UN when action is taken in accordance with the Charter[542]. States which are not member states of the UN are expected to act in accordance with the principles contained in the Charter "so far as may be necessary for the maintenance of international peace and security"[543]. The UN is prohibited from interfering in the domestic affairs of member states subject to the application of the provisions of the Charter authorizing the taking of enforcement action[544].

Membership of the UN is open to the original member states and subsequently to all peace loving states which undertake to abide by the obligations contained in the Charter[545]. Membership of a state against whom enforcement action is being taken by the UN may be suspended by the General Assembly on recommendation from the Security

[540] The UN membership comprises virtually all states of the world (currently 203 states) except the Holy See which holds observer status since 1964 and obtained full membership (except voting rights) in 2004 and Palestine which has held observer status since 1988. UN website http://www.un.org (visited 14/12/09).
[541] Article 1 UN Charter.
[542] Ibid Article 2.
[543] Ibid Article 2.6.
[544] Ibid Article 2.7.
[545] Ibid Article 3 and 4.

Council, while in extreme cases a member state which persistently violates the principles contained in the Charter may be expelled by the General Assembly on recommendation from the Security Council[546].

The main institutions of the UN are the General Assembly (GA), the Security Council (SC), the International Court of Justice (ICJ), the Secretariat and the Economic and Social Council[547]. Other subsidiary organs may be established under the Charter and the UN has established numerous other specialized organs falling under the auspices of the UN as well as other semi-autonomous institutions which are functionally linked to the UN[548]. In this chapter I consider the main political organs of the UN being the GA, SC and Secretariat, and the ICJ which is the main focus of this comparative study.

3.2.1 General Assembly[549]

The GA consists of all the members of the UN although each member state shall have no more than five representatives in the GA[550]. The GA could be regarded as the "parliament" of the UN although it lacks an essential feature of traditional parliaments namely the law-making function. The GA has no specific equivalent in the SADC structures. Its nearest counterpart is the SADC Summit which consists of all heads of state or government of member states but functionally there are huge differences. The Summit can make SADC laws and take decisions which are legally binding things which the GA is unable to do. However, the GA is empowered to discuss any questions or any

[546] Ibid Articles 5 and 6. No member has as yet been expelled from the UN. The nearest that the UN has gone to expulsion is the case of South Africa. In 1974 the credentials of the South African representative were not accepted by the Credentials Committee of the GA and the President of the General interpreted this to mean that South Africa could no longer participate in the in the work of the GA hence effectively suspending the country from the UN till 1994 when the country held democratic elections following the abandonment of apartheid.

[547] Article 7 UN Charter also includes the Trusteeship Council which in now virtually defunct since currently there are no territories falling under UN trusteeship.

[548] Article 7.2 UN Charter. Some of the organs include the International Labour Organization, Food and Agriculture Organization of the United Nations, United Nations Educational, Scientific and Cultural Organization, World Health Organization, World Bank, International Monetary Fund, World Meteorological Organization, World Intellectual Property Organization, International Fund for Agricultural Development, United Nations Industrial Development Organization. World Tourism Organization, and the International Atomic Energy Agency.

[549] Chapter IV Articles 9-22 Charter, Dugard op cit Chap 2.

[550] Article 9 UN Charter.

matter within the scope of the Charter or relating to any organ of the UN and to that end it may make recommendations to the member states or the SC on the questions or matters discussed[551]. The GA may, in general, consider principles of co-operation in the maintenance of international peace and security which include issues of disarmament and control of armaments and again to that end it may make recommendations to member states and the SC[552]. In addition, the GA may discuss any question relating to the maintenance of international peace and security brought to it by a member state, the SC or by a non-member state and again to that end it may make recommendations to the member state, SC or non-member state[553]. If an issue -raised before the GA requires "action", the GA shall refer the matter to the SC[554]. Apart from matters relating to the maintenance of international peace and security, the GA is also charged with the responsibility of initiating studies and making recommendations aimed at promoting international co-operation in politics and "encouraging the progressive development of international law and its codification"[555]. Further, the GA shall initiate studies and make recommendations to promote international co-operation in socio-economic, cultural, educational and health fields and assisting in the attainment of human rights and fundamental freedoms for all without discrimination based on race, sex, language or religion[556]. Under Article 14 of the UN Charter, the GA may, subject to Article 12 (which precludes the GA from making a recommendation on a matter being dealt with by the SC), recommend measures for the peaceful adjustment of any situation which is likely to

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[551] Ibid Article 10. The power to discuss any matter within the scope of the UN Charter was held by the ICJ to include the power to discuss matters relating to South Africa's mandate for South West Africa. The Court said in the *International Status of South West Africa Opinion* ICJ Reports 1950 128 137 "This resolution presupposes that the supervisory functions exercised by the League would be taken over by the United Nations. The competence of the General Assembly of the United Nations to exercise such supervision and to receive and examine reports is derived from the provisions of Article 10 of the Charter, which authorizes the General Assembly to discuss any questions or any matters within the scope of the Charter and to make recommendations on these questions or matters to the Members of the United Nations. This competence was in fact exercised by the General Assembly in Resolution 141 (II) of November 1th 1947, and in Resolution 227 (III) of November 26th, 1948, confirmed by Resolution 337 (IV) of December 6th, 1949."

[552] Article 11.1 UN Charter.

[553] Ibid Article 11.2.

[554] In the *Certain Expenses of the United Nations* Opinion 1962 ICJ Rep 151 164-5 the ICJ ruled that the word "action" as used in Article 11.2 UN Charter means enforcement action against a state which could only be taken by the SC.

[555] Article 13.1(a) UN Charter.

[556] Ibid Article 13.1(b).

impair the general welfare or friendly relations among nations. If any situation is "likely to endanger international peace and security," the GA may call the attention of the SC to that situation[557]. It must be emphasized that the GA is not a legislative body of the UN and as such it has no law-making functions but, as we shall see, its decisions or resolutions, as they are commonly called, have largely contributed to the development of international law in general, and of law by the ICJ in particular.

Each member state has one vote in the GA[558]. Decisions on important questions are decided by a two-thirds majority of members present and voting, and these include recommendations relating to the maintenance of peace, election of non-permanent members of the SC, election of members of the Economic and Social Council, the admission, suspension and expulsion of members and budgetary matters[559]. Decisions on other questions are decided by a majority of members present and voting[560], but since most resolutions of the GA fall under "important questions" in practice most GA resolutions are adopted by two-thirds majority.

GA resolutions on its internal management such as admission, suspension and expulsion of members and the budget are legally binding, but resolutions addressed to members on matters affecting the maintenance of international peace and settlement of disputes are not legally binding[561].

While not legally binding, the political weight of the latter resolutions can be quite effective as can be demonstrated by numerous resolutions against apartheid[562] as previously practiced in South Africa which eventually led to its abandonment in the early nineties. GA resolutions have a number of legal consequences[563]. According to Dugard

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[557] Ibid Article 11.3.
[558] Ibid Article 18 UN.
[559] Article 18 UN Charter See also Dugard op cit 482.
[560] Article 18.3 UN Charter.
[561] Articles 4-6 and 17 UN Charter See Dugard op cit 482.
[562] The first UN resolution on apartheid was General Assembly Resolution 1761 of 1962 followed by Security Council resolutions 181 of 1963 and 418 0f 1977. Other international instruments on apartheid are the Crime of Apartheid Convention 1973, Gleneagles Agreement 1977, Sullivan Principles 1977 and the Comprehensive Anti-Apartheid Act 1986.
[563] Dugard op cit 482-483.

first, they may provide legal authorization for states to engage in action which might otherwise be illegal[564]. Dugard[565] argues that "if economic intervention is considered illegal, then the numerous GA resolutions calling for economic sanctions against SA would have violated international law but the actions could be justified on the strength of the resolutions." Secondly, according to Dugard "if repeated frequently, the resolutions may acquire the force of customary law" and as such "the norms of non-discrimination, outlawing of apartheid and colonialism fall under this category"[566]. Thirdly, resolutions must be considered in good faith with a view to implementation. Failure to do this may result in serious repercussions for the defaulting state[567]. In the case of South Africa, repeated resolutions of the GA condemning its policies and its occupation of South West Africa led to the imposition of sanctions against it.

For purposes of this study the standing of the GA before the ICJ is relevant. The GA has no standing in contentious proceedings before the ICJ which is essentially a court for states. However, the GA is authorised to invoke the advisory opinion jurisdiction of the ICJ, or to authorise organs of the UN to obtain such advice[568]. In addition, the Charter does not envisage a situation where decisions of the GA can be subjected to review by the ICJ. This is understandable having regard to the fact that its decisions do not bind member states except on matters of internal management.

3.2.2 The Security Council[569]

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[564] Dugard op cit.
[565] Dugard op cit.
[566] Dugard op cit also note here the dissenting opinion of Tanaka J in the *SWA* cases 1966 ICJ Rep 266 292 where he noted, "Of course, we cannot admit that individual resolutions, declarations, judgments, decisions, etc., have binding force upon the members of the organization. What is required for customary international law is the repetition of the same practice; accordingly, in this case resolutions, declarations, etc., on the same matter in the same, or diverse, organizations must take place repeated... In short, the accumulation of authoritative pronouncements such as resolutions, declarations, decisions, etc., concerning the interpretation of the Charter by the competent organs of the international community can be characterized as evidence of the international custom referred to in Article 38, paragraph 1 (b)."
[567] Dugard op cit.
[568] Article 96 UN Charter.
[569] Chapter V Articles 23-32 UN Charter, Dugard op cit 485.

The SC is composed of fifteen members of the UN; five permanent members, France, the United States of America, the United Kingdom, China and Russia; and ten non-permanent members elected by the GA for a term of two years[570]. Each member state shall be represented by one representative[571]. The establishment of the SC within the UN system was meant to ensure prompt and effective action on the part of the UN which action cannot otherwise be taken timeously by a large body such as the GA. Members of the UN confer on the SC "primary responsibility for the maintenance of peace and security" and authorise the SC to act on their behalf[572]. The SC can be regarded as the executive body of the UN with primary responsibility for the maintenance of international peace[573]. Functionally, the SC can be compared with the SADC Organ on Politics, Defence and Security which constitutes the institutional framework by which SADC states coordinate their policies and activities in areas of politics, defence and security[574].

Member states of the UN agree to accept and carry out decisions of the SC and to this extent it can be said that decisions of the SC are binding on states[575]. Each member of the SC has one vote and decisions of the SC on procedural matters are by affirmative vote of nine members[576]. Decisions of the SC "on all other matters shall be by an affirmative vote of nine members including the concurring votes of all the permanent members"[577]. The

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[570] Article 23 UN Charter. At time of writing the ten members are Austria, Burkina Faso, Cost Rica, Croatia, Japan, Mexico, Libya, Turkey, Uganda and Vietnam. www.un.org/sc/members (visited 14 /12/09).
[571] Article 23.3 UN Charter.
[572] Ibid Article 24.1.
[573] Article 24 UN Charter See Dugard op cit 486.
[574] The Organ is an institution of SADC established by the Protocol on Politics, Defence and Security Cooperation. Some of its objectives include to protect and safeguard the region against instability through breakdown of law and order, intra-state conflict, inter-state conflict and aggression, resolve regional conflicts by peaceful means, develop collective security measures and consider enforcement action in accordance with international law where peaceful means have failed. (Article 2 Protocol on Politics, Defence and Security).
[575] Article 25 UN Charter, see also Dugard op cit 486.
[576] Article 27.1 and 2 UN Charter.
[577] Ibid Article 27.3. According to the ICJ if a permanent member abstains from voting that amounts to an affirmative vote. This was stated in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia(South West Africa) Notwithstanding Security Council Resolution 276 (1970)* ICJ Reports 1971 16 22 para 22 where the Court dealt with SA's contention that abstention of two permanent members amounted to negative votes. The Court said: "However, the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions. By abstaining, a member does not signify its objection to the approval of what is being

powers and functions of the SC are further elaborated in Chapters VI and VII of the UN Charter and these are considered below.

3.2.2.1 Chapter VI

Article 33 of the UN Charter obliges parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, to have recourse to pacific means of settlement of disputes such as negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement or resort to regional bodies or arrangements[578]. The SC may call upon the parties to a dispute to settle the dispute through pacific means. Article 34 of the UN Charter empowers the SC to "investigate" any dispute or situation which might create international friction or give rise to a dispute in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security. A dispute of the situation envisaged in Article 34 may be brought to the attention of the SC or GA by a member or non-member of the UN[579].

Where a dispute is referred to it or a situation is drawn to its attention under Article 34, the SC may "recommend appropriate procedures or methods of adjustment" of the dispute[580]. It has been argued that the resolutions of the SC made under Chapter VI have the same status as GA resolutions hence Article 25 which obliges member states to carry out decisions of the SC as opposed to recommendations, does not apply to recommendations made under Chapter VI[581].

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proposed; in order to prevent the adoption of a resolution requiring unanimity of the permanent members, a permanent member has only to cast a negative vote. This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been generally accepted by Members of the United Nations and evidences a general practice of that Organization."

[578] See discussion on international settlement of disputes in Chap 1.

[579] Article 35 UN Charter.

[580] Ibid Article 36.1.

[581] Dugard op cit 487.

Article 36(3) provides that the SC when acting under Chapter VI should bear in mind that legal disputes "as a general rule", should be referred to the ICJ. The SC rarely does this. It has been suggested that this reluctance by the SC to make references to the ICJ arose from the *Corfu Channel* case[582] when the Court's failure to accept such referral as a basis for compulsory jurisdiction of the ICJ might have deterred the SC from referring further cases[583].

3.2.2.2 Chapter VII

Under Chapter VII the SC is empowered to make decisions which are binding under Article 25 of the UN Charter[584] and it has been said that this is where the "real power of the SC" flows from[585]. Under that article, the SC is empowered to direct members to take "measures not involving the use of armed force"[586] and measures involving "such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security"[587].

Because of the serious consequences which might ensue from action taken under Chapter VII, the SC has not readily resorted to it and the veto by the permanent members has been used frequently to block any enforcement action. Before action can be taken under Chapter VII, the SC as a political body, has to decide under Article 39 of the UN Charter whether the situation constitutes a threat to the peace or a breach of the peace or an act of aggression and that decision is subject to the veto by the permanent members.

Under Article 40 of the UN Charter provisional measures, such as calling for a ceasefire or withdrawal of forces, may be invoked before enforcement action is taken. Article 41 of the UN Charter authorises the SC to direct members to take measures not involving the use of force to implement its decisions. Measures may include complete or partial

[582] ICJ Reports 1948 15.
[583] Dugard op cit 488.
[584] Under Article 25 member states of the UN undertake to accept and carry out decisions of the SC made in terms of the Charter.
[585] Dugard op cit 489.
[586] Article 41 UN Charter.
[587] Ibid Article 42.

interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

If the SC considers that the measures taken under Article 41 of the UN Charter are inadequate or have proved inadequate, it may, pursuant to Article 42, take such action by air, sea or land forces as may be necessary to restore or maintain international peace and security.

One issue of concern regarding the powers of the SC to take legally binding decisions under Chapter VII and Article 25 is the impact which such decisions may have on the potential law-making role of UN organs. Concerns have been raised in relation to the impact of some resolutions of the SC especially on matters relating to counter-terrorism measures[588]. Three SC resolutions have been cited to illustrate the point. The first is Resolution 1373(2001) which obliges member states to prevent and suppress the financing of terrorist acts, freeze the funds of terrorists, refrain from giving support to persons or entities involved in terrorist acts, take steps to prevent the commission of terrorist acts, and criminalise the perpetration of terrorist acts. The second is Resolution 1540(2004) which obliges member states to refrain from supporting "non-state actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery." Member states are also obliged to "adopt and enforce effective laws" to prohibit non-state actors from doing any of the listed things in relation to the weapons. The third is Resolution 1566 (2004) which condemns all acts of terrorism and calls on states to cooperate fully in the fight against terrorism while providing a comprehensive definition of terrorist acts. To these might also be added SC resolution 1267(1999) which was the first to deal with terrorist activities though directed specifically at the terrorist group known as the Taliban. The resolution obliges member states to deny permission for aircraft suspected to be connected to the Taliban to take off or land in their territories, as well as to freeze funds and resources of the Taliban. These resolutions are said to have assumed the nature of

[588] See Dugard op cit 494-495.

legislative acts in that they are general and abstract in character[589]. To this extent the SC is said to have assumed the role of law-maker calling into question the possibility of review of such decisions by the ICJ[590]. There is merit in these submissions since the effect of these resolutions is such that member states are obliged to take or refrain from taking specific action at the behest of the SC. This action or inaction might actually impinge on the national constitutional rights of private persons thus creating serious legal problems. States might be faced with a dilemma on whether to comply with the resolution at the pain of infringing their national constitutions thus raising issues of sovereignty of states. One way to ensure that that the rule of law prevails is to subject the resolutions of the SC to judicial scrutiny. Apart from the prospect of the SC "legislating" for states without consent there is also the potential of abuse of SC powers for ulterior motives which are usually political. A recent example of the risk of potential abuse of SC powers under Chapter VII, is the Zimbabwe case. Following allegations of alleged abuse of human rights by the Zimbabwe government and a disputed presidential election, two members of the SC, namely, the UK and the USA, proposed an SC resolution imposing travel and other economic measures against selected members of the Zimbabwe government despite protestations from the affected government and other states[591]. The resolution failed to pass after two permanent members of the SC, China and Russia, vetoed the proposal[592]. For one, it is debatable whether the matter itself is a dispute "the continuance of which is likely to endanger the maintenance of international peace and security" within the meaning of Article 33 such that it warrants SC action. It is even more debatable whether the situation in Zimbabwe constituted a threat to international peace

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[589] Ibid.

[590] See Petculescu "The Review of the United Security Council Decisions by the International Court of Justice". The article is a summary of the author's PHD Thesis in Public international law published in the *Netherlands International Law Review* (2005) 52 167-195 also available on the Cambridge University Press website http://journals.cambridge.org/ .(visited 09/02/10). The author argues in favour of judicial review of certain decisions of the SC by the ICJ.

[591] A copy of draft resolution and the various statements made by the respective parties can be viewed at UN website www.un.org/News/Press/docs/2008/sc9396.doc.htm (visited 11/01/10).

[592] The vote was taken on 11 July 2008 and nine SC members voted in favour of the resolution while China, Russia, South Africa, Libya and Vietnam voted against the resolution with Indonesia abstaining.

and security as was claimed in the draft resolution[593]. These are cases where states or the individuals affected should have some form of judicial redress in order to prove that the SC acted capriciously or outside its powers. Unfortunately, such redress is not available except for political redress which can only be obtained by having the resolution reversed by the SC itself.

3.2.3 Secretary-General[594]

Article 97 of the UN Charter provides for a Secretariat which consists of the Secretary-General (SG) who is appointed by the GA on the recommendation of the SC and he or she is the "chief administrative officer" of the UN[595]. The position of the SG can be compared to the Executive Secretary of SADC who can also be considered as the chief administrative officer of SADC. Under Article 99 of the UN Charter, the SG is authorized to bring to the attention of the SC any matter which threatens international peace and impliedly he or she is authorised to conduct investigations into the situation before coming to a decision. Like the SADC Secretariat, the UN SG and staff shall not in the performance of their duties, "seek or receive instructions from any government or from any other authority external" to the UN[596]. The SG however has no *locus standii* before the ICJ.

The SG is frequently instructed by the SC to provide good offices or to act as mediator in disputes, for example in the Middle East in 1967, in Cyprus and East Timor in 1975, in Namibia in 1978 and Yugoslavia in 1991. The SG can also act on the invitation of parties to a dispute as happened in 1992 when he was invited to chair a commission to implement peace between the Mozambican government and RENAMO[597]. An SG may play an active role in the promotion of international peace such as happened during the Congo peace-keeping operation when the SC was not ineffective due to superpower

[593] The operative part reads "Determining that the situation in Zimbabwe poses a threat to international peace and security in the region" accessed at the UN website.
[594] Chapter XV Articles 97-101 UN Charter, Dugard op cit 498.
[595] Article 97 UN Charter Dugard op cit 498.
[596] Article 100 UN Charter.
[597] This is the Mozambican National Resistance Movement, a then rebel armed organization which was fighting to bring about or restore democracy in Mozambique.

rivalry. This depends on the incumbent SG as some have preferred to take a neutral and less active role.

3.3 The International Court of Justice[598]

A close examination of the functioning and experiences of the ICJ is crucial to this study. Our purpose as outlined earlier, is to scrutinize the experiences of other international courts with a view to identifying some common features on specific issues which issues can then be used as guidelines for the Tribunal. The experience and jurisprudence developed by the ICJ is obviously of immense value to the study. Therefore, in this section I examine the ICJ against the backdrop of the identified issues.

Before 1920, international disputes used to be settled by the other methods noted in Chapter 1, but the Permanent Court of International Justice (PCIJ) was then established under the auspices of the League of Nations though it was not linked to it. The PCIJ was established under the Statute of the PICJ with a view to making it a world court. In 1945 the ICJ was established as a successor to the PCIJ and this court was established under the auspices of the UN to constitute its judicial organ. The Statute of the ICJ was incorporated into the UN Charter. The ICJ is a continuation of the earlier court the only difference being that only signatories to the earlier statute were members of the PCIJ while all members of the UN automatically become parties to the ICJ.

3.3.1 Organisation of the Court[599]

The ICJ is situated at the Hague[600] and comprises of fifteen independent judges, elected regardless of nationality from persons of high moral character, "who posses the

[598] Chapter XIV Articles 92-96 UN Charter together with the Statute of the International Court of Justice which is annexed thereto provide for the establishment of the Court and other matters relating to the Court, see also generally Rosenne op cit, Eyffinger op cit and Shaw op cit 959.
[599] Matters pertaining to the ICJ, its organization, competence, procedure and advisory jurisdiction are contained in the Statute of the ICJ which is annexed to and forms an integral part of the UN Charter.
[600] Article 23 ICJ Statute.

qualifications required in their respective countries for appointment to the highest judicial offices, or are juriconsults of recognized competence in international law."[601] who together represent the main forms of civilization and the principal legal systems of the world[602]. The judges are elected by the GA and the SC and hold office for nine years[603].

In 1946, five judges were elected for three years, five for six years and five for nine years hence elections are held every three years to ensure continuity. The President, who is elected by the Court, holds office for three years and nine judges constitute a quorum[604]. All decisions are made by majority vote (of the judges present) but in the event of equality of votes the President has a casting vote[605].

A judge may not sit in a matter in which he or she was personally involved as counsel or in some other capacity, but he or she is not required to recuse himself or herself if his or her state is party to the proceedings[606]. If a party to a dispute has no national on the Court it may appoint an *ad hoc* judge to sit for that case[607]. The practice of appointing *ad hoc* judges of the nationality of a litigant state undermines the credibility and impartiality of the Court since a judge would hardly ever find against his or her own state.

The Court may also sit in chambers consisting of three or more judges to hear a particular case[608]. The composition of the chamber is decided by the Court after the parties have been consulted and given their views. This procedure provides the parties with flexibility in the choice of judges to hear their case and resembles arbitration. The process is governed by the rules of the Court.

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[601] Ibid Article 2.
[602] Ibid Article 9 ICJ.
[603] Ibid Articles 3, 4 and 13.
[604] Ibid Articles 23 and 25.
[605] Ibid Article 55 ICJ. The president's casting vote was given in the *South West Africa Cases(Second Phase)* ICJ Reports 1966 6 51 to tilt the vote in favour of the finding that the two states Ethiopia and Liberia which had brought cases of breach of the mandate for SWA against South Africa had no *locus standii* before the ICJ.
[606] Article 17 ICJ Statute.
[607] Ibid Article 31.
[608] Ibid Articles 26 and 29.

The ICJ's main task, unlike the other courts under consideration, is to resolve disputes which are brought before it by states, and in doing so it must apply international law[609]. The other task of the ICJ is to give advisory opinions to organs of the UN[610]. In the case of the Tribunal, we have noted that its task is not confined to the resolution of disputes between states alone, but that it shall determine disputes involving states, SADC institutions and private persons as long as the dispute falls within the ambit of the SADC Treaty[611]. We shall see, as well, that the ECJ has a similar broader mandate to that of the Tribunal. With this limitation on the ICJ in mind, I am therefore confined to discuss the selected areas of study in respect of the ICJ to a limited extent as well. I therefore consider in the next sections the question of access to the ICJ, both the contentious and advisory jurisdiction of the Court, the sources of law, and enforcement methods. For present purposes particular attention is paid to the question of indirect access to the ICJ by private persons through the diplomatic protection procedure and the application of the principle of exhaustion of local remedies, the advisory jurisdiction of the ICJ, the sources of law used by the ICJ, and problems of enforcement of ICJ judgments. These areas are significant to the selected areas of study identified for the Tribunal and it is hoped that the experience of the ICJ will be useful in this regard.

3.4 Parties (access to the ICJ)[612]

3.4.1 States

Article 34.1 of the ICJ Statute provides that only states may be parties before the ICJ.[613] According to Dugard, the exclusion of other legal persons such as international organisations and private persons may be explained on the basis that states were the only actors on the international arena in 1920 when its predecessor the PCIJ was established

[609] Ibid Articles 34 and 38.
[610] Article 96 Charter read with Article 65 ICJ Statute.
[611] Article 15 Protocol.
[612] See Dixon op cit 284 to 286.
[613] Dixon op cit, Brownlie op cit 58.

but the principle was carried over to the ICJ[614]. However, we have seen that in SADC private persons have access to the Tribunal in cases involving states or SADC institutions. We have also seen that private persons cannot bring cases against other private persons directly before the Tribunal except, perhaps through a reference by a national court for a preliminary ruling under Article 16 of the Protocol.

The difficulties associated with having states only as parties to proceedings before the ICJ can be best illustrated through the South West Africa/Namibia experience. SWA was until 1919 a Germany colony. After Germany was defeated by the Allied powers in the 1914-1919 war, Germany surrendered all her overseas possessions including SWA to the victorious Allied Powers. The Allied powers then established the "mandates" system whereby territories inhabited by people who were considered to be underdeveloped by the standards of civilization applicable then were placed under the tutelage of states considered then to be advanced. The mandate for SWA was thus given to the UK which in turn requested the then Union of South Africa to exercise the mandate on its behalf. The mandates were all to be exercised on behalf of the League of Nations which was to be created in 1920. Under the mandate, the mandatory power was required to administer the territory in accordance with Article 22 of the Covenant of the League and the mandate for SWA which was in the form of an agreement between the SA and the Council of the League. The inhabitants of SWA acquired certain rights which were to be respected by SA. The Council of the League was to act as the supervisory authority over the mandatories which included SA. Problems arose in 1946 when the League of Nations was dissolved and the United Nations came into being. SA then sought to incorporate the territory of SWA to became an integral part of its territory and according to the mandates system this amounted to a modification of the mandate which required to consent of the Council of the League as the other party to the mandate. SA argued that the mandate for SWA lapsed with the dissolution of the League and that the newly formed UN had not taken the place of the League in relation to the mandate and that therefore it was not accountable to the UN or any of its organs for the administration of the territory. The UN argued otherwise and an advisory opinion was sought from the ICJ in 1949. The Court

[614] See Dugard op cit 459.

gave its opinion in the *International Status of South West Africa* case[615]. The Court unanimously confirmed the UN's view that the mandate system did not die with the League and continued to exist after the League since it was for the benefit of the inhabitants of SWA [616]. It further found by twelve to two votes that SA was under the same obligation to administer SWA in accordance with the mandate and that the UN General Assembly had assumed the role of the Council of the League to supervise SA over the mandate and that the ICJ had compulsory jurisdiction over any dispute between parties to the mandate[617]. Another opinion was sought from the ICJ over the voting procedures in matters relating to SWA. In giving its opinion on the *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa*[618], the Court confirmed the findings made in the 1950 opinion and ruled that the two-thirds majority voting procedure which was proposed for matters on SWA was consistent with the 1950 opinion[619]. Yet another opinion was sought from the ICJ in 1956 concerning the question whether the procedure for calling petitioners from SWA to give oral evidence before a committee of the GA was in line with the 1950 opinion. Again the Court confirmed the findings in the 1950 opinion and ruled in the affirmative in the *Admissibility of Hearings of Petitioners by the Committee on South West Africa* opinion[620]. In all these proceedings SA resisted the jurisdiction of the Court to give the opinions and refused to accept the authority of the UN over SWA. These opinions were, however, advisory and thus not binding on any state including SA, thus SA continued to defy them as well as resolutions of the UN adopting them. The situation finally culminated in two states Ethiopia and Liberia bringing contentious proceedings against SA in the ICJ with a view to get a binding decision of the Court which could be enforced against SA. That this was the only way open to enforce the mandate was stated by the Court itself in the *South West Africa Cases (Preliminary Objections)* case[621], when it explained as follows:

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[615] ICJ Reports 1950 128.
[616] Ibid 143.
[617] Ibid.
[618] ICJ Reports 1955 67.
[619] Ibid 76-78.
[620] ICJ Reports 1956 23 26-29 32.
[621] ICJ Reports 1962 319.

> "Under the unanimity rule (Articles 4 and *5* of the Covenant), the Council could not impose its own view on the Mandatory. It could of course ask for an advisory opinion of the Permanent Court but that opinion would not have binding force, and the Mandatory could continue to turn a deaf ear to the Council's admonitions. In such an event the only course left to defend the interests of the inhabitants in order to protect the sacred trust would be to obtain an adjudication by the Court on the matter connected with the interpretation or the application of the provisions of the Mandate. But neither the Council nor the League was entitled to appear before the Court. The only effective recourse for protection of the sacred trust would be for a Member or Members of the League to invoke Article 7 and bring the dispute as also one between them and the Mandatory to the Permanent Court for adjudication..
>
> ..In the second place, besides the essentiality of judicial protection for the sacred trust and for the rights of Member States under the Mandates, and the lack of capacity on the part of the League or the Council to invoke such protection, the right to implead the Mandatory Power before the Permanent Court was specially and expressly conferred on the Members of the League, evidently also because it was the most reliable procedure of ensuring protection by the Court, whatever might happen to or arise from the machinery of administrative supervision."[622]

In the proceedings the Court dismissed SA's objections to its jurisdiction finding specifically that Article 7 of the mandate as interpreted by the Court in the 1950 advisory opinion gave express jurisdiction to the Court and entitled the two states to bring the case before the ICJ[623]. Later, when the matter went to hearing on the merits in the *South West Africa Cases (Second Phase)* case[624], a differently constituted Court held that the two applicant states had no *locus standii* before the Court which was clearly contradictory to the finding in the preliminary stages. The Court concluded as follows:

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[622] Ibid 337-338.
[623] Ibid 334.
[624] 1966 ICJ Reports 6.

> "Accordingly, viewing the matter in the light of the relevant texts and instruments, and having regard to the structure of the League, within the framework of which the mandates system functioned, the Court considers that even in the time of the League, even as members of the League when that organization still existed, the Applicants did not, in their individual capacity as States, possess any separate self-contained right which they could assert, independently of, or additionally to, the right of the League, in the pursuit of its collective, institutional activity, to require the due performance of the Mandate in discharge of the "sacred trust". This right was vested exclusively in the League, and was exercised through its competent organs. Each member of the League could share in its collective, institutional exercise by the League, through their participation in the work of its organs, and to the extent that these organs themselves were empowered under the mandates system to act.[625]

An equally divided Court by the casting vote of its President thus rejected the claims brought by Ethiopia and Liberia without going into the merits of the cases[626]. This case did not settle the question of SWA as there was unhappiness in both in the UN and the developing states in particular. This culminated in the UN GA terminating SA's mandate over SWA through resolution 2145(XXI) of 27 October 1966. Subsequently the UN Security Council adopted resolution 276 of 1970 which declared the continued presence of South Africa in SWA (then called officially Namibia since 1968) to be illegal and called on member states to act accordingly. The SC then sought an opinion from the ICJ with a view to confirming the legality of its opinion. The Court gave its opinion in the *Legal Consequences for Sates of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* case[627]. In its opinion the Court cited with approval the various findings made in the 1950 opinion as well as in the 1962 *SWA* cases[628] and concluded that it had jurisdiction to give the opinion and that the Security Council resolution on the matter was properly given and thus

[625] Ibid 28-29 para 33.
[626] Ibid 51 para 100.
[627] ICJ Reports 1971 16.
[628] Ibid 28-30 32-33.

binding on member states of the UN[629]. As a consequence of its findings it followed that the illegal presence of SA in Namibia had legal consequences for SA itself and other states[630]. The opinion was repudiated by SA but approved by the SC and became the basic law of the UN on Namibia and it culminated in the SC adopting resolution 435 (1978) which paved the way for the independence of Namibia in 1990[631].

One wonders if this whole episode of the South West Africa cases before the ICJ would have happened if the UN Charter had created an avenue for UN organs to bring contentious proceedings before the ICJ. One of the organs of the UN could simply have brought proceedings before the Court to get an enforceable judgment against SA instead of going the indirect way of advisory opinions and proceedings through proxies. Perhaps this might explain why the EU and SADC and other international organizations chose to give *locus standii* to organs of the respective organizations before their courts or tribunals.

All members of the UN become, on admission to the UN, *ipso facto* parties to the Statute of the Court[632]. Non-members of the UN may become party to the Statute on conditions determined by the GA on the recommendation of the SC[633]. In the case of Switzerland, the GA and SC declared that it could become party to the ICJ Statute on condition that it accepted the provisions of the ICJ Statute and all the obligations of UN members under Article 94 of the Charter, i.e. undertaking to comply with the decision of the Court and to pay certain expenses of the Court[634].

The SC has resolved that states which are not party to both the Charter and the Statute of the ICJ may be party to proceedings before the Court if they have previously deposited with the Registrar of the Court a declaration accepting the jurisdiction of the Court and

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[629] Ibid 54.
[630] Ibid 544 paras 118 -119.
[631] See Dugard op cit 476.
[632] Article 93.1 UN Charter.
[633] Article 93.2 UN Charter, Article 35.2 ICJ Statute.
[634] General Assembly resolution 91 (I). Switzerland became a member of the UN in 2002.

agreeing to abide by the decision of the Court[635]. Albania filed such a declaration in the *Corfu Channel* case[636], while West Germany filed a similar declaration in the *North Sea Continental Shelf* cases[637]. However, problems arising from these restrictions are not likely to arise in the SADC context since SADC law specifically permits both states, SADC institutions and private persons to be party to any proceedings before the Tribunal.

3.4.2 Private persons

In so far as private persons are concerned, *prima facie* they have no right of access to the ICJ but may have their cases brought before it by way of diplomatic protection[638]. This principle which is recognized in international law, empowers a state to protect its nationals by taking up their claims against other states in international courts or tribunals[639]. Once a state does this, the claim becomes that of the state. The principle is based on the notions of state sovereignty and non-interference with the internal affairs of other states and it was elaborated by the PCIJ in *Mavrommatis Palestine Concessions* case[640] where the Court stated:

> "..by taking up the case of its subject and by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own rights, its rights to ensure, in the person of its subjects, respect for the rules of international law…."[641]

However, two requirements must be met before a claim can be admitted namely, that the person in respect of whom the claim is brought is a national of the claimant state, and that local remedies must have been exhausted. For present purposes our concern is mainly

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[635] Security Council resolution 9 (1946).
[636] ICJ Reports 1949 4.
[637] ICJ Reports, 1969 44.
[638] Rosenne op cit 83.
[639] Shaw op cit 721. Article 1 of the ILC's Draft Articles on Diplomatic Protection as adopted by the GA in 2002 provides that: "Diplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a state adopting in its own right the cause of its national in respect of an injury ti that national arising from an internationally wrongful act of another state."
[640] PCIJ, Series A no. 2 1924.
[641] Ibid 12.

with the latter requirement because Article 15.1 of the Protocol makes it a condition that before an action is brought before the Tribunal by a private person that person must have exhausted all available remedies or be unable to proceed under the domestic jurisdiction[642]. This provision is based on the international principle now being considered and the Tribunal will have to determine its application in claims brought by private persons against states. In doing so the Tribunal is expected to develop its own jurisprudence having regard to among other things, "…general principles and rules of public international law…"[643]. Such rules and principles, it is submitted, should include principles developed by the ICJ and other international tribunals (see section on sources of law for the ICJ). It is therefore necessary that I consider some principles which have been developed by the ICJ and other tribunals in relation to the doctrine of exhaustion of domestic remedies. It must be noted, however, that the Tribunal has had occasion to deal with the principle of exhaustion of domestic remedies in the *Campbell* case[644]. The Tribunal concluded that in the case the applicant had satisfied the requirements of exhaustion of domestic remedies because in its view Amendment No. 17 to the Zimbabwe Constitution had effectively ousted the jurisdiction of the Zimbabwean courts in matters relating to acquisition of agricultural land. According to the Tribunal, this position was subsequently confirmed by the Supreme Court of Zimbabwe itself and in the opinion of the Tribunal the ousting of the jurisdiction of the courts effectively meant there were no domestic remedies to exhaust. On the facts, this finding cannot be faulted, but an issue which may be cause for concern is the premises upon which the Tribunal based its reasoning. The Tribunal stated "…The concept of exhaustion of local remedies is not unique to the Protocol. It is also found in other regional international conventions…."[645] The Tribunal then cited the European Convention on Human Rights of 1950 and the African Charter on Human and Peoples' Rights in support of its submission that the principle under discussion is an established principle of international law. What the Tribunal did not explain is the basis on which it asserted that the principle

[642] The Protocol does not set out the circumstances under which a person will be unable to proceed under domestic law and this presumably is left to be deduced from established general principles of international law. Situations where a person may be unable to proceed could be where the claim becomes time-barred or where the person cannot prosecute the case because of ignorance of legal procedures.
[643] Article 21(b) Protocol.
[644] *Campbell* case op cit 19-23.
[645] Ibid 19.

is part of the *corpus* of international law. For example, is this a principle of customary international law which has become binding on states and if so, was it established that such principle is binding on the respondent state? Does the reference to the two conventions imply that they are binding on the respondent state, in particular the European Convention? Alternatively is the principle binding on SADC states by virtue of conventional law alone as the principle is stated in the Protocol? It may be argued that there was no need for the Tribunal to go further than stating the obvious, that exhaustion of local remedies is an established principle of international law, but for jurisprudential purposes it is my view that this was necessary. In developing its jurisprudence, as directed by the Protocol, the Tribunal ought to discuss the various aspects of international law -be it conventional or customary- with a view to ensuring that all the legal aspects of the disputes are adequately dealt with. This approach enhances the standing of the Tribunal as a tribunal of international law whose decisions carry weight by virtue of its ability thoroughly to analyse legal doctrines. It is not sufficient to simply state a legal principle and conclude that it is applicable to a case without indicating on what basis the principle applies.

3.4.3 Exhaustion of local remedies

It is a well established rule of customary international law that before international proceedings are instituted, the various remedies provided by the local state should have been exhausted[646]. This is to enable the particular state to have an opportunity to redress the wrong that has occurred there within its own legal order and to reduce the number of international claims that might be brought[647]. Some principles regarding the rule have been developed in the literature among them that a local remedy is not adequate or need not be resorted to if the national courts are unable to award compensation or damages, that a claimant is not required to exhaust justice if there is no justice to exhaust, and

[646] Shaw op cit 730, *Campbell* case and the *Elettronica Sicula SpA (ELSI)* ICJ Reports 1989 15 case discussed below.

[647] Shaw op cit 730. In the *Campbell* case the Tribunal mentioned at 20 that "..The rationale for exhaustion of local remedies is to enable local courts to first deal with the matter because they are well placed to deal with the legal issues involving national law before them. It also ensures that the international tribunal does not deal with cases which could easily have been disposed of by national courts."

where the injury is caused by executive act of the government which is not subject to the jurisdiction of national court, there is no remedy to exhaust[648]. The rule was illustrated in the *Ambatielos* arbitration[649] between Greece and the UK. Greece brought proceedings against the UK arising out of a contract signed by Ambatielos, which were rejected by the tribunal since the remedies available under English law had not been fully utilized. In particular, he had failed to call a vital witness and he had not appealed to the UK House of Lords from the decision of the Court of Appeal.

The principle applies only where effective local remedies[650] are available: it would not be sufficient to dismiss a claim merely because the person has not taken the matter on appeal, where the appeal would not have affected the outcome of the case. This point was stressed in the *Finnish Ships* arbitration[651] where ship-owners brought a claim before the Admiralty Transport Arbitration Board but did not appeal against the unfavourable decision. It was held that since the appeal could only be on points of law, which could not overturn the vital finding of fact that there had been a British requisition of ships involved, any appeal would have been ineffective. Thus the claims of the ship-owners could not be dismissed for non-exhaustion of local remedies.

The ICJ was seized with a case involving the principle in the *Interhandel* case[652]. In this case the United States had, in 1942, seized the American assets of a company owned by the Swiss firm Interhandel. The assets were seized on suspicion that Interhandel was under the control of a German enterprise (Germany being an enemy as the US had declared war on Germany). In 1958 after nine years of litigation in the US courts regarding the unblocking of the Swiss assets in the US, Switzerland took the matter to the ICJ on behalf of Interhandel. However, before the ICJ had reached a decision, the US Supreme Court readmitted Interhandel into the proceedings thus disposing of the Swiss argument that the company's suit had been finally rejected. The ICJ then dismissed the

[648] Starke *Introduction to International Law* (1989) 310-312.
[649] 12 RIAA (1956) 83, 23 ILR 306.
[650] In the *Campbell* case op cit 21 the Tribunal reiterated this point when it said "..where the municipal law does not offer any remedy or the remedy that is offered is ineffective, the individual is not required to exhaust the local remedies."
[651] 2RIAA (1934) 1479.
[652] ICJ Reports 1959 26.

Swiss government's claim on the basis that local remedies available had not been exhausted. This decision has been and can be criticised on the ground that litigation extending over almost ten years could hardly be described as constituting an "effective" remedy[653]. A question which may be posed here is what constitutes an effective remedy for the purposes of the principle? In determining whether the remedies are effective the Court looks at the nature of the remedies available, in particular, the delay in delivery of a decision, the circumstances surrounding the access to such a remedy, and the ultimate utility of the remedy to the person[654].

The difficulties which can be encountered in the application of the principle of exhaustion of local remedies can be illustrated in the ICJ case of *Elettronica Sicula SpA (ELSI)*[655]. This case concerned an action brought before a chamber of the Court by the US against Italy alleging injuries to the Italian interests of two US corporations. Italy claimed that local remedies had not been exhausted, while the US argued that the doctrine did not apply since the case was brought under the Treaty of Friendship, Commerce and Navigation, 1948 between the two states which provided for the submission of disputes relating to the treaty to the ICJ, with no mention of local remedies. The chamber of the ICJ, however, held that while the parties to an agreement could, if they so chose, dispense with the local remedies requirement in express terms, it "..finds itself unable to accept that an important principle of customary international law should be held tacitly to have been dispensed with, in the absence of any words making clear an intention to do so."[656]

The chamber also had to deal with the issue of mixed claims involving the interests of both nationals and the state. In that respect the US had argued that the doctrine did not apply to a request for declaratory judgment finding that that the treaty in question had been violated. The argument was based on the view that the doctrine does not apply in cases of direct injury to a state. The chamber was unable to find in the case a dispute over

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[653] Shaw op cit 731.
[654] *Campbell* case op cit 21.
[655] ICJ Reports 1989 15.
[656] Ibid 42.

alleged violation of the treaty resulting in direct injury to the US that was both distinct from and independent of the dispute with regard to the two US corporations. On the issue of whether in fact local remedies had not been exhausted by the two corporations in the case, the chamber acknowledged the difficulties presented in such cases when it stated:

> "It is never easy to decide, in a case where there has in fact been much resort to the municipal courts, whether local remedies have truly been "exhausted". But in this case Italy has not been able to satisfy the Chamber that there clearly remained some remedy which Raytheon and Machlett, independently of ELSI, and of ELSI's trustee in bankruptcy, ought to have pursued and exhausted…"[657]

Accordingly, the Court held that for the purposes of the principle it was sufficient if the essence of the claim had been brought before the competent tribunals of Italy.

The question of exhaustion of local remedies arose again in the *La Grand* case[658]. In that case Germany brought a case against the USA before the ICJ claiming that the USA had violated the rights of two La Grand brothers (both German nationals) who had been executed by US authorities for various crimes. Germany claimed that by failing to inform its nationals of their right to obtain consular assistance from German authorities as required by the Vienna Convention on Consular Relations of 1963, the US had violated its obligations under international law[659]. For its part, the US argued that Germany's right to exercise diplomatic protection was inadmissible due to failure by its nationals to exhaust local remedies. In this regard, the US maintained that the La Grands' counsel should have raised the issue of the right to consular assistance during the trial stages in the US courts and his failure to raise the matter was imputable to his clients and the US state could not be held accountable for the mistakes of lawyers[660]. In dismissing the US contentions the Court accepted the German contentions that remedies are required to be exhausted only when they are legally and practically available and that it was incumbent

[657] Ibid 47-48.
[658] ICJ Reports 2001 466 487-488.
[659] Ibid para 12.
[660] Ibid para 58.

upon the US to inform the La Grands about their rights to consular protection[661]. With regard to counsel's failure to raise the issue at the trial stage the Court stated:

> "However, the United States may not now rely before this Court on this fact in order to preclude the admissibility of Germany's first submission, as it was the United States itself which had failed to carry out its obligation under the Convention to inform the La Grand brothers."[662]

In another later case involving the US's alleged failure to inform prisoners of their right to consular assistance under the Vienna Convention on Consular Relations, the US raised the same defence of non-exhaustion of local remedies. In the *Avena and others* case[663], Mexico brought a case against the US on behalf of its nationals who had been convicted in the US courts and sentenced to death by execution. The US argued that local remedies had not been exhausted since the Mexican nationals had failed to raise the issue of non-compliance with the Vienna Convention in the US courts and in cases where judicial remedies had been exhausted, the Mexican nationals had not had recourse to the clemency process which was available to them. The Mexican government argued that it claimed on behalf of its nationals in exercise of the right to diplomatic protection, as well in its own right, contending that it had suffered directly and through its nationals as a result of the US's breach of its international obligations. The Court ruled that in such situations where a state claimed on behalf of its nationals as well as on its own behalf, the doctrine of exhaustion of local remedies did not apply. The Court said:

> "In these special circumstances of interdependence of the rights of the State and of individual rights, Mexico may, in submitting a claim in its own name, request the Court to rule on the violation of rights which it claims to have suffered both directly and through the violation of individual rights conferred on Mexican

[661] Ibid paras 59-60.
[662] Ibid para 60.
[663] ICJ Reports 2004 12 34-36.

> nationals under Article 36…….The duty to exhaust local remedies does not apply to such a request."[664]

The liberal approach adopted by the ICJ in the application of the principle of exhaustion of local remedies in these cases is commendable since it affords the private person easier access to international tribunals than is the case under traditional international law. The same approach can equally be adopted by the Tribunal to the great benefit of private persons seeking to litigate before it.

3.5 Jurisdiction of the ICJ[665]

The ICJ has no compulsory jurisdiction over contentious disputes of international law between states. It has jurisdiction only over states which consent to its jurisdiction and only in respect to those cases where consent has been given[666]. The element of consent which features in the jurisdiction of the ICJ distinguishes that Court from the Tribunal and the ECJ whose jurisdictional powers are compulsory. Member states of the EU and SADC have no option but to submit to the jurisdiction of the ECJ or Tribunal respectively once they become members of those organizations because the respective treaties governing their jurisdiction make the jurisdiction of the courts compulsory. To that extent, the experience of the ICJ in this area is not particularly useful, but for the sake of completeness the contentious jurisdiction of the ICJ will be briefly considered in this section. However, the advisory jurisdiction of the ICJ is of significance to the Tribunal as the Tribunal is conferred with similar jurisdiction by the SADC Treaty and Protocol. To that extent the advisory jurisdiction of the ICJ is considered with a view to identifying principles developed by that Court in exercising that jurisdiction which may be useful to the Tribunal.

Before considering the various ways in which the ICJ can establish jurisdiction in particular cases, I must consider the nature of disputes with which the Court is expected

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[664] Ibid para 40.
[665] Rosenne op cit Chap 4, Ayffinger op cit 127, Shaw op cit 966 and Dixon op cit 289.
[666] Rosenne op cit Chap 4.

to deal. We have noted that in the SADC context[667] questions might arise as to the type or nature of disputes which the Tribunal is expected to deal with, and that the reference to "acts of the institutions of the Community" in Article 14 of the Protocol is wide enough to encompass all manner of disputes, including those of a political nature. I contented that in cases of disputes having both legal and political dimensions, the Tribunal must exercise caution by confining itself to the legal aspects of the dispute lest it compromises its judicial character. It is therefore necessary to examine how the ICJ has dealt with disputes involving political and legal aspects. Both the UN Charter and the ICJ Statute provide some guidelines as to the nature of disputes with which the ICJ is expected to deal. Article 36.2 of the ICJ Statute confers jurisdiction on the ICJ in "legal disputes" concerning the application of the treaties and questions of international law among other matters. In the case of the ICJ's advisory opinion jurisdiction, Article 96 of the UN Charter empowers the ICJ to give an opinion on "any legal question". The PCIJ had occasion to describe the general nature of a dispute in the *Mavrommatis Palestine Concessions* case when it stated that a dispute arises when there is "a disagreement on a point of law or fact, a conflict of legal views or interests between two persons[668]. In later cases the ICJ had occasion to consider what constitutes a legal dispute. In the *Border and Transborder Armed Actions* case[669] the ICJ stated that a dispute is legal if it is "capable of being settled by the application of principles of international law." From the above cases it can be deduced that a legal dispute involves a disagreement over a question of fact or law such as in the *East Timor* case[670] where the Court reaffirming its previous case law noted that:

> **"**For the purpose of verifying the existence of a legal dispute in the present case, it is not relevant whether the "real dispute" is between Portugal and Indonesia rather than Portugal and Australia. Portugal has rightly or wrongly, formulated

[667] See Chap 1 section on resolution of disputes in SADC.
[668] *Mavrommatis Palestine Concessions (Jurisdiction)* case PCIJ Series A No. 2, 1924 11.
[669] *(Nicaragua v Honduras)(Jurisdiction and admissibility)* ICJ Reports 1988 69 91 para 52.
[670] ICJ Reports 1995 90.

> complaints of fact and law against Australia, which the latter denied. By virtue of this denial, there is a legal dispute."[671]

One other issue to be noted in the context of disputes before the ICJ concerns disputes having both political and legal dimensions. This issue has arisen in situations where the parties are negotiating[672] or other institutions such as the Security Council[673], the UN Secretary-General[674] or even regional organizations[675], are concurrently dealing with the same dispute. In all these situations the Court has made it clear that the mere fact that the dispute is being dealt with elsewhere does not prevent the Court from exercising its judicial function. In the case of the Security Council, the Court has noted that while the Security Council performs functions of a political nature, it (the Court) performs functions of a legal nature and that even though both organs perform separate functions,

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[671] Ibid 100 para 22.

[672] *Aegean Sea Continental Shelf (Greece v Turkey)* case ICJ Reports 1978 3 12 para 28 the Court said: "The Turkish Government's attitude might thus be interpreted as suggesting that the Court ought not to proceed with the case while the parties continue to negotiate and that the existence of active negotiations in progress constitutes an impediment to the Court's exercise of jurisdiction in the present case. The Court is unable to share this view. Negotiation and judicial settlement are enumerated together in Article 33 of the Charter of the United Nations as means for the peaceful settlement of disputes. The jurisprudence of the Court provides various examples of cases in which negotiations and recourse to judicial settlement have been pursued *pari passu.* Several cases, the most recent being that concerning the *Trial of Pakistani Prisoners of War (I. C.J. Reports 1973,* p. 347), show that judicial proceedings may be discontinued when such negotiations result in the settlement of the dispute. Consequently, the fact that negotiations are being actively pursued during the present proceedings is not, legally, any obstacle to the exercise by the Court of its judicial function."

[673] *US Diplomatic and Consular Staff in Tehran* Case *(USA v Iran)* ICJ Reports 1980 3 21 para 40. In that case the Court said: " In the preamble to this second resolution the Security Council expressly took into account the Court's Order of 15 December 1979 indicating provisional measures ; and it does not seem to have occurred to any member of the Council that there was or could be anything irregular in the simultaneous exercise of their respective functions by the Court and the Security Council. Nor is there in this any cause for surprise." Also in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility,* I.C.J. Reports 1984 392 433 para 93 the Court said: "The United States is thus arguing that the matter was essentially one for the Security Council since it concerned a complaint by Nicaragua involving the use of force. However, having regard to the *United States Diplomatic and Consular Staff in Tehran* case, the Court is of the view that the fact that a matter is before the Security Council should not prevent it being dealt with by the Court and that both proceedings could be pursued *pari pussu."*

[674] Ibid.

[675] *Land and maritime between Cameroon and Nigeria (Preliminary Objections*) (*Cameroon v Nigeria*) ICJ Reports 1998 275. Nigeria contented that the Court had no jurisdiction because the matter was being dealt with by the Lake Chad Commission which was a regional organization within the meaning of the UN Charter. The Court found that the Commission was not a regional organization contemplated in Chapter VII of the Charter and that even if this was so citing the *Nicaragua* case op cit 307 para 68 the Court concluded: "Whatever their nature, the existence of procedures for regional negotiation cannot prevent the Court from exercising the functions conferred upon it by the Charter and the Statute."

their functions are complementary with respect to the same issues. In the *Nicaragua (Merits)* case[676] the Court dealt with the issue of the justiciability of cases which are being dealt with simultaneously by other organs of the UN and stated:

> "…again according to the United States, that a claim of unlawful use of armed force is a matter committed by the United Nations Charter and by practice to the exclusive competence of other organs, in particular the Security Council; and that an "ongoing armed conflict" involving the use of armed force contrary to the Charter is one with which a court cannot deal effectively without overstepping proper judicial bounds. These arguments were examined by the Court in its Judgment of 26 November 1984, and rejected."[677].

This liberal approach of the ICJ could prove useful to the Tribunal when confronted with similar situations. The Tribunal should be at liberty to deal with the legal aspects of a dispute notwithstanding that another organ of SADC, such as the Summit is dealing with the political aspects of the dispute.

When considering the admissibility of a case, the Court tries to ensure that its judgment will have practical consequences, in the sense that it should affect a state's legal obligations or resolve some area of uncertainty or contention. The Court may make a declaratory judgment but only if this is consistent with the judicial nature of its function[678]. However, the ICJ will not decline jurisdiction merely because the dispute between the parties has 'political' or 'military' dimensions since the Court is not concerned with the political inspiration which may have led a state to choose pacific settlement of the dispute[679]. The lesson to be learned here is that if the Tribunal is to

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[676] *Nicaragua* case ICJ Reports 1986 14.
[677] Ibid 26 para 32.
[678] *Northern Cameroons (Cameroons v UK)* case ICJ Reports 1963 15.
[679] In *South-West Africa Cases (Preliminary objections)* ICJ Reports 1962 319 328 the Court noted "It is to be noted that this preliminary question really centres on the point as to the existence of a dispute between the Applicants and the Respondent, *irrespective of the nature and subject* of the dispute laid before the Court in the present case."

maintain its legitimacy as a judicial body it must act cautiously and, if necessary, decline to exercise jurisdiction where its integrity as a judicial body could be compromised.

3.5.1 Contentious jurisdiction[680]

Article 36.1 ICJ Statute provides that the ICJ has jurisdiction over "all cases which parties refer to it and all matters specially provided for in the Charter of the UN or in treaties and conventions in force." The key element with respect to this jurisdiction is that of consent of the states party to the proceedings. This is said to be a general principle of international law which has been at the centre of many disputes brought before the Court[681].

There is no specific provision in the Protocol covering a similar situation but the nearest to this provision is Article 14(c) of the Protocol which confers jurisdiction on the Tribunal over "all matters specifically provided for in any other agreement that states may conclude among themselves or within the community". It is submitted that Article 14(c) is wide enough to encompass some of the situations referred to in Article 36.1 of the ICJ Statute. These include cases referred to the ICJ through special agreement of the parties to the ICJ Statute or by virtue of "treaties and conventions in force" between the parties. In the SADC context it may be contented that the "other agreements" need not be limited to matters involving SADC law. It is therefore conceivable that such agreements may contain matters which fall outside the ambit of SADC law. The bottom line here seems to be the existence of an agreement between the parties which confers jurisdiction on the Tribunal. But, unlike in the ICJ where the issue of consent to the jurisdiction of the Court is critical, this need not be the case in the SADC context because where a party refers a dispute to the Tribunal "the consent of other parties to the dispute" is not

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[680] For a discussion of the contentious jurisdiction of the ICJ see Rosenne op cit 85-105, Dugard op cit 460-467 and Dixon op cit 282-300.

[681] *Nicaragua v Honduras(Jurisdiction and Admissibility)* ICJ Reports 1988 69 109 where Judge Oda in a separate opinion emphasized that the Court's jurisdiction 'must rest upon the free will of sovereign states, clearly and categorically expressed, to grant to the Court the competence to settle the dispute in question.'. See also *Application for the Interpretation and Revision of the Judgment* in the Tunisia/Libya Case ICJ Reports 1985 192 where the Court noted that it was 'a fundamental principle' that 'the consent of states parties to a dispute, is the basis of the Court's jurisdiction in contentious cases'.

required[682]. An issue which might arise in this regard is whether an agreement referred to in Article 14 of the Protocol actually confers jurisdiction on the Tribunal. This might turn on the question whether the states concerned actually consented to conferring jurisdiction on the Tribunal in the specific agreement, especially if the subject matter of the agreement falls outside the ambit of SADC law. In this regard the experience of the ICJ in applying the provisions of the Article 36 in relation to the issue of consent could prove valuable to the Tribunal.

The jurisdiction of the ICJ under Article 36 can conveniently be discussed under the following heads: matters referred by special agreement *(compromis*), and by the *forum protogatum,* matters provided for in the UN Charter, and a compromissory clause in a treaty. Article 36.2 makes provision for states to make declarations recognising the jurisdiction of the Court as between themselves and other states which have made similar declarations and this is discussed under the head: optional clause. Each of these basis of jurisdiction will be considered in turn.

*3.5.1.1 Cases which parties refer to the ICJ (special agreement or **compromis**)*

Article 36.1 confers jurisdiction on the ICJ in cases which the parties refer to it based on the consent of the parties. The consent to such reference can be given before the matter is brought before the Court or after proceedings have been instituted. The consent is usually given expressly in the form of a special agreement or *compromis* whereby the parties agree to refer the matter to the Court[683]. The *compromise,* which has its origins in the arbitral procedure explicitly states the subject of the dispute and parties to it. It has been used in several cases including in 1996 by Botswana and Namibia when the two countries signed a special agreement requesting the ICJ to resolve a dispute over the boundary of the Kasikili/Sedudu island and the legal status of the island[684]. It was also used in the

[682] Article 15.3 Protocol.
[683] See Article 40 ICJ Statute and discussion by Dixon op cit 292, Shaw op cit 963 and Dugard op cit 461.
[684] *Kasikili/Sedudu Island* Case ICJ Reports 1999 1045.

Minquiers and Ecrehos case[685] and the *Sovereignty over Pedra Branca* case [686] to mention just a few.

If one party unilaterally applies to the ICJ to hear a dispute and the respondent state conducts itself in such a manner that an agreement to accept jurisdiction may be implied, the Court may found jurisdiction on the doctrine of *forum prorogatum*[687]. In the *Corfu Channel* case[688] the consent of Albania was inferred from its conduct subsequent to the filing of a unilateral application by the UK. It wrote letters intimating acceptance of the court's jurisdiction. In the letters it protested its innocence for the sinking of the UK destroyers and accepted the jurisdiction of the court but later sought to withdraw its consent. Albania subsequently refused to comply with the adverse finding of the court to compensate UK for the loss of the ships and this has raised doubt on the wisdom of implying consent and since then jurisdiction has not been exercised on this basis[689].

Where the consent of a state is to be inferred from its conduct, the Court does not readily infer it. Consent has to be clearly present and not a mere technical creation. In the *Corfu Channel* case the UK sought to found jurisdiction of the Court on the basis of the recommendation of the SC that the dispute be referred to the Court which it was agreed was a binding decision with which members had to comply under Article 25 of the Charter. The UK argued that Albania was obliged to accept the court's jurisdiction irrespective of its consent. The Court did not deal with this point since it inferred consent from on other grounds stating that "The Court does not consider that it needs to express an opinion on this point, since, as will be pointed out, the letter of July 2nd, 1947,

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[685] *(France v UK)* ICJ Reports 1953 47.
[686] (*Malaysia v Singapore)* ICJ Reports 2008 2 5 The two countries referred the case to the ICJ by way of a special agreement between the two States, signed at Putrajaya on 6 February 2003 and having entered into force on 9 May 2003, the date of the exchange of instruments of ratification.
[687] Shaw op cit 974, Dugard op cit 461 and Dixon op cit 292.
[688] *Corfu Channel (Preliminary Objection)* ICJ Reports 1948 15 24 the Court found that "Even if (which is not admitted) there was any formal irregularity in the mode of the commencement of the present proceedings, this irregularity has been cured, because the Albanian Government by its letter of 2nd July, 1947, has waived any possible objection and has consented to the jurisdiction of the Court. An irregularity in the manner in which a case is introduced may be cured by subsequent events."
[689] Dugard op cit 462.

addressed by the Albanian Government to the Court, constitutes a voluntary acceptance of its jurisdiction[690].

3.3.1.2 Matters specially provided for in the UN Charter

Article 36.1 of the ICJ Statute has been said to be "otiose" and to have "no meaning"[691]. This is so because the provision was designed to "trigger" a jurisdiction in the Charter which was meant to be compulsory for all member states of the UN for certain types of dispute. Since that jurisdiction was never included in the final version of the Charter, the provision is now considered redundant. An attempt was made by the UK to invoke this head of jurisdiction in the *Corfu Channel* case[692]. In that case the Security Council had made a recommendation under Article 36.3 of the Charter that the parties to the dispute the UK and Albania should refer the dispute to ICJ because it was a legal dispute. It was accepted that this recommendation was binding under Article 25 of the Charter and on that basis the UK argued that Albania was obliged to accept the jurisdiction of the Court regardless of consent. The majority of the Court found it unnecessary to deal with the point but seven of the judges in a joint separate opinion rejected this argument stating that:

> "In particular having regard to..the terms used in Article 36, paragraph 3, of the Charter and to its object which is to remind the Security Council that legal disputes should normally be decided by judicial methods, it appears impossible to us to accept an interpretation according to which this article, without explicitly saying so, has introduced more or less surreptitiously, a new case of compulsory jurisdiction."[693]

[690] ICJ 1948 15, 26 and Dugard op cit 463.
[691] See Dixon op cit 292.
[692] ICJ Reports 1948 15.
[693] Ibid 31-32.

Again, in the *Aerial Incident of 10 August 1999* case [694], Pakistan attempted to rely on Article 36.1 arguing that the Court should found jurisdiction as against India. The Court rejected the contention on stating that:

> "The Court observes that the United Nations Charter contains no specific provision of itself conferring compulsory jurisdiction on the Court. In particular, there is no such provision in Articles 1, paragraph 1. 2, paragraphs 3 and 4, 33, 36, paragraph 3. and 92 of the Charter, relied on by Pakistan."[695]

No further case has been brought to the ICJ basing jurisdiction in this way.

3.5.1.3 Cases provided for in treaties or conventions in force (compromissory clause)

Many treaties, both bilateral and multilateral, contain a clause in which the parties accept the Court's jurisdiction for disputes which may arise in future relating to the treaty in question and this has been referred to as the compromissory clause[696]. Some of the clauses are 'compulsory' in the sense that if accepted by a state when a dispute arises concerning the treaty, the state is subject to the jurisdiction of the Court whether it likes it or not[697]. Some clauses in treaties are 'optional' in the sense that a state may be allowed to become party to the treaty without accepting the clause conferring jurisdiction on the ICJ[698]. Examples of such treaties include the 1948 Genocide Convention which the Court relied on to found jurisdiction in the *Application of the Genocide Convention (Bosnia v Yugoslavia)* case[699] and the United Nations Framework Convention on Climate Change of 1992[700]**.** Another example is the United Nations Convention Against Illicit Traffic in

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[694] (*Pakistan v India)* ICJ Reports 2000 12.
[695] Ibid para 48.
[696] Dugard op cit 462, Shaw op cit 976.
[697] See Dixon op cit 293.
[698] Ibid.
[699] (*Bosnia v Yugoslavia)(Provisional Measures)* ICJ Reports 1993 325. The Court found jurisdiction on Article 9 of the Convention.
[700] Article 14 of that Convention allows states when ratifying, accepting, approving or acceding to the Convention to make a written declaration accepting the compulsory jurisdiction of the ICJ over disputes arising from the Convention.

Narcotic Drugs and Psychotropic Substances, Article 32 of which provides for mediation and other dispute resolution options, but also states that "any such dispute which cannot be settled ... shall be referred, at the request of any one of the States Parties to the dispute, to the International Court of Justice for decision". Article 37 of the ICJ Statute provides that where a treaty provides for reference of a matter to the PCIJ that matter shall "as between the parties to the present Statute" be referred to the ICJ.

It was a compromissory of this type which gave the ICJ jurisdiction in the *South West Africa* cases in 1962[701]. The Mandate for South West Africa provided that if any dispute arose between South Africa and another member of the League of Nations resulting from the interpretation or application of the provisions of the mandate it was to be referred to the PCIJ[702]. The Court noted in that case that Article 37 of the ICJ Statute whose effect was to transfer compromissory clauses in treaties which gave jurisdiction to the PCIJ to the newly established ICJ had the effect of transferring the jurisdictional clause in Article 7 of the Mandate to the ICJ. The Court stated:

> "By the effect of these provisions the Respondent has bound itself since 7 November 1945, when the League of Nations and the Permanent Court were still in existence and when therefore Article 7 of the Mandate was also in full force, to accept the compulsory jurisdiction of this Court *in lieu* of that of the Permanent Court, to which it had originally agreed to submit under Article 7 of the Mandate.
>
> This transferred obligation was voluntarily assumed by the Respondent when joining the United Nations. There could be no question of lack of consent on the part of the Respondent as regards this transfer to this Court of the Respondent's obligation under Article 7 of the Mandate to submit to the compulsory jurisdiction of the Permanent Court."[703]

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[701] *South West Africa Cases (Preliminary Objections)* ICJ Reports 1962 319, Dugard op cit 462.
[702] Article 7.2 of the Mandate for South West Africa which was in the form of a resolution of the League of Nations.
[703] *SWA* cases op cit 335.

In the *US Diplomatic and Consular Staff in Tehran* case[704], the Court found jurisdiction on the basis of Article 1 of the Optional Protocols to the 1961 Vienna Conventions which provided for compulsory settlement of disputes by the ICJ and Iran was party to these protocols.

3.5.1.4 The Optional Clause

Article 36.2 of the ICJ Statute which has also been referred to as the 'optional clause' is the most important and controversial basis upon which the ICJ can found jurisdiction[705]. It is said to be "optional" simply because states party to the ICJ Statute "may" at any time "opt" to accept the compulsory jurisdiction of the ICJ. The discretionary "may" implies that a state may still become a party to the statute without accepting the article and in that sense the article is "optional". The provision has been said to be a compromise between states which favoured compulsory jurisdiction and those which opposed this[706].

During the period of the League of Nations and the first decade of the UN a majority of states made declarations under Article 36 ICJ Statute[707] and as of February 2010 seventy-nine of the parties to the ICJ Statute have made declarations[708]. The reason suggested for this decline is that, unlike the League of Nations, all members of the UN are automatically party to the Statute, whether they oppose judicial settlement of disputes or not[709].

The significance of the system has, however, been undermined by Article 36.3 of the Statute which allows declarations to be "made unconditionally or on condition of reciprocity" or for "a certain time". Several cases have surfaced before the ICJ

[704] ICJ Reports 1980 3 24.
[705] Dugard op cit 463, Shaw op cit 978 and Dixon op cit 294.
[706] Rosenne op cit 90, Dugard op cit 463.
[707] Dugard op cit 463.
[708] UN website http://treaties.un.org (visited 07/02/10).
[709] Dugard op cit 464.

concerning reservations made to the provision[710] but for purposes of this study these are not valuable since the jurisdiction of the Tribunal is compulsory and neither the SADC Treaty nor the Protocol contains an "optional" clause. However, for completeness sake I might just mention the types of reservation which states have made when accepting the compulsory jurisdiction of the ICJ.

Reservations have been made in respect to the subject matter which the ICJ may deal with. For example, a state may stipulate that the ICJ is precluded from adjudicating disputes concerning its land or maritime boundaries or matters relating to its armed forces. Some states have excluded the compulsory jurisdiction of the Court on matters falling within the "domestic jurisdiction" of the reserving state. It has been said that such reservations are strictly speaking not necessary since the ICJ only deals with matters of international as opposed to national law[711]. Some states have even gone further to exclude the jurisdiction of the Court on domestic matters as determined by the state concerned. The validity of these so-called "automatic" or "self-judging" reservations has been questioned in several quarters[712]. The main issue raised is that such clauses allow the state to be the sole judge of what amounts to domestic matters and in this sense taking away the power of the ICJ to determine the limits of its jurisdiction under Article 36.6 of the Statute[713]. However, the ICJ appears to have accepted the validity of such reservations when it upheld such a reservation in the *Norwegian Loans* case[714]. In that case the French declaration of acceptance contained a reservation excluding all 'differences relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic." This reservation was applied in the case thus allowing Norway to rely on it to defeat the jurisdiction of the Court.

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[710] Eg *Certain Norwegian Loans (France v Norway)* ICJ Reports 1957 9, *Rights of Passage over Indian Territory Case (Preliminary Objections)(Portugal v India)* ICJ Reports 1957 125, *Military and Paramilitary Activities in and against Nicaragua (Jurisdiction and Admissibility)(Nicaragua v USA)* ICJ Reports 1984 392 and *Land and Maritime between Cameroon and Nigeria (Preliminary Objections) (Cameroon v Nigeria)* ICJ 1998 275.

[711] Dixon op cit 296.

[712] Dixon op cit 296-297, Shaw op cit 981, Judge Lauterpacht regarded such reservations as unlawful and invalid in the *Norwegian Loans* Case and in the *Interhandel* Case *(Switzerland v USA)* ICJ Reports 1959 6 but these were minority opinions.

[713] Shaw op cit 981.

[714] (*France v Norway)* ICJ Reports 1957 9 The Court held that Norway could invoke France's reservation which excluded the Court's jurisdiction in certain matters.

Reservations have also been made *ratione temporis* that is dealing with the time frame in which disputes must arise to give jurisdiction to the Court[715]. A state may stipulate in its declaration that the ICJ has jurisdiction in respect of disputes before or after a particular date set out in the declaration. A state may also stipulate that that its acceptance of the Court's jurisdiction expires after a specified period or on notice of termination being given to the UN Secretary-General.

The other matter which has arisen in connection with reservations to declarations made under Article 36 is that of reciprocity[716]. Two related issues arise from the principle of reciprocity. The first is that the optional system applies only between states which have made a declaration under the article. Some states have even gone to the extent of excluding jurisdiction in relation to a state which joins jurisdiction for the purpose of a single dispute or whose declaration has been in force for less than a year[717].The second aspect of the principle means that where two declarations are different in terms, the jurisdiction of the Court exists to the extent that they coincide[718]. This principle of the "lowest common denominator" has been said to operate regarding reservations and this essentially means that a party may invoke a reservation which it has not expressed in its own declaration but which the other party declared.

In the *Norwegian Loans* case[719] between Norway and France, France had made a reservation excluding the Court's jurisdiction in domestic disputes as determined by France. Norway had not made such a narrow declaration but it was allowed to invoke the French declaration in order to defeat France's claim. In describing the basis of the Court's jurisdiction the Court noted:

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[715] Dixon op cit 296, Shaw op cit 981.
[716] Dixon op cit 298-299.
[717] In the *Legality of the Use of Force (Yugoslavia v UK)* ICJ Reports 1999 826 the UK's declaration excluded disputes with states whose declarations were less than one year old. Yugoslavia made a declaration on 26 April 1999 and instituted proceedings on 29 April 1999 and the Court found that the dispute was excluded by the UK's declaration. The Court noted 835: "..there can be no doubt that the conditions for the exclusion of the Court's jurisdiction provided for in the second part of subparagraph (iii) of the first paragraph of the United Kingdom's declaration are satisfied in this case."
[718] Rosenne op cit 90, Dixon op cit 298.
[719] ICJ Reports 1957 9.

> "since two unilateral declarations are involved, such jurisdiction is conferred upon the Court only to the extent to which the declarations coincide in conferring it. A comparison between the two declarations shows that the French declaration accepts the Court's jurisdiction within narrower limits than the Norwegian declaration; consequently, the common will of the parties, which is the basis of the Court's jurisdiction, exists within these narrower limits indicated by the French reservation."[720]

However, despite the Court's apparent endorsement of the so called "self-judging" reservations, there appears to be some academic and judicial opinion to the effect that these types of reservations are invalid[721]. In addition, a state which has made such a reservation can hardly bring a case before the court because the respondent state may rely on that state's (reserving state) reservation to exclude the jurisdiction of the Court.

Another type of reservation that undermines the system of compulsory jurisdiction is that which permits a state to withdraw its acceptance with immediate effect. In such case a state may use its acceptance as an applicant only and may withdraw its acceptance once it senses that it is likely to be summoned to the Court. However, once a matter is before the Court any subsequent expiry or withdrawal of acceptance will become invalid[722].

3.5.1.5 Third Parties

One issue which is a consequence of the principle of the need for consent before the ICJ can found jurisdiction, is the issue of third party states whose interests may be affected by the decision of the Court. The Court regards the issue of consent strictly and has refused to decide a matter where a third state's interests are closely linked to a dispute which

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[720] Ibid 23.
[721] See Dixon op cit 296 for the various viewpoints from minority judgments in the *Norwegian Loans* case, *Interhandel* case and *Nicaragua* case.
[722] See *Rights of Passage* case ICJ Reports 1957 125 discussed in section on general principles of law as a source of law for the ICJ.

involves states parties before the Court unless the third states also consents[723]. In the *East Timor* case[724] the ICJ refused to pronounce on a dispute between Portugal and Australia relating to Australia's recognition of Indonesia's jurisdiction over East Timor. This recognition was given by treaty between Australia and Indonesia relating to the continental shelf between Australia and East Timor. A ruling over the dispute would necessitate the Court deciding over the lawfulness of Indonesia's occupation of East Timor and Indonesia was not party to the dispute. Portugal's argument that the right to self-determination which is *erga omnes* existed in respect of the people of East Timor and that because of that Indonesia's consent to the jurisdiction of the Court was irrelevant was rejected by the Court which stated as follows:

> "However, the Court considers that the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*."[725]

But the Court has also stated that it cannot simply refuse to exercise jurisdiction merely because the rights of a third state may have to be considered at a later stage[726]. In such situations the state is protected by Article 59 of the ICJ Statute which provides that a decision of the Court has no binding force except between the parties to the dispute[727]. Third states may also derive protection from Article 62 of the ICJ Statute. Under that article, a state which considers that it "has an interest of a legal nature" which may be affected by the decision of the Court may request to be allowed to intervene in the matter.

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[723] *Monetary Gold Removed From Rome* Case ICJ Reports 1954 19. In that case the Court noted that it would decline jurisdiction where the interests of the third state "would form the very subject-matter of the decision".
[724] *(Portugal v Australia)* ICJ Reports 1995 90 102 para 28.
[725] Ibid 102 para 29.
[726] *Frontier Dispute Case(Burkina Faso v Mali)* ICJ Reports 1986 554.
[727] Ibid 577 para 46.

The ICJ has adopted a strict approach in allowing intervention and has done so in very few cases[728].

3.6 Advisory jurisdiction

Article 96 of the UN Charter authorizes the GA and SC of the UN to request the ICJ to give advisory opinion on any legal question. Under the same article other organs and specialized agencies of the UN authorized by the GA may also request for advisory opinions on legal questions arising within the scope of their activities. Under Article 65 of the ICJ Statute, the ICJ may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the UN.

This advisory opinion jurisdiction of the ICJ can be traced back to the PCIJ and its inclusion in the Statute has been described thus: "the introduction into the Covenant of the League of Nations of a discretionary power for the Permanent Court to render Advisory Opinions was thus a controversial innovation'[729]. This skepticism is based on the notion that the traditional judicial role of a court in most legal systems is that of adjudicating over concrete disputes which have arisen and not rendering advisory opinions to persons or bodies who may in future be potential litigants before the same court over the same matter. In line with this traditional thinking, the ICJ has tried by all means to maintain the judicial character of its function and has assimilated the principles governing its contentious jurisdiction to the advisory role. In some cases the Court has declined to give its opinion where it felt doing so would be contrary to its role as a judicial body. However, the advisory function can be distinguished from the contentious function in that in the latter case there are no parties, the decisions are not binding and the characters involved are not states but international organisations. The ICJ has developed a number of principles regarding its advisory jurisdiction which may afford guidelines to

[728] *Land, Island and Maritime Frontier Dispute* case 1990 ICJ Reports 92 Nicaragua was allowed to intervene in a case involving El Salvador and Honduras.
[729] Rosenne op cit 107.

the Tribunal when exercising its similar jurisdiction under Article 16.4 of the Treaty and Article 20 of the Protocol.

The ICJ will refuse to give opinion if giving the opinion would amount to deciding a dispute between states as this would amount to undermining the consent of the state to the jurisdiction of the ICJ. In the *Status of Eastern Carelia* case[730], the PCIJ refused to give opinion in a dispute between Finland and Russia over the status Eastern Carelia at the time when Russia was not a member of the League of Nations. The principle of declining to exercise jurisdiction because of the refusal of a party to take part in the proceedings which is said to be based on the principles of sovereignty and independence of states appears to have been undermined in subsequent cases[731]. In the *Interpretation of Peace Treaties* opinion[732] concerning the interpretation of peace treaties between Bulgaria, Hungary and Romania, the Court noted that while in contentious cases the jurisdiction of the Court is based on consent of the parties to the dispute this was not necessarily so in case of advisory opinions. This was so because opinions of the ICJ are not binding on anyone and were not given to particular states but to organs of the UN.

The *Carelia* case has been distinguished by the ICJ in other opinions including the *Namibia Opinion* case[733] and the *Western Sahara* case[734]. In the *Namibian Opinion* case the SC had sought the advisory opinion of the Court on the legal consequences for states of South Africa's continued presence in Namibia. In deciding to give the opinion the Court distinguished the *Carelia* case noting that:

> "However, that case *(Carelia*) is not relevant, as it differs from the present one. For instance one of the States (Russia) concerned in that case was not at the time a Member of the League of Nations and did not appear before the Permanent Court.

[730] PCIJ Reports Series B No 5 (1923) 27.
[731] See Shaw op cit 1001.
[732] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (*Advisory Opinion)* ICJ Reports 1950 65 71.
[733] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution* 276 (1970) ICJ Reports 1971 16.
[734] ICJ Reports 1975 12. For discussion of these cases see also Shaw op cit pg 1001-1002 and Dugard op cit 474.

> South Africa, as a Member of the United Nations, is bound by Article 96 of the Charter, which empowers the Security Council to request advisory opinions on any legal question. It has appeared before the Court, participated in both the written and oral proceedings and, while raising specific objections against the competence of the Court, has addressed itself to the merits of the question."[735]

Further, the request was not made for the purpose of settling a dispute but to assist the UN on its decisions over Namibia[736]. This principle was emphasized by the ICJ in the *Reservations to the Genocide Convention* opinion where the Court stated that the object of advisory opinions was "to guide the United Nations in respect of its actions." [737]

In the *Western Sahara* case[738] the Court gave an advisory opinion as regards the nature of the territory and the legal ties therewith of Morocco and Mauritania at the time of colonization, despite the objections of Spain, the administering power. The Court distinguished the case from the *East Carelia* dispute on a number of grounds[739]. In the *Carelia* case, Russia, which had objected to the Court's jurisdiction, was neither a member of the League of Nations (at the time) nor a party to the Statute of the PCIJ, whereas in the *Western Sahara* case, Spain was a member of the UN and thus party to the Statute of the ICJ[740]. It (Spain) had therefore given its consent in general to the exercise by the Court of its advisory jurisdiction. Another point in the *Western Sahara* case was that the dispute had arisen within the framework of the GA's decolonization proceedings and the object of the request for the advisory opinion by the GA was to obtain from the Court an opinion which could aid the GA in the decolonisation of the territory[741]. Thus, the opinion was intended to guide the UN in its functions. Spain's objection related to the restriction of the reference to the Court to the historical aspects of the Western Sahara question. In this regard, the ICJ emphasized that the central core of issue was not a

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[735] ICJ Reports 1971 16 23 para 31.
[736] Ibid para 32.
[737] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* ICJ Reports 1951 15 19.
[738] *Western Sahara (Advisory Opinion)* ICJ Reports 1975 12.
[739] Ibid paras 23-27.
[740] Ibid paras 30-32.
[741] Ibid para 39.

dispute between Spain and Morocco, but rather the nature of Moroccan and Mauritanian rights at the time of decolonization. Thus the rights of Spain as the administering power would not be affected by the Court's judgment which was aimed basically at assisting the GA to decolonize the territory[742].

Thus the ICJ, when faced with an objection that the rendering of an advisory opinion amounts to deciding a dispute between states which will not be party to the request for the opinion, is more inclined to give the opinion if doing so would assist the UN or other authorized organs in the performance of their functions. In the *Namibian Opinion* case the Court emphasized this point when it stated:

> "The fact that, in the course of its reasoning, and in order to answer the question submitted to it, the Court may have to pronounce on legal issues upon which radically divergent views exist between South Africa and the United Nations, does not convert the present case into a dispute nor bring it within the compass of Articles 82 and 83 of the Rules of Court..Differences of views among States on legal issues have existed in practically every advisory proceeding; if all were agreed, the need to resort to the Court for advice would not arise."[743]

The Tribunal may be inclined to take the same liberal approach since there appears to be no restrictions on the nature and manner in which it must give its opinions[744]. But caution may be necessary where the opinion sought touches on a matter which might be considered sensitive by some states. For example, controversy might be stirred if the Summit or the Council were to seek an opinion from the Tribunal, on say, the legality of the compulsory acquisition of land by the Zimbabwe government ostensibly for the purposes of resettlement of landless persons in that country. Whichever way the opinion of the Tribunal were to go, it is not impossible to imagine all sorts of claims and counterclaims based on state sovereignty and non-interference in internal affairs on the

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[742] Ibid paras 39-42.
[743] *Namibian Opinion* case op cit 24 para 34.
[744] Neither Article 16.4 Treaty nor Article 20 Protocol restricts the manner in which opinions may be given or the substance of the opinion. All that appears to be required is that the Summit or Council requests for such opinion.

one hand, and issues of human rights on the other hand, being raised. The Tribunal might compromise the credibility of its character as a judicial body were it to venture to give an opinion in such matters. The position may be different if the matter is raised in contentious proceedings where the state concerned will have an opportunity properly to present its case.

The ICJ will not give an opinion to a specialised agency of the UN for matters which fall outside the scope of its activities. Thus the Court refused to give the World Health Organisation an advisory opinion on the legality of nuclear weapons[745]. It held that before it could give an opinion three conditions had to be met namely; the specialized agency in question must be duly authorized by the GA to request the opinion, the opinion requested must be on a legal question, and that the question must be one arising within the scope of the activities of the requesting agency[746]. The Court found that according to its constitution and practice, the WHO was authorized to deal with the effects on health of the use of nuclear weapons and of other hazardous activities, and to take preventive measures with the aim of protecting the health of populations if the weapons are used or the activities are engaged in[747]. However, the question put to the Court did not concern the effects of the use of nuclear weapons on health, but rather the legality of the use of such weapons in the light of their health and environmental effects. Accordingly, the Court held that the advisory opinion requested did not arise within the scope of the activities of the WHO[748]. However, in a subsequent request for an opinion made during the same year on the same subject the Court gave an opinion to the GA dismissing suggestions that it was exceeding its judicial role in these terms:

> "Finally, it has been contended by some States that in answering the question posed, the Court would be going beyond its judicial role and would be taking upon itself a law-making capacity. It is clear that the Court cannot legislate, and, in the circumstances of the present case, it is not called upon to do so. Rather its

[745] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)* ICJ Reports 1996 66.
[746] Ibid 71-72 para 10.
[747] Ibid 76 para 21.
[748] Ibd 76-77 paras 21-22.

> task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable to the threat or use of nuclear weapons. The contention that the giving of an answer to the question posed would require the Court to legislate is based on a supposition that the present *corpus juris* is devoid of relevant rules in this matter. The Court could not accede to this argument; it states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend."[749]

An advisory opinion is not binding thus it is not enforceable under Article 94 of the UN Charter. The advisory opinion, however, does have some legal consequences because in practice if the opinion is given to the GA or the SC, and is subsequently adopted by the relevant organ, it then becomes the law that guides the UN on the matter. A case in point is the *South West Africa* cases[750]. In 1950 the ICJ gave an opinion on the international status of South West Africa at the request of the GA in which it rejected South Africa's claim that the mandate for South West Africa had ceased with the demise of the League of Nations[751]. The Court held that the mandate continued in force and that South Africa was obliged to account to the UN for its administration of the territory. Two subsequent opinions[752] were sought from the ICJ which were ignored by South Africa, ultimately leading to the contentious proceedings being brought by Liberia and Ethiopia between 1962-1966 which were unsuccessful[753]. In 1971 the SC then sought an opinion from the ICJ on the matter and the opinion given confirmed the illegality of South Africa's occupation of Namibia. The opinion was approved by the SC and thus became the basic UN law on Namibia leading to the adoption of resolution 435 (1978) which eventually culminated in the independence of Namibia.

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[749] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* ICJ Reports 1996 226 237 para 18.
[750] These cases are discussed in the section of parties (access to the ICJ) *supra*.
[751] ICJ Reports 1950 128.
[752] ICJ Reports 1955 67 and 1956 23.
[753] ICJ Reports 1962 319 and 1966 6.

The rendering of opinions by the ICJ on sensitive matters has not been without controversy as is illustrated by the 2004 advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[754]. The ICJ held that the wall or barrier being built by Israel, the occupying power in the Occupied Palestinian Territory, was contrary to international law; that Israel is under an obligation to cease forthwith the construction of the wall and to dismantle sections of the wall that already had been built; that Israel is under an obligation to make reparation for all damage caused by the construction of the wall; that all states are obliged to withhold recognition of the illegal situation resulting from the construction of the wall; and that the UN should consider what further action is required to bring an end the illegal situation resulting from the construction of the wall[755].The ICJ also dealt with other legal issues such as that Israel is obliged to comply with international human rights conventions to which it is party in its treatment of the people of Palestine. The opinion has been accepted by the GA[756], but has also been subject to serious criticism[757]. According to Dugard, the opinion of the ICJ in the *Wall* case could, like that in the Namibia case, be used by the political organs of the UN as the basic law on the Israel/ Palestine conflict[758].

The function of the ICJ in this respect can be contrasted to that of the Tribunal. Article 16.5 of the Treaty provides that the Tribunal shall give advisory opinions on such matters as the Summit or the Council may refer to it. Article 20 of the Protocol reiterates the same provision in the same words. These two provisions appear to be mandatory when consideration is given to the use of the word "shall" as opposed to the word "may" used

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[754] ICJ Reports 2004 136.

[755] Ibid 197-200 paras 147-159. For a discussion of this case See Dugard op cit 477 and Dixon op cit 304-305. The latter likens the opinion in the case to a judgment in a contentious case.

[756] ES-10/15 (2 August 2004) The adoption of the Opinion by the GA was not without difficulty. Six states including Israel itself and the US voted against the resolution while 10 other states abstained. 150 states voted in favour of adopting the Opinion with the EU having initially agreed to abstain from voting but agreeing to vote after some amendments pointing out the rights and duty of states to take actions in conformity with international law in order to protect the life of citizens (implicitly recognising the right for a state to defend itself against terrorism) were introduced. For a commentary on the Opinion see Bernardez, C P "Some Comments Concerning the Advisory Opinion of the International Court of Justice on the Construction of Wall in the Occupied Palestinian Territory: The Performance of the European Union". *Institute of European Studies* (2005) 2005 (University of California, Berkey) http://repositories.edlib.org (visited 12/12/09).

[757] For a critique of the opinion see Agora "ICJ Advisory Opinion on the Construction of a Wall in the Occupied Palestinian Territory" (2005) 99 *AJIL* 1-141.

[758] Dugard op cit 477.

in Article 65 of the Statute of the ICJ. It follows that once requested to give an opinion in terms of the Treaty and the Protocol, the Tribunal is obliged to give that opinion and this appears to place the Tribunal in an invidious position.

In addition, the provisions of the Treaty and the Protocol appear to be broader in ambit than Article 65 of the ICJ Statute in that they refer to the giving of opinion on "such matters" as may be referred to the Tribunal without restricting the opinion to 'legal questions' as with the ICJ. However, not much should be read into this different terminology when regard is had to Article 15 of the Protocol which, it is submitted, regulates the overall jurisdiction of the Tribunal. This article, as we have noted, defines the basis of the jurisdiction and limits it to the matters specified therein, i.e. matters pertaining to the Treaty and subsidiary legal instruments made thereunder.

However, it may be argued that the jurisdictional power of the Tribunal under Article 20 of the Protocol is separate from and independent of the general jurisdiction under Article 15 of the Protocol. This would then mean that when rendering an advisory opinion to the Summit or the Council, the Tribunal need not be restricted to the matters specified in Article 15 of the Protocol, and can thus give an opinion on any matter, including political matters or matters falling outside the ambit of the Treaty. It is submitted that this interpretation cannot be correct, and that the opinion sought should be on matters within the ambit of the Treaty which essentially are legal matters hence the principles developed by the ICJ in this regard should be pertinent. The Tribunal should also be cautious when exercising its advisory jurisdiction as the experience of the ICJ shows that states may refuse to comply with the opinion, as with South Africa in the Namibia cases.

The other issue is that neither the Treaty nor the Protocol states what the legal effect of an advisory opinion is on states, institutions or private persons, i.e. whether it is legally binding or not on those to whom it is addressed. This omission in the Treaty and Protocol appears to exist with regard to the advisory opinions of the ICJ: neither the Charter nor the ICJ Statute mentions what the effect of an opinion is. We have noted that in the UN

context the opinions of the ICJ are regarded as non-binding and the same should be the case with opinions of the Tribunal.

3.7 Interim measures of protection

The ICJ has an inherent jurisdiction to take action as is necessary to ensure that its exercise of its jurisdiction over the merits of a dispute will not be frustrated, if and when such jurisdiction is established. Article 41 of the ICJ Statute provides that, before deciding the question of jurisdiction, the Court has the power "to indicate…any provisional measures which ought to be taken to preserve the respective rights of either party"[759]. Since these measures may be indicated before any disputed question of jurisdiction is settled, this may be regarded as a form of involvement in the affairs of states that does not depend on their consent, apart from the original signature to the Statute. This could be the reason why interim measures of protection are indicated rather than ordered, and this terminology was thought to ensure that they were not legally binding in the ordinary sense. However, it now appears from the *La Grand* case[760], that failure to take action to preserve the *status quo* of a dispute as 'indicated' by provisional measures, itself amounts to a breach of an international obligation. Thus, in that case, the United States failed to observe the provisional measures indicated against it and the Court found that it was thereby in breach of the obligations incumbent on it[761]. In other words, the 'indication' of provisional measures can involve a binding obligation to comply with the Court's order and this makes them effectively legally binding.

One difficult question in this regard is the degree to which the Court must be satisfied of at least a prospect of jurisdiction over the merits of the dispute before interim measures can be indicated. In several cases involving requests for interim measures the Court has

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[759] In the *US Diplomatic and Consular Staff in Tehran* ICJ Reports 1979 19 para 36 the Court declared that the purpose of provisional measures is to preserve "rights which are the subject of the dispute in judicial proceedings."

[760] *(Germany v United States)* ICJ Reports 2001 466 502-503 para 102. The Court after reviewing the applicable principles in relation to interim measures concluded: "The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article."

[761] Ibid paras 109-110.

down the test to be applied when deciding a request for interim measures. In the *Nuclear Test (Interim Protection)* cases[762], the Court ruled that it "ought not to indicate such measures unless the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded" and this was reaffirmed in the *Armed Activities on the Territory of the Congo* case[763], where such measures were not indicated because a *prima facie* case for jurisdiction could not be made out. Similarly, in the *US Diplomatic and Consular Staff in Tehran* case[764] the Court in indicating provisional measures against Iran noted that "on the request for provisional measures in the present case the Court ought to indicate such measures only if the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded." By way of contrast, in the *Passage Through The Great Belt* case[765], the Court was faced with a Danish argument (upon which it did not adjudicate directly) that no measures should be indicated because, although there may have been a *prima facie* case for jurisdiction (which in fact was not disputed), it was essential that Finland was able to substantiate the rights it claimed to a point where a reasonable prospect of success in the main case existed and that there was no *prima facie* evidence that Finland had any rights which needed to be protected[766]. The Court noted that Finland's right to passage over the Great Belt was not challenged but what was in dispute was the nature and extent of that right. The Court then placed on record assurances given by Denmark that no physical obstruction of the Channel would occur before the end of 1994 by which time the proceedings on the merits would be completed and found that "it has not been shown that the right claimed will be infringed by construction work during the pendency of the proceedings"[767]. It then refused to indicate provisional measures and advised the parties to enter into negotiations to find an amicable solution to the dispute[768].

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[762] *(Australia v France)* ICJ Reports 1973 99 101 para 13.
[763] *(New application:2002) (Democratic Republic of the Congo v Rwanda)* ICJ Reports 2002 219 241 para 58. The Court found in the case it did not have the *prima facie* jurisdiction to indicate the provisional measures requested by the DRC therefore it rejected the DRC's application 249-250 paras 89 and 94.
[764] ICJ Reports 1979 7 13 para 15.
[765] (*Finland v Denmark) Provisional Measure*s ICJ Reports 1991 12.
[766] Ibid 17 para 21.
[767] Ibid 18 para 27.
[768] Ibid 20.

What these cases illustrate is that the when considering a request for interim measures the Court is sometimes faced with a delicate situation. It has to decide on competing interests: those of the state seeking the measures and those of the state which may have to be hamstrung by such measures when it may not always be clear that the Court has jurisdiction in the matter. The situation has been compounded further by the fact that interim measures, according to the *La Grand* case, are effectively legally binding, hence there will always be political pressure on the party against whom they are issued to conform to the Court's indication. In some cases this pressure has not always proved effective since the indication of interim measures has been ignored in a number of cases, such as the *US Diplomatic and Consular Staff in Tehran* case[769] and *Nicaragua v USA* case[770]. In the latter case the Court noted in its judgment on the merits, the failure by the US to abide by the order of 18 of 10 May 1984 indicating provisional measures against the US[771]. It reiterated the terms of the earlier order and then set out the obligations of states when provisional measures have been indicated as follows:

> "When the Court finds that the situation requires that measures of this kind should be taken, it is incumbent on each party to take the Court's indications seriously into account, and not to direct its conduct solely by reference to what it believes to be its rights. Particularly is this so in a situation of armed conflict where no reparation can efface the results of conduct which the Court may rule to have been contrary to international law."[772]

The Court is not bound to order interim measures and there are several examples where it has refused a request. The Court refused to indicate interim measures in the *Lockerbie* case[773] where Libya requested the Court to indicate provisional measures prohibiting the UK from coercing or compelling Libya to surrender two of its nationals who were wanted

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[769] ICJ Reports 1979 7. In the case Iran initially refused to comply with Court's order indicating provisional measures because it did not accept the Court's finding on jurisdiction.
[770] ICJ Reports 1984 169.
[771] ICJ Reports 1986 14 144 para 287.
[772] Ibid paras 288-289.
[773] *Case Concerning Questions in Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v UK)* ICJ Reports 1992 3 15. By order dated 14 April 1992, the Court after hearing the parties declined to indicate provisional measures.

for prosecution in Scotland following the destruction of a Pan Am aircraft over Lockerbie. Libya argued that the threats by the UK to compel Libya to surrender the two men were in violation of its right to try the men under the Montreal Protocol[774]. At the time the request was made to the ICJ the matter had been referred to the Security Council and a resolution had been passed calling on Libya to comply with the UK's demands to hand over the men. After the oral hearings on Libya's request for interim measures, the SC adopted a further resolution repeating the demands and imposing measures against Libya pursuant to Chapter VII of the UN Charter. The Court did not consider the questions of it having *prima facie* jurisdiction on the merits of the case and the rights which Libya wanted to be protected under the Montreal Convention. Instead, the Court relied on the SC resolution holding that both Libya and the UK were bound by it and that "in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention."[775]

Again, in the *Arbitral Award* case[776] a request for indication of provisional measures by Guinea-Bissau against Senegal was rejected by the ICJ. In that case Guinea-Bissau brought the application requesting the Court to indicate measures restraining Senegal from exercising acts of sovereignty in disputed maritime zones which acts could prejudge the judgment of the Court on the merits and the maritime delimitation to be effected by the parties subsequently[777]. However, in its main application to the Court, Guinea-Bissau challenged the validity of an arbitral award which had been given by an arbitral tribunal established by the two states. The Court firstly reiterated the principle that the Court before indicating the measures need not "finally satisfy itself that it has jurisdiction on the merits of the case, yet it ought not to indicate such measures unless the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded."[778] It then noted that *prima facie* it had jurisdiction under

[774] This is the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation signed at Montreal on 21 September 1971.
[775] *Lockerbie* case op cit 15 para 39.
[776] *Case Concerning the Arbitral Award of 31 July 1989* ICJ Reports 1990 64.
[777] Ibid 67.
[778] Ibid 68-69 para 20.

Article 36.2 of the ICJ Statute and that Guinea-Bissau had acknowledged that the dispute before the Court was not the dispute over maritime delimitation brought before the arbitral tribunal but a "new dispute" relating to the validity of the arbitral award[779]. Thus the Court was being requested to indicate measures on the existence and validity of the award but not on the respective rights of the parties in the maritime areas in question. In the case, the Court held that "the alleged rights sought to be made the subject of provisional measures are not the subject of the proceedings before the Court on the merits of the case" and that "any such measures could not be subsumed by the Court's judgment on the merits"[780].

The Court unanimously refused to indicate interim measures in the *Great Belt* case because there was no factual possibility that Denmark would infringe any of Finland's rights before the merits of the case could be heard[781]. Nevertheless, the Court reaffirmed the general principle that any action taken by a state while a dispute was pending before the Court which affected the merits of that dispute, could not improve its legal position *vis-a –vis* the other party[782]. Interim measures were also refused in the *Congo Case* (new application 2002) primarily because of a lack of *prima facie* jurisdiction[783].

In so far as the Tribunal is concerned, we have seen that the Tribunal is empowered by Article 28 of the Protocol to grant interim relief and that it has already done so. The issue of establishing a *prima facie* case as to jurisdiction of the court which has occupied the ICJ for some time is not likely to arise in the Tribunal because, unlike the ICJ, the Tribunal has compulsory jurisdiction over SADC states. What are likely to arise are issues of whether the application for interim relief has merit in that it satisfies the criteria set in the *Campbell* case[784].

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[779] Ibid 69 paras 22 and 25.
[780] Ibid 70 para 26.
[781] *Great Belt* case op cit 20 para 38.
[782] Ibid 19 para 32.
[783] *Congo* case op cit 249 para 89.
[784] See Chap 2 section of jurisdiction of the Tribunal: interim measures.

3.8 Source of law for the ICJ[785]

We have noted that the Article 21 of the Protocol sets out the sources of law for the Tribunal and these include the Treaty, the Protocol, other protocols and all subsidiary instruments adopted by SADC or any of its institutions or organs[786]. We also noted that the Tribunal is enjoined by the same article of the Protocol to "develop its own ..jurisprudence having regard to applicable treaties, general principles and rules of public international law and principles of the law of states." The reference to "general principles and rules of public international law"[787] was intended to widen the scope of the various sources of international law which the Tribunal could resort to and this could include all the sources which the ICJ is directed to apply under Article 38 of its Statute and other recognized sources of international law. In this section I therefore discuss the sources of law prescribed by the ICJ Statute which are treaties, international custom, general principles of law recognized by civilized nations, judicial decisions and writings of publicists. I also discuss other possible sources of international law which have been resorted to by the ICJ and by other international tribunals and which could be applied by the Tribunal under the rubric of general principles and rules of public international law. These include resolutions of international organizations, unilateral acts by states and the so-called "soft law". The objective is to explore the various possible sources of international law which the Tribunal can apply in developing its own jurisprudence under Article 21 of the Protocol.

Article 38.1 of the Statute of the ICJ provides:

The Court, whose function is the to decide in accordance with international law such disputes as are submitted to it shall apply,

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[785] See generally Shaw op cit Chap 3, Brownlie op cit Chap 1, Dugard op cit Chap 3, Mendelson, M "The International Court of Justice and the Sources of International Law" in *Fifty Years of the International Court of Justice* (eds Lowe and Fitzmaurice) (1996) 63, Dixon op cit Chap 3, Janis: *An Introduction to International law* (2003) Chap 3 and Dixon and McCorquodale *Cases and Materials on International Law* (2003) Chap 4.

[786] See Chap 2 section on sources of law for the Tribunal.

[787] Article 21(b) of the Protocol.

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting parties

(b) international custom, as evidence of a general practice accepted as law;

(c) the general principles of law recognized by civilized nations;

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Although Article 38.1 of the ICJ Statute refers to the functions of the ICJ as to decide disputes in accordance with international law, this article is generally accepted as covering the main possible sources of international law but it is not exhaustive, there are other possible sources of international law[788]. The sources enumerated here are almost identical to those enumerated for the Court of Justice of the AU[789] but differ from those of the Tribunal. The Tribunal is required by Article 21 Protocol to apply the Treaty, Protocols and other subsidiary legal instruments, as well as to develop its own Community jurisdiction having regard to applicable treaties, general principles and rules of public international law and any rules and principles of the law of states. The reference to "treaties" in this article can be equated to the reference to "international conventions" in Article 38 of the ICJ Statute hence the experience of the ICJ in the application of treaties as a source of law will prove valuable.

Secondly, the reference in Article 21 of the Protocol to "general principles and rules of public international law" could be equated to the reference in Article 38 of the ICJ Statute to customary law and general principles of law of civilized nations which must be applied by the ICJ. This provision could be equally applicable to the references to judicial decisions and academic writers in Article 38.1(d) of the ICJ Statute, including decisions

[788] Shaw op cit 66, Brownlie, op cit 3, Dixon and McCorquodale op cit 24 and Dixon op cit 23-24.
[789] See Article 20 of the Protocol of the Court of Justice also discussed in Chap 2.

of ICJ itself which, it is submitted, form part of the general *corpus* of principles of public international law. With regard to the reference to "rules and principles of the law of states" in the Protocol, again this source can be compared to the reference in Article 38 of the ICJ Statute to general principles of law which has been held by the ICJ on several occasions to include general principles of law common to legal systems generally[790]. Once again, the experience of the ICJ in this regard could be useful for the Tribunal. With these observations in mind I can now consider how the ICJ has dealt with each source of law enumerated in Article 38.1 of the ICJ Statute.

3.8.1 International conventions (treaties)

A treaty has been described as a written agreement between states or between states and international organisations operating in international law[791]. The rules relating to capacity, procedure, interpretation and termination of treaties are found in the Vienna Convention on the Law of Treaties 1969[792] and the Vienna Convention on the Law of Treaties between States and International Organisations and between International Organisations 1986. Treaties can be multilateral or bilateral and may also be classified as legislative (law-making), contractual or constitutional[793]. Treaties are considered to be the most important source of international law since they are based on the express consent of states[794] and as we have noted the SADC legal system itself is based on treaty law.

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[790] For example, in the *Advisory Opinion on the International Status of South West Africa Case* ICJ Reports 1950 128 Judge McNair noted that "International law has recruited and continues to recruit many of its rules and institutions from private systems." In case of the Tribunal the Protocol is more specific than Article 38, Article 21(b) specifically refers to "principles of law of States" which removes the ambiguity created by Article 38.1(c). See also section on 'general principles of law' *infra*.

[791] Dugard op cit 8 and Shaw op cit 88. Article 2.1(a) of the Vienna Convention on the Law of Treaties 1969 defines a treaty as "..an international agreement concluded between States in written form governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;".

[792] Of the SADC member states only the Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mozambique and Zambia have ratified the Vienna Convention 1969 source UN website www.un.org/ (visited 30/11/09).

[793] Dugard op cit 28.

[794] Customary international law discussed in the next section though supposedly based on the consent of states is in reality invariably based on tacit or implied consent of states as opposed to express consent of states.

Before examining how the ICJ has contributed to the development of treaty law in general, it is necessary to draw a distinction which is often made in literature between substantive treaty law and the "formal" law of treaties. The former deals with the contents of the law contained in a treaty, i.e. what the treaty is all about, for example, diplomatic relations, while the latter deals with the rules governing matters such as the validity, interpretation, suspension, termination, etc of treaties. The ICJ has contributed to both aspects of the law on treaties as explained above, but for purposes of this study, I consider the work of the ICJ in relation mainly to the latter case, i.e. rules governing procedural and structural matters such as the interpretation of treaties, etc.

I must also note two fundamental principles of treaty law in general. The first principle is that treaties are binding upon the parties to them and must be performed in good faith. This principle, also termed *pacta sunt servanda,* is arguably the oldest principle of international law and is enshrined in Article 26 of the 1969 Vienna Convention[795]. The second principle on treaty law is that of consent, treaties are based on consent of the parties and this consent can be expressed in various ways such as by signature, exchange of instruments constituting the treaty, ratification, acceptance, approval or accession[796]. There are other matters relating to treaties such as reservations to treaties, entry into force, application of treaties, amendment and modification of treaties, invalidity, termination and suspension of treaties, which are all dealt with in the 1969 Convention, but for purposes of this study the main concern is the interpretation of treaties. This is so because one of the major tasks of the Tribunal will be to interpret the Treaty, protocols and other applicable treaties.

In the interpretation of treaties three traditional approaches are used, namely, the textual (objective/positivist) approach which centres on the text itself and emphasizes an analysis of the words used; the subjective approach which looks to the intention of the parties to the agreement as a solution to ambiguous provisions in the treaty; and the teleological approach which adopts a wider perspective than the other two and emphasizes the objects

[795] Shaw op cit 811-12.
[796] See Article 11 of the Vienna Convention 1969.

and purpose of the treaty as the most important background against which the meaning of any provision in a treaty should be measured[797]. This last approach underlines the role of the judge or arbitrator who will be called upon to define the object and purpose of the treaty and it may attract criticism because it encourages judicial law-making.

In practice, however, any interpretation of a treaty will have to take into account all aspects of the treaty from the words used, to the intention of the parties and the aims of the treaty[798].

The ICJ has approved all these methods of treaty interpretation at one point or another, in particular the teleological approach which was applied in the *South West Africa* cases in the advisory opinions given between 1950 and 1971 and in its judgment on the preliminary objections in the 1962[799]. In the 1950 opinion[800] the Court was faced with the South African contention that the mandate for SWA had lapsed with the dissolution of the League of Nations. The Court distinguished the concept of 'mandate' as understood in some national legal systems, from the regime created by the Covenant of the League and the mandate for SWA itself by looking at the nature of the mandate as well as its object. The Court said:

> "The League was not, as alleged by that Government, a "mandator" in the sense in which this term is used in the national law of certain States. It had only assumed an international function of supervision and control. The "Mandate" had only the name in common with the several notions of mandate in national law. The object

[797] See Shaw op cit 858, Dugard op cit 417, Fitzmaurice "The Law and Practice of the International Court of Justice: Treaty Interpretation and Certain other Treaty points" (1951) 28 *BYBIL* 1 cited by Dixon and McCorquodale op cit 84. See also O'Brien *International Law* (2001) 345-349 for a detailed discussion of the principles applied in the interpretation of treaties. O'Brien (345-347) lists the literal or textual approach, the actual intention of the parties, the teleological approach (object or purpose) and the linked principles of effectiveness and consistency. He also considers the approach to be taken in interpreting human rights treaties and the use of extrinsic evidence in interpreting treaties.

[798] Article 31 Vienna Convention confirms this principle and it reads in part "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."

[799] For a discussion of these cases see section on "parties (access to the court)" *supra* and Dugard op cit 418-420.

[800] *SWA* opinion 1950 op cit.

> of the Mandate regulated by international rules far exceeded that of contractual relations regulated by national law. The Mandate was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object-a sacred trust of civilization. It is therefore not possible to draw any conclusion by analogy from the notions of mandate in national law or from any other legal conception of that law. The international rules regulating the Mandate constituted an international status for the Territory recognized by al1 the Members of the League of Nations, including the Union of South Africa."[801]

In the same opinion the Court had to deal with the question whether the mandated territories had been placed under the new trusteeship system of the UN in the absence of express provisions in the UN Charter that such transfer had taken place or that the UN has assumed rights or obligations under the mandate. The Court then applied both the subjective and teleological approaches by considering the general scheme of the mandate system and the supposed intentions of its authors. The Court explained as follows:

> "The obligation incumbent upon a mandatory State to accept international supervision and to submit reports is an important part of the Mandates System. When the authors of the Covenant created this system, they considered that the effective performance of the sacred trust of civilization by the mandatory Powers required that the administration of mandated territories should be subject to international supervision. The authors of the Charter had in mind the same necessity when they organized an International Trusteeship System..
>
> ...These general considerations are confirmed by Article 80, paragraph 1, of the Charter, as this clause has been interpreted above. It purports to safeguard, not only the rights of States, but also the rights of the peoples of mandated territories until Trusteeship Agreements are concluded. The purpose must have been to provide a real protection for those rights; but no such rights of the peoples could

[801] Ibid 132.

> be effectively safeguarded without international supervision and a duty to render reports to a supervisory organ."[802]

Thus the ICJ managed to interpret ambiguities in the Mandate for South West Africa, the Covenant of the League of Nations and the UN Charter in such a way as to give effect to the principal object of the mandates system - the "well-being and development" of the peoples of mandated territories which was to form a "sacred trust of civilization." Thus the ICJ was able to find that, despite the absence of express provision in the UN Charter, the UN had succeeded the League of Nations on matters over the mandate for South West Africa and hence could lawfully terminate South Africa's mandate to administer the territory.

Articles 31 to 33 of the Vienna Convention 1969 embody elements of all the aspects of the three approaches to treaty interpretation. Article 31.1 provides that a treaty shall be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The word "context" has been held to include the preamble and annexes as well as any documents made by the parties in connection with the treaty[803]. Where provisions of a treaty need confirmation or determination since the meaning is ambiguous or obscure, or leads to a manifestly absurd or unreasonable result recourse may be had to supplementary means of interpretation under Article 32 of the Vienna Convention. Supplementary means include preparatory works and the circumstances of the treaty's conclusion.

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[802] Ibid 136-137.

[803] Article 31.2 Vienna Convention and the *US Nationals in Morrocco (France v USA)* ICJ Reports 1952 176. The case concerned a French law which imposed customs duties on imports from the USA made by USA citizens who were resident in the then French protectorate of Morocco. This law, according to the USA, was allegedly in contravention of various treaties between France and the USA which included the General Act of the International Conference of Algeciras of 1906. In considering the matter, the Court took into account the preamble to the 1906 General Act. It found that the principle of economic liberty without any inequality which was one of the principles contained in the preamble was already established between the parties before it was inserted into the preamble to the General Act therefore it was binding on the parties. (183-184) The Court further stated: "On the other hand, the interpretation of the provisions of the Act must take into account its purposes, which are set forth in the Preamble in the following words.." (197).

In the *Interpretation of Peace Treaties* case[804] the Court was asked whether the UN Secretary-General could appoint the third member of the Treaty Commission on the request of one side to the dispute where the other side (Bulgaria, Hungary and Romania) refused to appoint its representative[805]. The Court emphasized that the natural and ordinary meaning of the terms of the Peace Treaties with the three states concerned, envisaged the appointment of the third member after the other two had been nominated[806]. The breach of a treaty obligation could be remedied by creating a commission which was not the kind envisaged by the Peace Treaties. The Court refused to use the principle of effectiveness[807] to attribute to the Peace Treaties a meaning which was contrary to the letter and spirit of those treaties[808]. However, the principle of effectiveness has been used in order to give effect to provisions in accordance with the intention of the parties. This principle was arguably applied by the ICJ in the *Reparation for Injuries* opinion[809].The ICJ has adapted a more flexible approach in the interpretation of a treaty establishing the constitution of an international organization. In the *Reparation for Injuries* opinion the ICJ was faced with the legal question:

> "In the event of an agent of the UN in the performance of his duties suffering injury in circumstances involving the responsibility of a state, has the UN, as an organization, the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of damage caused (a) to the UN, (b) to the victim or to persons entitled through him?"[810]

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[804] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase)* ICJ Reports 1950 221. See O' Brein op cit 346.
[805] The question was contained in the GA resolution requesting the opinion ibid 224.
[806] Ibid 227.
[807] This principle is often expressed in the maxim "*ut res magis valeat quam pereat"* which literally means it is better for a thing to have effect than to be made void. See Dixon op cit 71-72 and O'Brein op cit 346.
[808] The Court stated: "*Ut res magis valeat quam pereat,* often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which, as stated above, would be contrary to their letter and spirit." Ibid 229.
[809] *Reparation for Injuries Suffered in the Service of the United Nations* ICJ Rep 1949 174.
[810] Ibid 175.

The Court answered both questions in the affirmative, holding that lack of international personality of the UN would lead to the inefficient functioning of the organization[811]. It held that since the UN is tasked with such important functions it can only function properly when it has some legal personality and this includes the capacity to bring claims such as the one before the Court. This decision illustrates that the proposition that international organizations' legal personality is contained in the enabling treaty is not absolute. They have implied powers necessary for the execution of their duties.

In the *La Grand* case[812] the ICJ applied the teleological approach and Article 33.4 of the Vienna Convention in interpreting Article 41 of the ICJ Statute. The Court noted that there were divergences in meaning between the French and English versions of Article 41. The Court then resorted to Article 33.4 of the Vienna Convention which it acknowledged reflected customary international law. The article provides that **"**when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted." The Court then interpreted Article 41 of the ICJ Statute as follows:

> "The object and purpose of the Statute is to enable the Court to fulfill the functions provided for therein, and, in particular, the basic function of judicial settlement of international disputes by binding decisions in accordance with Article 59 of the Statute. The context in which Article 41 has been seen within the Statute is to prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved. It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on necessity, when the circumstances call for it, to safeguard, and avoid prejudice to, the rights of the parties as determined by the

[811] Ibid 184.
[812] *(Germany v USA)* ICJ Reports 2001 466 501-503.

> final judgment of the Court. The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article."[813]

It can be safely concluded that in cases of ambiguous provisions in treaties or where the meaning cannot be readily ascertained from the wording or context of the provision, the ICJ has resorted to the purposive or teleological method of interpretation of treaties. This raises the question of judicial law-making under the guise of interpretation of treaty provisions but we shall see that other tribunals such as the ECJ have used this method of interpretation generously to give beneficial effect to the objects of treaty provisions. The Tribunal can equally do the same when confronted with ambiguous or unclear provisions of the Treaty or protocols.

The ICJ has also contributed to development of the law in the area of reservations to treaties. Historically, a reservation could was only possible when all the parties to the treaty had consented. This approach was followed by the League of Nations and the effect was that if one state objected to the reservation then the reserving state could not become a party to the treaty.

However, this restrictive approach was rejected by the ICJ in its advisory opinion in the *Reservations to the Genocide Convention* opinion[814]. The convention contained no reservation clause, thus some states made reservations to its application. The Court held that a state which has made a reservation which has been objected to by one or more states to the treaty, but not by others, could be regarded as party to the treaty if the reservation was compatible with the object and purpose of the treaty. This approach by

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[813] Ibid 103.

[814] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) ICJ Reports 1951 15 21-22. After noting the traditional concept that no reservation was valid unless it was accepted by all the contracting parties without exception that Court stated: "In this state of international practice, it could certainly not be inferred from the absence of an article providing for reservations in a multilateral convention that the contracting states are prohibited from making reservations." It noted that the absence of such a provision could be explained by the desire of the states to discourage multiple reservations to the convention and set out the factors which must be considered when determining whether reservations may be allowed to a treaty which is silent on reservations.

the Court has been criticized it being said that the decision was a retrograde step, sacrificing the integrity of treaties in a vain quest for universality[815]. In the SADC context, the issue of reservations is not likely to arise in relation to the Treaty since SADC membership itself is not subject to reservations[816]. This in my view implies that a member state may not make a reservation to the Treaty. However, the question of reservations may arise in relation to SADC protocols because some specifically exclude reservations while some are silent on the matter[817]. Those which are silent might attract problems of interpretation and the principles set out by the ICJ could useful guidelines for the Tribunal.

These few cases of the ICJ cited illustrate the various ways in which the ICJ has approached the interpretation of treaties, which is, in essence a combination of the three traditional ways of treaty interpretation as complemented by the Vienna Convention on the Law of Treaties. We shall see that the ECJ basically employs similar methods of interpreting EU law[818], and so there seems to be no way in which the Tribunal could do otherwise. The ICJ has also made a major contribution to the complex issue of the relationship between treaty and custom but this is dealt with in the next subsection on custom.

3.8.2 International Custom[819]

3.8.2.1 Introduction

[815] Mendelson op cit 66.
[816] Article 8.5 of the Treaty.
[817] For example, of 17 Protocols considered in the study only three namely those on transport, communications and meteorology, fisheries and legal affairs have provisions which prohibit reservations. The rest are silent on the matter.
[818] Chapter 4 *infra* section on methods of interpretation used by the ECJ.
[819] Article 38 uses the term "international custom" some commentators including the ICJ use the term "general international law" while others use the term 'customary law'. In this section in the main I use the term 'customary law' as common terminology to refer to all these various terms and expressions. See Janis op cit Chap 3, Dixon op cit 30-40, Dugard op cit 29-38 and Brownlie op cit 4-11 for a detailed discussion of custom as a source of international law. See also Akehurst 'Custom as Source of International law' (1974-75) 47 *BYBIL* 53 cited by Dixon and R McCorquodale op cit 28 and the International Law Association's London Conference (2000) Final Report of the Committee on Formation of Customary (General) International Law which deals with the various aspects of the formation of customary international law. The report can be accessed at the Association's website http://www.ila-hq.org. (visited 06/02/10).

Article 38.1 of the ICJ Statute which sets out the sources of law which the ICJ must apply in deciding disputes lists international custom in second place. The concept of custom as a source of international law has itself generated a vast amount of academic debate as well as receiving judicial attention by the ICJ and other international tribunals. Of particular importance is the work of the International Law Association(ILA)[820] as reflected in the Final Report (Final Report) of its Committee on Formation of Customary (General) International Law (Committee) adopted at the London Conference (2000). The Final Report contains an introductory section and five parts dealing with definitions, the objective element: state practice, the subjective element, the role of treaties in the formation of customary law and the role of UN resolutions in the formation of customary law. The Committee calls its report the Statement of Principles applicable to the formation of general customary international law and in this section I shall refer to the "Final Report" or the "Statement" and where appropriate I shall refer to the pages of the Final Report or "sections" (of which there are 33) of the Statement of Principles.

In this section I discuss the nature of customary international law, the elements of customary law, the relationship between customary law and treaty, as well as the relationship between customary law and resolutions of international organizations. The discussion on international custom ends with a conclusion offering options for the Tribunal. The relevant parts of the Final Report of the Committee are discussed since the report represents a major attempt to systematically present a concise statement of the principles governing the illusive concept of customary law. Some of the difficulties associated with attempts to come up with a "code" so to speak of these principles have been identified in academic writings as well as in the Final Report[821]. These include the imprecision of the concept of customary law itself due to the informal manner in which it is created, the absence of a central legislative body which makes law for the international community, conflict of legal ideology with divergent views between positivists and

[820] The ILA is a private institution founded in Brussels in 1873. It is established by its Constitution which was adopted in 2004 and its main objective among others is the study, clarification and development of international law, both public and private.
[821] Final Report 2-3.

naturalists, political implications involving states not wishing to be subjected to non-consensual rules originating from bodies such as the UN and the lack of authoritative rulings on all aspects of customary law[822].

3.8.2.2 Nature of customary law

The idea of custom as a source of law dates back to the ancient times of Roman law[823]. The early writers on international law such as Grotius, Vattel and Brierly have also had occasion to grapple with custom as a source of international law. In recent times Janis has stated that the basic idea behind custom as a source of international law is that "states in and by their international practice may implicitly consent to the creation and application of international legal rules"[824]. To this end custom constitutes implied consent by states to be bound by international law which according to the positivist theory of law is the only basis for states to be bound by law. So much can be said for and against these views but the basic fact is that the problems which have been encountered when using custom as a source of law stem from the very reason that it is often difficult to say whether a custom has come into being or not because of its informal evolution. Despite the shortcomings custom has been and remains a major source of law for states. Its advantage is that unlike most treaties, once established customary law is general in application in that it binds all states subject to the rules relating to particular customary law and the persistent objector. The ICJ has dealt with the notion of customary law on various occasions and so has the Committee critically articulated the rules relating to the formation of customary law in modern times.

The ICJ has acknowledged the principle that a custom can be general in that it applies to all states of the world, or particular in that it applies to some states within a particular

[822] The decisions of the ICJ on the subject have not been systematic as they tend to be *ad hoc* dealing with the precise issue before it and the same can be said for other tribunals.
[823] Janis op cit 41-44 and see also Hahlo and Kahn *The South African Legal System and its Background* (1968) 302-303 for discussion on custom as a source of law in the South African and Roman-Dutch contexts.
[824] Janis op cit 42-43.

region or locality or when it applies to a limited number of states[825]. This particular form of customary law is discussed in the section on the objective element of customary law which is state practice.

Another issue which arises in the general context of the nature of customary law is the question of the so-called "persistent objector" which is also discussed in the section on the objective element of customary law which is state practice.

Customary international law has been described as the law which evolved from the practice or customs of states[826]. As in national societies, custom plays an important role where there is no legislature to codify the law, or judiciary to clarify the law. In the *Gulf of Maine* case[827] the ICJ described custom as being ideally suited to the development of general principles. In that regard it stated:

> "In a matter of this kind, international law - and in this respect the Chamber has logically to refer primarily to customary international law -can of its nature only provide a few basic legal principles, which lay down guidelines to be followed with a view to an essential objective. It cannot also be expected to specify the equitable criteria to be applied or the practical, often technical, methods to be used for attaining that objective - which remain simply criteria and methods even where they are also, in a different sense, called "principles"."[828]

The Court continued with its thesis that customary law, as opposed the treaty law, is best suited to develop general rules and principles of international law and remarked further:

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[825] In the *Asylum* case 1950 ICJ Reports 266 276-7 the ICJ stated that "The party which relies on custom…..must prove that this custom is established in such a manner that it has become binding on the other party…that the rule invoked..is in accordance with a constant and uniform usage practiced by the States in question…." The Court on the facts that the local custom alleged to exist among the Latin American states on diplomatic asylum had not been established.
[826] Dixon op cit, 30.
[827] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v USA)* ICJ Reports 1984 246.
[828] Ibid para 81.

> "So far as conventions are concerned, only "general conventions", including, *inter alia*, the conventions codifying the law of the sea to which the two States are parties, can be considered. This is not merely because no particular conventions bearing on the matter at issue (apart from the Special Agreement of 29 March 1979) are in force between the Parties to the present dispute, but mainly because it is in codifying conventions that principles and rules of general application can be identified."[829]

For a customary rule of international law to be binding on a state, that state must have consented to be bound by that customary rule. Consent to be bound by customary international law is inferred from the conduct of states but difficulties of proof arise. For a custom to qualify as a rule there must be two elements namely the physical element commonly referred to as state practice and the physiological elements known as the *opinio juris*. These elements have largely been developed by the ICJ through its case law the main ones being the *North Sea Continental Shelf* cases[830], the *Lotus* case[831] the *Anglo-Norwegian Fisheries* case[832] and the *Nicaragua* case[833], and other cases which are discussed in the ensuing sections. These criteria are, however, not absolute and vary with the subject matter in dispute, but the ICJ itself has not been clear on whether both elements must be present in all cases for the customary law to exist[834]. For instance, in the *North Sea Continental Shelf* cases the ICJ made this often quoted stated on the elements of custom:

> "Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it. The need for

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[829] Ibid para 83. The Court continued to expand on the theory see paras 111, 114 and 191.
[830] *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark and Netherlands)* ICJ Reports 1969 3.
[831] *Lotus Case (France v Turkey)* PICJ, Series A No. 10 (1927) PCIJ 28.
[832] *Fisheries (Anglo-Norwegian Fisheries) Case (UK v Norway)* ICJ Reports 1951 116.
[833] *Military and Paramilitary Activities in and against Nicaragua (Merits)(Nicaragua v USA)* ICJ Reports 1986 14.
[834] See Shaw op cit 71 for discussion on whether both elements of custom must exist.

> such a belief, i.e. the existence of a *subjective element*, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty."(my emphasis)[835].

In the *Nicaragua* case the ICJ appears to suggest that the *opinio juris* may be deduced from the attitude of states towards a UN General Assembly resolution[836] and that subsequent state practice could lead to the creation of binding customary law[837]. The *Nicaragua* case also appears to have treated certain General Assembly resolutions as evidence of both elements of customary law an approach which has received criticism[838]. However, in the South African case *S v Petane*[839], the court took the view that the physical element of customary must precede the *opinio juris* before a rule of customary law can come into existence. The court stated:

> "This statement as such is certainly correct. It does not follow, however, that such resolutions or declarations can be classified as *usus* giving rise to custom. They may constitute *opinio juris* which, if expressed with respect to a rule sufficiently delineated through *usus*, may create a customary rule of international law.

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[835] *North Sea* cases op cit 44 para 77.

[836] *Nicaragua* case op cit 99-100 where the Court noted that the relevant " *opinio juris* may, though with due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions..".

[837] *Nicaragua* case op cit 184 where the Court stated: "…but in the field of customary international law, the shared view of the parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice."

[838] See Mendelson op cit 68 where the writer questions the ICJ's approach and describes it as "a form of double counting, taken to its logical extreme it could mean that, if there was no countervailing material, a majority vote in the General Assembly could satisfy all of the requirements for the formation of customary law..".

[839] *S v Petane* 1988(3) SA 51(C) a division of the High Court of South Africa found that the practice of granting prisoner of war status to members of the national liberation movements such a the Umkhonto we Sizwe did not amount to state practice despite the fact that there was in existence a 1977 Additional Protocol to the Geneva Conventions of 1949 which allowed such status and 60 states minus South African had signed the Protocol at the time.

> ..But, if there is no preceding *usus*, such a declaration cannot give birth to a customary rule, unless, of course, the declaration itself is treated as *usus* at the same time. However, it takes too wide a stretching of the concept of *usus* to arrive at the latter conclusion. As was rightly observed, 'repeated announcements at best develop the custom or usage of making such pronouncements."[840]

The Committee does however provide a working definition[841] of customary law which incorporates both the physical element which it terms "objective" and psychological element which it terms "subjective". The Committee's working definition is discussed in the relevant parts of this section but a few general remarks can be made at this point. The definition refers to the "creation" and "sustenance" of a rule of customary law which is a departure from the traditional elements of customary law which refer to the 'creation' or 'existence' of customary law. The definition further captures the notion of "practice of States" which must be constant and uniform and this is in line with current judicial and academic thinking on the subject. However, the practice of other subjects of international also counts towards the creation and sustenance of customary law and this appears to be a departure from traditional theory although both judicial and academic opinion acknowledge the role which these other subjects play in the formation of customary law[842]. The definition connects the state practice to activity impinging in their international legal relations. This is a new concept which is meant to distinguish practice which is merely habitual or a matter of comity from that which is intended to create legal relations. The definition appears to do away with the idea of *opinio juris* but instead

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[840] Ibid 58.

[841] The working is contained in Part 1 of the Final report and reads as follows: Section 1"(i) Subject to the Sections which follow, a rule of customary international law is one which is created and sustained by the constant and uniform practice of States and other subjects of international law in or impinging upon their international legal relations, in circumstances which give rise to a legitimate expectation of similar conduct in the future.
(ii) If a sufficiently extensive and representative number of States participate in such a practice in a consistent manner, the resulting rule is one of "general customary international law". Subject to Section 15, such a rule is binding on all States.
(iii) Where a rule of general customary international law exists, for any particular State to be bound by that rule it is not necessary to prove either that State's consent to it or its belief in the rule's obligatory or (as the case may be) permissive character."

[842] Dixon op cit 31, Shaw op cit 78-19.

refers to the practice of states being engaged in "..in circumstances which give rise to a legitimate expectation of similar conduct in the future"[843]. This last aspect could create practical problems since it is not always easy to determine when a legitimate expectation could arise. The next part of the definition then expands on the degree of participation which is required to establish a rule of general customary law. We shall see that the general approach of the Committee to the question of the two elements of customary law is that it is not always necessary to prove the "subjective" element in all cases[844]. It must be pointed out, however, that the statements of principles contained in the report are not legally binding hence international tribunals including the Tribunal are free to disregard or to take into account all or part of the recommendations of the Committee when confronted with matters of customary law. It is therefore necessary to consider the traditional elements and characteristics of customary law alongside the principles propounded by the Committee. I now consider the ingredients of customary law which broadly speaking consist of the objective (state practice) and subjective (psychological) elements along the same lines taken by the Committee.

3.8.2.3 Objective Element: State practice

The ICJ has not provided a formal definition of what constitutes state practice but guidelines can be discerned from literature and the case law of the Court[845]. State practice includes actual activities of states (acts or omissions), statements made in respect of concrete situations or disputes, treaties, decisions of national and international courts, statements by government officials or state comments to draft reports of the International Law Commission[846]. Some states publish their official reports on their practices e.g. South African Yearbook of International Law. However, some doubts have been expressed as to whether verbal acts can amount to state practice but these contrary views appear to be unsupported by authority and the Committee accordingly took the view that

[843] Section 1(i) of the Statement.
[844] Sections 16 and 18 of the Statement.
[845] See Dixon op cit 31, Dugard op cit 29 and Akehurst op cit para 1.
[846] Dugard op cit 31, Shaw op cit 77-80, Brownlie op cit 5 and Mendelson op cit 69.

such acts constitute state practice [847]. The Committee's opinion is that both physical and verbal acts constitute state practice and what counts most is the weight to be attached to each type of conduct[848]. The Committee further suggests that for the acts to count as state practice they must be made public and that in appropriate circumstances omissions can count as state practice[849]. The Committee also deals with the identity of the "State" for purposes of identifying state practice. In this regard the Committee sets out a number of important principles which could be useful to international tribunals such as the Tribunal[850]. While these principles are not authoritative, they reflect current practices and the Committee supports them by accompanying them with well researched and thought out commentaries and authorities. Any international tribunal worth its name would be wise to have regard to them.

3.8.2.4 Uniformity of state practice

In the *Asylum Case* the ICJ found that for the practice to qualify as customary law it must constitute 'constant and uniform usage'[851]. There must be consistency and uniform usage of the custom. In that case Colombia claimed that a regional or local custom existed which entitled it to demand the safe transit from its embassy in Lima, Peru of a political opponent of the Peru Government. In support of the claim Colombia referred to treaties on the subject some of which Peru was not party and a number of instances in which

[847] See Final Report 13 where the Committee cites the dictum in Judge Read's dissenting opinion in the *Anglo-Norwegian Fisheries* case op cit 191 to this effect: "The only convincing evidence of State practice is to be found in seizures, where the coastal State asserts its sovereignty over the waters in question by arresting a foreign ship and by maintaining its position in the course of diplomatic negotiations and international arbitration."

[848] Sections 3 and 4 of the Statement.

[849] Sections 5 and 6 of the Statement.

[850] Final Report op cit 16-19 Sections 7-11 7. Acts of individuals, corporations, etc. do not count as State practice, unless carried out on behalf of the State or adopted ("ratified") by it.

8. The activities of territorial governmental entities within a State which do not enjoy separate international legal personality do not as such normally constitute State practice, unless carried out on behalf of the State or adopted ("ratified") by it.

9. The practice of the executive, legislative and judicial organs of the State is to be considered, according to the circumstances, as State practice.

10. Although international courts and tribunals ultimately derive their authority from States, it is not appropriate to regard their decisions as a form of State practice.

11. The practice of intergovernmental organizations in their own right is a form of "State practice".

[851] *Asylum* case op cit 276-7.

diplomatic asylum was granted to political refugees by some Latin American states. The ICJ was not convinced by this evidence and it stated as follows:

> "The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law..."[852].

The requirement for uniformity or consistency of state practice is not absolute or total, it is sufficient that it is substantial. In the *Anglo-Norwegian Fisheries* case concerning the Norwegian method of delimiting the territorial sea through straight base-lines which was challenged by the UK the Court said:

> "The Court considers that too much importance need not be attached to the few uncertainties or contradictions, real or apparent, which the United Kingdom Government claims to have discovered in Norwegian practice. They may be easily understood in the light of the variety of the facts and conditions prevailing in the long period which has elapsed since 1812, and are not such as to modify the conclusions reached by the Court."[853]

These observations relate to inconsistencies within a state's own conduct which has been termed "internal" by the Committee and if they are minor they could be disregarded as was the case with the alleged Norwegian inconsistent practices.

[852] Ibid 276-7.
[853] *Anglo-Norwegian Fisheries* case op cit 138.

In relation to inconsistent practice by third states, i.e. states whose conduct is not in issue, the Court affirmed the principles stated in the *Asylum* case and remarked as follows in the *Anglo-Norwegian Fisheries* case:

> "although a ten-mile closing line had been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law."[854]

According to Dixon, it can be deduced from the *Anglo-Norwegian Fisheries* case that the degree of consistency required varies according to the subject matter of the rule in dispute[855]. Thus, if the alleged custom requires a positive duty (such as a duty to prosecute or extradite a terrorist found in a state's jurisdiction) on a state a greater degree of consistency might be required than where a passive duty (such as allowing innocent passage to a ship in a state's territorial waters) is involved[856]. The same may be the case where the rule in question has the character of *jus cogens* (discussed in the next subsections) almost universal consistent state practice may be needed. In the *Nicaragua* case the Court found the mere existence of some state practice which appears to be contrary to an existing or emerging rule of customary law should not be taken *per se* to be destructive of the rule[857]. Contrary state practice should, in the absence of evidence of intent, be presumed to be action in breach of the rule rather than destructive of it.

Based on the principles propounded by the ICJ, the Committee developed the principle that for "state practice to create a rule of customary law, it must be virtually uniform,

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[854] Ibid 131.
[855] Dixon op cit 31-32.
[856] Ibid.
[857] *Nicaragua* case op cit para 186 The Court stated: "It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule."

both internally and collectively"[858]. The Committee goes further to describe what internal and collective uniformity entails. Internal uniformity means that each state whose behaviour is being considered should have acted in the same way on virtually all of the occasions on which it engaged in the practice in question. Collective uniformity means that different states must not have engaged in substantially different conduct, some doing one thing and some another. The use of the term "virtually" a synonym for "almost" implies that the behaviour of the state concerned need not be the same on all the occasions on which the act is engaged in. This is in line with dicta in the *Anglo-Norwegian Fisheries* quoted above and is reinforced by the finding of the ICJ in the *Nicaragua Case* that inconsistencies between what a state says is the law and what it does are not fatal so long as it does not try to justify its conduct by asserting that it is legally justified[859]. In case of collective uniformity, the reference to states not engaging in "substantially different conduct" is meant to accommodate minor departures from the conduct which should not be taken as fatal. Thus in the *Continental Shelf* case[860] the ICJ held that the exclusive economic zone claimed by states had become part of customary law even though the various proclamations claiming it were not identical but sufficiently similar. It is submitted that the principles developed by the Committee in relation to uniformity or consistency of state practice are valid as they reflect actual judicial opinion on the subject and should be used as guidelines by international tribunals including the Tribunal.

3.8.2.5 Extensiveness and representiveness of state practice

For a rule of general customary law to develop the practice of states must be fairly general i.e. the practice must be common to a significant number of states. In the

[858] Section 13 of the Statement. The expression "virtually uniform" is borrowed from the ICJ in the *North Sea Continental Shelf* Cases op cit 43.
[859] The Court noted at para 186 "…The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of states should , in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule."
[860] *Continental Shelf (Libya v Malta)* ICJ Reports 1985 13 para 34.

Fisheries Jurisdiction case the ICJ referred to the extension of a fishery zone up to a twelve-mile limit 'which appears now to be generally accepted'[861] and to 'an increasing and widespread acceptance of preferential rights for coastal states' in a situation of special dependence on coastal fisheries[862]. The Court said in the *Anglo-Norwegian Fisheries* case that "it is the low-water mark as opposed to the high-water mark, or the mean between the two tides, which has generally been adopted in the practice of States"[863], and not all states need participate before the practice can become law[864]. It is not possible to say how many states must participate but once again the degree of generality required varies with the subject matter of the rule. Contrary to what a South African court found in *Nduli v Minister of Justice*[865], the practice need not be "universal" in the sense that all states participate in the practice in question[866]. As to the binding nature of the alleged customary rule the court stated in the *Nduli* case:

> "It was conceded by counsel for appellants that according to our law only such rules of customary international law are to be regarded as part of our law as are either *universally* recognised or have received the assent of this country,..I think that this concession was rightly made."(my emphasis)[867]

In some cases such as the *Arrest Warrant* case[868], the ICJ was prepared to dispense with the requirement of evidence of state practice. In that case it held that a Minister of Foreign Affairs is entitled to immunity from the criminal jurisdiction of a foreign court

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[861] *Fisheries Jurisdiction (Germany v Iceland)* ICJ Reports 1974 175 192 para 44.
[862] *Fisheries* case op cit 195 para 50.
[863] *Anglo-Norwegian Fisheries* op cit 128.
[864] Ibid.
[865] 1978(1)SA 893 The case involved a contention that the court had no jurisdiction to try the appellants who claimed to have been arrested in Swaziland territory by South African police and brought to South Africa for detention and trial all allegedly in breach a of rule of customary international law which precludes jurisdiction in such cases. This finding was subsequently questioned in subsequent SA cases. For example in *S v Petane* 1988(3) SA 51 56 the judge stated: "It is not clear to me whether Rumpff CJ (the judge in the *Nduli* case) in giving the judgment meant to lay down any stricter requirements for the incorporation of international law usages into South African law than the requirements laid down by international law itself for the acceptance of usages by States. International law does not require universal acceptance for a usage of States to become a custom."
[866] This proposition is confirmed by the Committee see Final Report 24 where it confirms the practice need not be universal for all states but that "general" practice suffices.
[867] *Nduli c*ase op cit 906.
[868] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* ICJ Reports 2002 3.

on the ground that the nature and function of his office require such immunity but made no attempt to provide evidence of 'constant and uniform' or 'widespread' practice in support of such rule[869]. However the views of van den Wyngaert in a dissenting judgment are pertinent. The judge argues that "there is no settled practice *usus* about the postulated "full" immunity of Foreign Ministers to which the International Court of Justice refers" and that the "negative practice of States, consisting in their abstaining from instituting criminal proceedings, cannot, in itself, be seen as evidence of an *opinio juris*"[870].

The case law of the ICJ has identified an important qualification to the concept of generality of state practice being in the form of specially affected states. In the *North Sea Continental Shelf* cases the ICJ observed that:

> "Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, *including that of States whose interests are specially affected*, should have been both extensive and virtually uniform in the sense of the provision invoked, and should moreover have occurred in such a way as to show a general recognition that a rule of law or obligation is involved."[871](my emphasis)

The passage quoted above summarises the case law of the ICJ in relation to the duration which state practice must endure before ripening into customary law and the principle relating to specially affected states. The notion of specially affected states itself creates an impression of inequality in the sense that if all states being sovereign and equal are to be

[869] Ibid paras 52-4. The Court did not cite any evidence of state practice in support of the customary rule entitling Ministers of Foreign Affairs to immunity from criminal proceeding. The Court merely referred to some conventions which were cited by the parties which were not relevant anyhow and declared that under customary international law Ministers were entitled to such immunity. This can be contrasted with the Court's finding on whether such immunity was absolute. The Court referred to various instances of state practice in support of its finding that there was no exception to the immunity accorded to foreign Ministers by customary law. See paras 56-58.
[870] Ibid para 13.
[871] *North Sea* cases op cit 43 para 74.

bound by the rule of general customary law which is emerging why then should some states be regarded as more important that others? The answer to that objection can be illustrated by reference to the SADC region. Of the fifteen member states, six are landlocked[872] while the rest are coastal states. If a regional custom relating to the exclusive economic zones were to develop within the region the interests of the coastal states will be specially affected within the meaning of the ICJ observations and would have to be given special consideration. The position could be otherwise if, say, the alleged custom related to matters of right of access or transit to the high seas by states within the region. All the states including the landlocked states would have an interest in the matter since both the High Seas Convention 1948 and the Law of the Convention 1982 contain provisions which grant all states, including landlocked states, the right of free access to the high seas to exercise the rights conferred by the conventions, and the right of transit subject to agreement, through other states, to the high seas in order to exercise the rights conferred by the conventions.

The Committee opines that the position taken by states with special interests in a particular emerging rule has twofold effects- positive and negative effects[873]. If those states consent to or acquiesce to the formation of a rule of customary law then it is almost certain to come into existence. One the other hand, if those states, no matter how few they are, do not accept the practice, then the rule will not come to fruition.

The Committee has developed some principles in relation to the generality of state practice. For a customary law to come into existence, it is necessary for the state practice to be both extensive and representative, but it need not be universal. Section 14 of the Committee's Statement reads:

> "(i) For a rule of general customary international law to come into existence, it is necessary for the State practice to be both extensive and representative. It does not, however, need to be universal.

[872] The landlocked states of SADC are Botswana, Lesotho, Malawi, Swaziland, Zambia and Zimbabwe.
[873] Final Report op cit 26.

(ii) Subject to the rules about persistent objection in Section 15 below, for a specific State to be bound by a rule of general customary international law it is not necessary to prove that it participated actively in the practice or deliberately acquiesced in it."

The term "extensive" is borrowed from the language of the ICJ in the *North Sea Continental Shelf* cases quoted above[874]. The term is relative in that what amounts to extensive depends on the circumstances of each case and in line with judicial opinion the interests of states which are specially affected by the emerging need to be considered. The same can be said for the concept of representiveness, a relative term whose application depends on the circumstances of each given case.

The Committee also developed the principle that, with the exception of the persistent objector, for a specific state to be bound by a rule of general customary international law it is not necessary to prove that it participated actively in the practice or deliberately acquiesced in it[875]. This principle is also derived from judicial opinion and state practice. The Committee correctly points out in its commentary that the ICJ has on several occasions taken it for granted that a state involved in proceedings before it is bound by the rule in question if it could be shown that the other criteria for formation of customary law were satisfied[876].

The principle that makes it unnecessary to prove consent to be bound on the part of individual or of all states becomes acutely apparent in case of newly-independent or created states and existing states which are new to particular customary law[877]. Both categories of states are bound by the existing rules of customary law. It is unlikely that there will be newly independent states in the SADC region in the foreseeable future, but

[874] *North Sea* cases op cit 43 para 74.
[875] Section 14 (ii) of the Statement.
[876] See Final Report 24 and the ICJ cases cited by the Committee in this regard.
[877] With regard to new states Dixon op cit 33 states "the ability of new states to opt out of 'colonial' international law is a matter of considerable controversy and the better view may be that the contrary practice of newly independent states should be regarded as of special significance in assessing whether a new customary law has developed, at least where the 'old' rule is fundamentally contrary to their interests."

it is quite possible that some SADC states might be new to an established custom existing between other member states. One can think of the practice which is followed at certain border posts where persons living in the border areas are allowed to enter the territory of another state on the strength of what is termed a "day pass" in lieu of a passport provided that the person undertakes to return to his or her state on the same day[878]. It is quite possible that this practice may mature into customary law although it is practiced by some states only. Non-participating states which subsequently engage in the practice could be bound by the customary law which had emerged before their involvement in the practice.

3.8.2.6 The persistent objector

Another important qualification to the generality of state practice is the case of the persistent objector[879]. The essence of the rule is that if a state from the outset objects to a particular practice carried on by other states or adopts a contrary practice then it seems that the state may not be bound by the emerging customary rule. While there may be some academic debate questioning the existence of the persistent objector rule, there certainly is judicial authority is support of the rule[880]. In the *Asylum* case the Court stated that even if Colombia could prove a Latin American regional custom permitting the granting of political asylum in its embassy to a political refugee such custom "could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiated it by refraining from ratifying the Montevideo Conventions of 1933 and 1939, which were the first to include a rule concerning the qualification of the offence in matters of diplomatic asylum."[881]

[878] The practice is done through immigration officers who allow people to cross border to the other states especially for shopping purposes. It is rife at Oshikango and Sesheke border posts between Namibia and Angola and Namibia and Zambia respectively and it is also practiced at the Victoria Falls border post between Zambia and Zimbabwe.(the writer has personally observed the activity in question taking place).
[879] See generally Dixon op cit 30, Brownlie op cit 10 and Charney: 'The Persistent Objector Rule and the Development of Customary International Law' (1985) 56 *BYBIL* 1. (cited in Dixon and McCorquodale op cit 34).
[880] See Charney op cit 34.
[881] *Asylum* case op cit 268-269, 277-278.

In the *Anglo-Norwegian* case the ICJ appears to have confirmed the possibility that the rule exists when it noted that "in any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she had always opposed any attempts to apply it to the Norwegian coast"[882]. Since in that case Norway had objected to the formation of the 10 mile rule on delimiting the territorial sea hence it was not bound by it. In the southern African context, the SA court based its finding on the rule in the *S v Petane* case [883]. The court found that since both SA and the African National Congress the other belligerent to the conflict, were not party to Protocol I to the Geneva Conventions which sought to extend prisoner of war status to combatants from liberation movements a rule of customary law in that regard could not bind the two. The court explained as follows:

> "What one has here are two parties, one of which is not a State, which are agreed on at least one thing. Neither, for its own reasons, appears to desire the protection for civilians or combatants of Protocol I. Were an international tribunal to hear a dispute between the parties about the binding force of Protocol I, it would be faced with contentions from each side that neither desired its application. I have not found a case in which a rule or alleged rule of customary international law has been applied in these circumstances. There is hardly likely to be such a case, since customary international law rests on a foundation of consensuality."[884]

What these cases show is that the persistent objector rule has received some judicial recognition. The rule is in line with the positivist school of thought which emphasizes consent of states before they are bound by international obligations as demonstrated in the *Petane* case cited above. However, while the issue of consent may not have been problematic in the formative years of international law the same is not the case today. The increase in the number of states as well as corresponding state activity makes it difficult to rely on the consent of states to each and every emerging rule of customary law. This leads to situations whereby the consent of states may have to be dispensed with

[882] *Anglo-Norwegian Fisheries* case op cit 131.
[883] 1988 (3) SA 51.
[884] *Petane* op cit 63-64 per Condradie J.

and thereby overshadowing the persistent objector rule. In this regard Charney had this to say:

> "At this point it might be wise to conclude that regardless of one's theory of international law, the persistent objector rule has no legitimate basis in the international legal system. Not only is the rule hard to reconcile with current theories of international law, but evidence which might be produced to support the rule is weak indeed.."[885].

However, the objection by one state does not necessarily prevent the formation of a rule among the non-objecting states, but this might be the case where the objector is a specially affected state in which case the principles discussed earlier in regard to specially affected states apply.

Despite concerns about the legitimacy or otherwise of the rule, in practice it does apply. The Committee acknowledged the existence of the rule and developed the following principle in relation to the persistent objector: "If whilst a practice is developing into a rule of general law, a State persistently and openly dissents from the rule, it will not be bound by it."[886] This statement of the principle summarises the judicial and academic opinion on the matter. However, the Committee acknowledges the limitation on the application of the rule with regard to a rule of the *jus cogens*[887]. The limitation which appears to receive support from some commentators is to the effect that an objector state cannot successfully do so in respect of a rule of the *jus cogens*[888].

It not inconceivable that issues pertaining to the rule might arise in the SADC context. There are various areas in which this might happen. For example the practice of

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[885] Charney op cit cited in Dixon and McCorquodale op cit 35.
[886] Section 15 of the Statement.
[887] Final Report 28-29.
[888] Dugard op cit 32. In relation to the various resolutions of the UN which were passed condemning the practice of apartheid in SA to which SA objected (which objections were rejected by other states) the writer states that "This (rejection of objections) could be explained on the ground that the prohibition on apartheid is a peremptory norm, a norm of *jus cogens*, to which the normal rules relating to persistent objection are inapplicable."

recognition or non-recognition of new governments coming into power through unconstitutional means might result in a regional custom within the SADC region or the whole African continent itself. While states might in theory agree that in such cases such governments should not receive recognition and consequently a regional custom developing in that regard, it is possible that some states might recognize such governments thus following into the category of an objector. If the objections persist then the state concerned may be considered free of the obligation imposed by the fact of recognition of non-recognition of that state[889].

3.8.2.7 Particular customary law: regional or local customary law[890]

Judicial opinion especially from the ICJ confirms that particular customary law which may be regional (applicable to a region) or local (between two or more states) may exist side be side with general customary law[891]. In the *Asylum* case the ICJ stated as follows in relation to regional or a local custom:

> "The Colombian Government has finally invoked 'American international law in general'. In addition to the rules arising from agreements which have already been considered, it has relied on an alleged regional or local custom peculiar to Latin-American States.
>
> The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party."[892]

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[889] There are indeed consequences for recognition or non-recognition in international law. e.g. See Brownlie op cit 85-104 and Shaw op cit chap 8. See also the 1971 *Namibian Opinion* op cit case 55-56 where the Court detailed the legal consequences following from its finding that SA's presence in Namibia was illegal. The Court prohibited states from entering into treaty relations with SA, directed states not to respect existing bilateral treaty obligations with SA and also in case of multilateral treaties except those of humanitarian character. States were urged to severe diplomatic relations with SA and abstain from trading with the same state. Official acts of SA on behalf of Namibia were to be considered invalid and illegal with the exception of acts relating to the registration of births, deaths and marriages.

[890] See Mendelson op cit 71-72 for discussion on particular customary law.

[891] *Asylum* case op cit, *Case Concerning Right of passage over Indian Territory* ICJ Reports 1960 6.

[892] *Asylum* case op cit 276. In the case concerning *US Nationals in Morocco* ICJ 1952 176 199-200 the Court cited the pronouncements in the *Asylum* case and continued: "In the present case there has not been sufficient evidence to enable the Court to reach a conclusion that a right to exercise consular jurisdiction

On the facts the ICJ held that the Colombian Government had failed to establish that such a regional or local custom existed in the region and that such a custom was binding on Peru the other party to the case. The ICJ in a later case confirmed that a local custom might exist alongside general custom. This was in the *Rights of Passage over Indian Territory* case where the Court said:

> "with regard to Portugal's claim of right of passage as formulated by it on the basis of local custom, it is objected on behalf of India that no local custom could be established between only two states. It is difficult to see why the number of states between which a local custom may be established on the basis of long practice must necessarily be larger than two. The Court sees no reason why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two states."[893]

One principle which started of as a regional custom and later extended to other regions is that of *uti possidetis*[894]. The principle was affirmed by the ICJ in the *Frontier Dispute* case when it said:

> "[*Uti possidetis*] is a general principle, which is logically connected with the phenomenon of obtaining independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new states being endangered by fratricidal struggles provoked by the changing of frontiers following the withdrawal of the administering power."[895]

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founded upon custom or usage has been established in such a manner that it is has become binding on Morocco."

[893] *Right of Passage over Indian Territory (Portugal v India)* ICJ Reports 1960 6 39-43.

[894] Hasani, "International Law under Fire Uti Possidetis: From Rome to Kosovo" *Fletcher Forum of World Affairs* 2003 accessible on http://pbosnia.kenlaw.edu/symposium/resources/hasani-fletcher.htm (visited 21/10.09). This is a concept of international law that defines borders of newly sovereign states on the basis of their previous administrative frontiers.

[895] *Frontier Dispute (Burkina Faso v Mali)* ICJ Reports 1986 554 565 para 20.

The ICJ also alluded to the fact that the principle of *uti possidetis* though originally a Spanish-American regional custom, and adopted in African practice, should be considered as a general principle of law. The Court said:

> "The fact that the new African States have respected the administrative boundaries and frontiers established by the colonial powers must be seen not as a mere practice contributing to the gradua1 emergence of a principle of customary international law, limited in its impact to the African continent as it had previously been to Spanish America, but as the application in Africa of a rule of general scope."[896]

It is not clear from the Court's reasoning whether it is not possible to have a regional custom applicable to two regions namely, Spanish-America and Africa, without it being a general rule of international law. One view is that the principle remains regional as there is no evidence to show that it applies world-wide thus becoming a general customary rule.

In the southern African context the issue of local custom was raised in the South African case of *Nkondo v Minister of Police and Another*[897]. In that case the applicant's brother N had been on a Lesotho Airways flight from Maputo to Maseru. Due to adverse weather conditions at Maseru airport the plane could not land and was diverted to Bloemfontein in South Africa. N and the other passengers were placed on a bus which took them to the South Africa/Lesotho border where the passengers were required to complete immigration forms for exiting the South African territory. Due to some irregularities in N's travel papers he was arrested and subsequently charged with terrorism under SA's legislation. An application was brought before a SA court challenging the lawfulness of the arrest and arraignment on the basis that the arrest was in violation of international law because, among other matters, there existed a practice between South Africa and Lesotho that when such a situation arose the affected passengers would be bussed to the border

[896] Ibid para 21.
[897] 1980(2) SA 894(0).

where they would not be required to comply with immigration requirements on the SA side. There was evidence that on four previous occasions this had happened and on two other occasions the passengers had not travelled by road to Maseru but had boarded the same plane when the weather was clear. On the latter occasions the passengers had been allowed to enter the airport terminals at Johannesburg and Bloemfontein without having to comply with SA immigration formalities. It was contented on behalf of N that the practice followed in these occasions had developed and "crystallized into an agreement" between SA and Lesotho which was binding on SA[898]. The court rejected this proposition and held that the evidence was insufficient to establish a custom or an implied agreement between SA and Lesotho that passengers in N's situation would be granted free passage from SA and immunity from prosecution in SA even if they were found to have committed or intending to commit crimes against SA. The court said:

> "It is accordingly abundantly clear that no binding custom or implied agreement granting immunity from detention and arrest for a suspected crime against the safety and security of the State to passengers on Lesotho aircraft which have been forced to seek refuge at a South African airport, and who thereafter travel across South African territory on their way to Lesotho has been established. There is no allegation that it has ever happened before that a passenger who has been suspected of such a crime has been allowed, as a matter of right or in any other way, to travel freely to Lesotho."[899]

It must mentioned here that the court seems to have relied heavily on the fact that on the occasions that the passengers were allowed unhindered entry and departure into and from SA territory, there was no evidence of an *opinio juris* that SA felt this was obligatory on its part. It can be argued that this amounted to placing too high a burden on proof of the subjective element in custom. Surely by allowing unhindered passage to passengers on board planes "in distress" on four previous occasions there must somehow have been some kind of belief on the part of the SA authorities that there was a legal obligation to

[898] Ibid 906-7.
[899] Ibid 909.

do so. Otherwise an explanation was called for from those authorities to rebut the presumption that the state practice was attributable to something else other than the existence of a legal rule.

The possibility that regional customs will arise among SADC countries has implications for the SADC region as well as the work of the Tribunal. Local or regional customs are likely to develop between states which share common economic and political ideologies such as SADC and EU states[900]. It is possible that cases alleging the existence of local or regional customs will come up before the Tribunal under the rubric of general principles and rules of public international law. There has not been other cases dealing with local or regional custom but it is submitted that the requirements for the creation and existence of a general custom should not substantially differ from that of regional or local custom[901] hence the aspects of custom discussed in the next sections are relevant. The better view is that there should not be a distinction in the rules and principles regarding general customary law on one hand and regional or local custom on the other. The only difference should be with regard to the generality of state practice which by the nature of a regional local custom itself involves a limited number of states. Unfortunately the issue of regional or local custom fell outside the remit of the Committee therefore a statement of principle could not be made on this rather unclear matter[902].

3.8.2.8 Duration

In the *North Sea Continental Shelf* cases the Court said:

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[900] Dixon op cit 34.

[901] Some writers such as Dixon op cit 34 opine that the tests must differ by stating "However, the state alleging the existence of local custom will be under a heavy burden to show that the practice was regarded as legally binding, rather than merely habitual or born of the desire for amicable relations." There appears to be no specific authority for invoking this higher burden of proof in cases of local or regional custom other than the statement made by the ICJ in the *Asylum* case which was cited with approval by the court in the *Nkondo* case to the effect that: "The party which relies on custom... must prove that this custom is established in such a manner that it has become binding on the other party... that the rule invoked... is in accordance with a constant and uniform usage practiced by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State..." 907. The same reasoning can be applied in case of general custom.

[902] See Final Report 5-6.

> "Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked ..."[903]

This dictum summarises the case law on the point that no specific amount of time is required for a practice to ripen into law. The Committee dealt with the issue of time and developed the following principle which confirms judicial opinion on the matter:

> "Although normally some time will elapse before there is sufficient practice to satisfy these criteria, no precise amount of time is required."[904]

The Committee notes that if there is state practice of sufficient density over a short period of time, the practice can ripen into customary law provided the other requirements of customary law are met[905]. The Committee also notes that in normal circumstances a period of time is required before a practice matures into a rule. On this point it cites the 1945 Truman Proclamation on the "jurisdiction and control" of the USA over the adjacent continental shelf. Other states followed suit while others whose interest were affected failed to protest. It took several years for the original unilateral declaration by the USA to mature into law. The question of treaties or UN General Assembly resolutions creating instant law is discussed in the section on the relationship between customary law on one hand, and treaty and UN resolutions, on the other.

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[903] *North Sea* cases op cit 43 para 74.The dicta in the South African case *S v Petane* op cit appear to support the principle that a customary rule can come into being quickly. The Court said: "I am also prepared to accept that customary international law may in this way be created very quickly, but before it will be considered by our municipal law as being incorporated into South African law the custom, whether created by *usus* and *opinio juris* or only by the latter, I would at the very least have to be widely accepted." 57 per Conradie J.

[904] Section 12(ii) of the Statement.

[905] In support of the principle the Committee cites examples of the rapid development in the law relating to sovereignty over the airspace and the regime of the continental and suggests reasons for the developments. Final Report 20.

3.8.2.9 Subjective Element: Opinio Juris

The issue of *opinio juris*, which is the subjective element in customary was noted by the ICJ in the *North Sea Continental Shelf* cases and in the relevant part of the judgment which confirmed the principle enunciated in the *Lotus* case[906] the Court noted:

> "Not only must the acts concerned amount to a *settled practice*, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it. The need for such a belief, i.e. the existence of a *subjective element*, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation."[907](my emphasis)

The dicta by the ICJ appears to indicate that for a rule of customary law to come into existence there must be the objective element which is state practice and the subjective element which is the belief that the practice is being followed because it is law. The ICJ appears to have confirmed its reasoning in the above case when in the *Nicaragua* case it stated:

> "In considering the instances of the conduct above described, the Court has to emphasize that, as was observed in the *North Sea Continental Shelf* cases, for a new customary rule to be formed, not only must the acts concerned 'amount to a settled practice', but they must be accompanied by the *opinio juris sive necesessitas.* Either the States taking such action or other States in a position to

[906] PCIJ Series A, no 10 1927 28. In that case the Court rejected a contention by France that there was a customary rule to the effect that only the flag state of a ship had exclusive jurisdiction over the ship for incidents occurring on the high seas. In support of the contention France had cited instances of cases where non-flag states had abstained from prosecuting alleged offences occurring on the high seas. The Court noted that "only if such abstention were based on their being conscious of a duty to abstain would it be possible to speak of an international custom."

[907] *North Sea* cases op cit 44 para 77.

> react to it, must have behaved so that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it. The need for such a belief, i.e. the existence of a *subjective element* [my emphasis], is implicit in the very notion of the *opinio juris sive necessitatis.*'"[908]

Despite these dicta of the ICJ there has been much controversy and debate as to whether both these elements must be present for customary law to exist[909]. The SA court in *S v Petane* appears to accept that the two elements of custom need not necessarily be proved for a rule of customary law to come into existence and that proof of the *opinio juris* alone maybe sufficient. The court stated:

> "I am prepared to accept that, as might happen in rapidly developing fields of technical or scientific endeavour, like space exploration, if all the States involved share an understanding that a particular rule should govern their conduct, *such a rule may be created with little or no practice to support it. Indeed, the opportunity for putting the understanding into practice may not arise.* It may be,..that it would be better to regard customary international law so created as not emanating from custom but from a new and different source.
>
> I am also prepared to accept that customary international law may in this way be created very quickly, but before it will be considered by our municipal law as being incorporated into South African law the custom, whether created by *usus*

[908] *Nicaragua* case op cit 108-9 para 207.

[909] See Dixon op cit 34-36 for a discussion on these two approaches and what the writer considers to be a compromise deduced from case law of the ICJ. The writer states "A possible solution is to accept that the degree of proof required for *opinio juris* will vary according to the subject matter of the disputed rule. Thus, a claim that a rule has attained the status of *jus cogens* might require very clear evidence of *opinio juris* independent of the actual fact of state practice." See also Part III 29-30 of the Final Report where the Committee refers to the controversy surrounding the notion of *opinio juris* and cites Thirlway, *International Customary Law and Codification* (1972) 47 who states: "The precise definition of ... the psychological element in the formation of custom, the philosopher's stone which trans- mutes the inert mass of accumulated usage into the gold of binding legal rules, has probably caused more academic controversy than all the actual contested claims made by States on the basis of alleged custom, put together.".

> and *opinio juris* or only by the latter, I would at the very least have to be widely accepted."[910](my emphasis)

The views expressed by the SA court appear to have found favour with the Committee when it developed the principle that verbal acts may amount to an instance of state practice arguing that there is no inherent reason why this should not be so[911]. The Committee concludes by asserting that whichever school of thought one belongs to, there is no qualitative difference between the two sorts of acts they could constitute both the state practice and the *opinio juris*[912].

The Committee, however, took the liberal view that if both the objective and the subjective elements exist, then well and fine a customary rule exists or comes into being, but that it is *not necessary* to prove such subjective element on the part of individual or a number of states[913]. The Committee considered the subjective element from two different standpoints: a *belief* on the part of states that something is a rule of customary law and *consent or will* that something becomes a rule of customary law. It then developed two main principles based on these notions of the subjective element in customary law. The first principle relating to belief is as follows:

> "A belief, on the part of the generality of States, that a practice satisfying the criteria set out in Part II corresponds to a legal obligation or a legal right (as the case may be) (*opinio juris sive necessitatis*) is sufficient to prove the existence of a rule of customary international law; but it is not (subject to Section 17) necessary to the formation of such a rule to demonstrate that such a belief exists, either generally or on the part of any particular State."[914]

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[910] *Petane* op cit 57.
[911] Final Report op cit 14.
[912] Ibid.
[913] See 30-32 of the Final Report. This view also finds favour with academic opinion on the matter. For example, Mendelson op cit 70 submits "But in my (admittedly unorthodox) view, while the concept of *opinio juris* undoubtedly has a role to play, its not in all cases necessary to establish its separate existence, and if that view is right the unqualified language used by the Court was unfortunate."
[914] Section 16 of the Statement.

According to the Committee where there is a belief on the part of states that a practice satisfying the objective element (i.e. virtual uniformity, extensive and representative) corresponds to a legal obligation or right it is sufficient to prove that a rule of customary law exists. This principle is in line with case law which requires proof of both elements of customary law. The next limb of the principle which dispenses with the necessity to prove the belief in order to prove that a customary law has been formed is a departure from traditional doctrine. The Committee deals extensively with this aspect maintaining that in so far as an established customary rule is concerned states usually hold the necessary *opinio juris*. In case of emerging customary law the Committee argues "States actively engaged in the *creation* of a new customary rule may well wish or accept that the practice in question will give rise to a legal rule, but it is logically impossible for them to have an *opinio juris* in the literal and traditional sense, that is, a belief that the practice is *already* legally permissible or obligatory"[915].

The Committee's argument has merit even though it appears to be contrary to traditional doctrine and decisions of the ICJ, a fact the Committee itself acknowledges. It is, however, submitted that the better approach is that adopted by the Committee that it is not always necessary that the subjective element of customary law be proved to show that a rule has come into existence. Much depends on the circumstances such as the density of state practice in relation to the alleged rule.

The Committee however dealt with situations where the subjective element becomes relevant in that its absence or lack of it is decisive to the creation of customary law. In that regard it developed the principle that in some situations "an assumption, belief, or taking of position on the part of States that certain conduct cannot or does not give rise to a legal obligation or right can prevent that conduct from contributing to the formation of

[915] Final Report op cit 33. These sentiments appear to receive some support from academic writers such as Dixon op cit 35 who states "In a sense concept (of *opinio juris)* is tautologous for it suggests that something must be considered as law before it has become law." He however concedes that without the requirement "…..it would be impossible to determine where habit stopped and law began."

a rule of customary law"[916]. It then goes on to itemize the situations where lack of *opinio juris* can prevent conduct from contributing to the formation of law[917].

Acts of comity or friendship which include acts such as sending messages of condolences on the death of a head of state are cited as an example where there is regular conduct which does not count as law. Some practices may in theory give rise to customary law but fail to do so because of "an understanding on the part of States as a whole that they do not in fact do so"[918]. The examples given of such conduct is the exemption from duty on the personal effects of diplomats. Prior to the Vienna Convention of Diplomatic Relations 1961 the practice was regarded as a matter of comity as opposed to legal right but now the practice has been converted to conventional law and if state practice develops along these lines, may become customary law also binding on non-parties to the Convention. Another situation cited by the Committee is where the state practice is perfectly capable of creating a customary rule but for a disclaimer on the part of the parties involved. For example a payment in satisfaction of an alleged wrongful activity on the part of one state may be made *ex gratia* in the sense that no legal liability is acknowledged on the part of the payer. The last category of situations where conduct may not contribute to the formation of customary law is when the conduct itself is ambiguous in that it could refer to matters other than a belief in the existence or creation of a customary rule. This type of conduct was exhibited in the *Lotus* case[919] where France had argued that the absence of prosecutions instituted by states other than the flag state of a ship was evidence of an obligation not to prosecute in such cases. The argument was rejected by the Permanent Court on the basis that such abstention was no evidence of a "consciousness of having a duty to abstain"[920]. The abstentions could refer to other reasons such as lack of municipal jurisdiction. Another clear example of ambiguous conduct is found in the *North Sea Continental Shelf* cases where the other contention was that Article 6 of the Geneva Convention had the effect of crystallizing an emerging rule on delimitation and that subsequent state practice along the lines of the convention had

[916] Section 17 of the Statement.
[917] Paragraphs (i) to (iv) of Section 17. Final Report 35-38.
[918] Para (ii) of Section 17.
[919] (1927) PCIJ Ser A no. 10.
[920] *Lotus* case op cit 28.

developed resulting in the formation of a customary rule. Other examples given of such practice were the conclusion of bilateral treaties which incorporated the equidistance method of delimitation of the continental shelf. The Court rejected these contentions on the basis that state practice which had developed could refer not only to the emergence of a new customary rule, but also to treaty obligations. As regards the conduct of states not party to the treaty in question the Court said:

> "As regards those States, on the other hand, which were not, and have not become parties to the Convention, the basis of their action can only be problematical and must remain entirely speculative. ... [N]o inference could justifiably be drawn that they believed themselves to be applying a mandatory rule of customary international law. ... The essential point in this connection ... is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the *opinio juris*."[921]

In cases of ambiguous conduct of which examples have been given, the Committee suggests that the conduct in question will contribute towards formation of customary law "if there is positive evidence that the State or States concerned intended, understood or accepted that a customary rule could result from, or lay behind, the conduct in question"[922]. For all intents this is the only real situation where the *opinio juris* on the part of states does become relevant in relation to an alleged customary rule. In other situations it will not always be necessary to search for the *opinio juris* required for the formation of a customary rule.

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[921] *North Sea* cases op cit 43-44 paras 76-77. See also the *Asylum* case op cit 286 where the Court noted that "considerations of convenience or political expediency seemed to have prompted the territorial State to recognize asylum without such a decision being dictated by any feeling of legal obligation." and the *Nicaragua* case op cit where Jennings J. in a dissenting opinion in relation to state practice on refraining from use of force which had allegedly developed in line with Article 2 of the UN Charter stated: "But there are obvious difficulties about extracting even a scintilla of relevant 'practice' on these matters from the behavior of those few States which are not parties to the Charter; and the behaviuor of all the rest, and the *opinio juris* which it might otherwise evidence, is surely explained by their being bound by the Charter itself."

[922] Section 17(iv) of the Statement.

The second aspect of the subjective element in custom is dealt with by the Committee is that of the will or consent of states to be bound by an emerging rule of customary law. The Committee developed the following principle in that regard:

> "Whilst the will or consent of a particular State that a practice satisfying the criteria set out in Part II shall be a rule of law is sufficient to bind that State to a corresponding rule of customary international law, it is not generally necessary to prove that such consent has been given by a State for it to be bound by the rule in question, subject to Section 15. Neither is it necessary to prove the consent of the generality of States."[923]

For those who subscribe to the positivist theory of international law the only basis on which a state is bound by international law be it treaty or customary law is consent[924]. The first limb of the Committee's principle confirms this principle which as we have seen is also mirrored in the concept of belief. If a state consents to an emerging rule of customary law it is bound by that rule irrespective of whether the generality of states are also bound by the rule. In the former case the state might be bound by a particular rule which may be local or regional[925]. However, it is not always easy or possible to prove that a state consented to a particular rule of customary law and in most cases such consent will be inferred from the state's conduct. I have referred to the Committee's position with regard to state practice that it is not necessary for any particular State to have consented to a rule of general international law to be bound by it[926]. The second limb of the principle is that where there is state practice that satisfies the objective requirements of customary law, it is not generally necessary to prove that a state or states in general have consented to be bound by the rule arising from the practice. This is a departure from

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[923] Section 18 of the Statement.
[924] Final Report op cit 38 where the Committee discusses the requirement for consent be bound by legal obligations. See also *S v Petane* op cit 64 where the court said: "There is hardly likely to be such a case, since customary international law rests on a foundation of *consensuality*." See also *S v Nduli* op cit 906 where the court states that "according to our law only such rules of customary international law are to be regarded as part of our law as are either universally recognised or have received the *assent* of this country,..".(my emphasis)
[925] See Final Report op cit 40.
[926] See section on extensiveness and representiveness of state practice.

traditional positivist theory which calls for consent of states be it express or tacit, but the Committee supports its position by giving the analogy of new states or states new to a particular activity. It points out that the notion that these states tacitly consent to be bound by customary law the formation of which they were never involved is a "mere legal fiction."[927] The Committee continues

> "Likewise, it is simply not true that, whilst the rule is in the course of emerging, *all* States consent in one way or another to it. Obviously, those who initiate the practice *do* consent to the rule. This applies also to those who imitate the practice. Similarly for those who, being specially affected by a claim, fail to protest against it…"[928].

Once again the merits of the Committee's contentions must be accepted as they reflect the reality in international relations in relation to the formation of customary law. The consent of states, as with belief that a customary law exists, should only be necessary where states which are specially affected do not give consent which could prevent the practice from maturing into law. The other case is that of the persistent objector who, as we have seen, is not bound by a rule to which it persistently objected.

Lastly, the Committee alluded to the issue of the formation of customary rule without state practice to support the rule[929]. It has been noted that where uniform state practice which is both extensive and representative exists, for a state to bound by the rule it is not necessary to prove that the state consented to be bound by the rule. The Committee developed the reverse side of that in the following principle:

> "It appears that, in the conduct of States and international courts and tribunals, a substantial manifestation of acceptance (consent or belief) by States that a

[927] Final Report 39.
[928] Ibid.
[929] Final Report 40-42.

> customary rule exists may compensate for a relative lack of practice, and vice versa."[930]

The principle envisages a situation where there is substantial manifestation of the subjective element (in the form of belief or consent) of customary law supported by little or no state practice. In that situation the Committee suggests that the abundant form of *opinio juris* should compensate for the lack of practice and a rule of customary law can come into being. Once again the Committee acknowledges the controversial nature of this proposition and notes the two divergent schools of opinion on this issue. One school of thought is that customary law without custom (practice) is a contradiction in terms. The Committee has also proposed that verbal acts could constitute state practice in appropriate cases and it follows from this that if such verbal acts are also taken to be the *opinio juris*, then a single or series of verbal acts could constitute evidence of both state practice and *opinio juris*. The Committee warns however that if this principle is accepted it must be with caution and in such cases "evidence of states' intentions and *opinio juris* must be clear-cut and unequivocal."[931].

I shall next consider the impact of treaties and resolutions of international organization on the development or formation of customary law.

3.8.2.10 Impact of treaties on customary law

It cannot be disputed that in one way or another treaties have a bearing on customary law. First, is the role treaties play in the verification or determination of rules of customary law and in the evolution or formation of rules of customary law. Second, is the question of priority where a treaty covers the same area as that covered by customary law. I shall discuss these in turn.

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[930] Section 19 of the Statement.
[931] Final Report op cit 42.

A treaty can have impact on customary law in three main ways: it can be evidence of the existence of rules of customary law on the subject, it can help to "crystallize" an emerging rule of customary law into maturity and it can be the inspiration for the creating of a rule of customary by acting as an impetus for state practice along the lines of the treaty. A treaty may declare that it is codifying existing customary law or that it is setting out new principles of customary law[932]. For example, the preamble to the Vienna Convention on the Law of Treaties 1969 refers to codification and progressive development of international law[933]. If a treaty declares that it is declaratory of customary law, or if such intend can be proved, then it can be considered as evidence of customary law such as the Vienna Convention[934]. Where the treaty is silent on this aspect then difficulties of interpretation might arise if it is alleged that the treaty embodies rules of customary law[935]. On numerous occasions the ICJ has had to consider whether or not a treaty or a provision of a particular treaty is evidence of customary law[936]. In the *North Sea Continental Shelf* cases although the original contention by Denmark and the

[932] For treaties developed under the auspices of the UN this approach is sanctioned by Article 13 of the UN Charter which allows the UN GA to initiate studies and make recommendations *inter alia* "…encouraging the progressive development of international law and its codification."

[933] The preamble reads: "*Believing* that the codification and progressive development of the law of treaties achieved in the present Convention will promote the purposes of the United Nations set forth in the Charter, namely, the maintenance of international peace and security, the development of friendly relations and the achievement of cooperation among nations,". In the *Danube Dam Case (Hungary v Slovakia)* ICJ Reports 1997 7 the ICJ stated: " The Court..has on several times had occasion to hold that some rules laid down in the Vienna Convention on the Law of Treaties might be considered as a codification of existing contemporal law…" (para 46). More recently in the *Legal Consequences of the Construction of a Wall in the Occupied Paletsinian Territory* opinion ICJ Reports 2004 136 the Court recalled that, "according to customary international law as expressed in Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose." para 94.

[934] See Baxter, "Multilateral Treaties as Evidence of Customary International Law" (1965) 41 *BYIL* 275 298-300 cited by Dixon and McCorquodale op cit 37-39. In this regard Baxter states "The advantage of the employment of a treaty as evidence of customary international law, as at the time of the adoption of the treaty or as it has come to be, is that it provides a clear and uniform statement of the rule to which a number of states subscribe. There is no problem of reconciling ambiguous and inconsistent State practice of varying antiquity and authority. The treaty speaks with one voice as of one time.".(para 5).

[935] See Baxter, op cit 37 para 1.

[936] In the *Asylum* case the Court refused to regard the Montevideo Convention on Political Asylum of 1933 a proof of customary law partly because its content and context suggested that it was not. In the *Nottebohm Case (Second Phase*) case ICJ Reports 1955 30 the Court cited several bilateral treaties concluded by the US and a Pan-American Convention, among other things, in support of the doctrine of genuine link connection. In more recent times in the *Continental Shelf (Libya/Malta)* case op cit paras 26-34 the Court used the 1982 Convention on the Law of the Sea which had not yet come into force when determining the concept relating to delimitation formula, the concept of the exclusive economic zone, and the distance principle wherein the sea-bed and subsoil beyond the territorial sea up to 200 nautical miles from the baseline appertains to the coastal state.

Netherlands was to the effect that the method of delimiting the continental shelf through the equidistance principle (Article 6 of the Continental Shelf Convention) formed part of customary international law, by the time of the oral hearing the parties were now contending that the whole process leading up to the adoption of the Continental Shelf Convention had the effect of "crystallizing" an emerging rule of customary law into maturity. These contentions were rejected by the Court which found that although other provisions of the Convention could reflect or had the effect of crystallising emerging law, Article 6 did not have that effect. The Court said:

> "….and the Court considers this review sufficient for present purposes also, in order to show that the principle of equidistance, as it now figures in Article 6 of the Convention, was proposed by the Commission with considerable hesitation, somewhat on an experimental basis, at most *de lege ferenda*, and not at all *de lege lata* or as an emerging rule of customary international law. This is clearly not the sort of foundation on which Article 6 of the Convention could be said to have reflected or crystallized such a rule."[937]

The principle that a treaty can codify and thus reflect or be evidence of existing customary law was further confirmed in the *Nicaragua* case where the ICJ cited the reasoning in the *North Sea Continental Shelf* cases with approval by stating:

> "…But as observed above (….), even if the customary norm and the treaty were to have exactly the same content, this would not be a reason for the Court to hold that the incorporation of the customary norm into treaty-law must deprive the customary norm of its applicability as distinct from that of the treaty norm. The existence of identical rules in international treaty law and customary law has been clearly recognized by the Court in the *North Sea Continental Shelf* cases. To a large extent, those cases turned on the question whether a rule enshrined in a treaty also existed as a customary rule, either because the treaty had merely codified the custom, or caused it to "crystallize", or because it had influenced its

[937] *North Sea* cases op cit 38 para 62.

> subsequent adoption. The Court found that this identity of content in treaty law and in customary international law did not exist in the case of the rule invoked, which appeared in one article of the treaty, but did not suggest that such identity was debarred as a matter of principle."[938]

However, in the *Nicaragua* case the Court found that various treaties or conventions had codified or were evidence of existing customary law on the subject of the prohibition on the use of force[939]. The Court's reliance on both international and regional treaties on the customary law relating to non-intervention and non-use of force in particular the reference to the Inter-American Treaty of Reciprocal Assistance 1947 has been criticised on the basis that such reliance was not based on a critical evaluation of the relationship between the treaties and customary law at issue[940]. For purposes of this study we need not be bothered with justifications for these criticisms since the Committee has developed some useful principles in the area.

The Committee developed some principles in relation to the role of treaties as evidence of existing customary law and some of these principles reflect partially the principles developed by the ICJ. The first principle is that there is no general presumption that a treaty codifies customary law and this is based on the assumption that treaties rarely do so as it is not worth the parties' efforts to codify well-established rules of customary

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[938] Para 177. See also para 187 where the Court reviews the various views of the effect of Article 2.4 of the UN Charter on customary law and concludes in para 188: "The Court thus finds that both Parties take the view that the principles as to the use of force incorporated in the United Nations Charter correspond, in essentials, to those found in customary international law. The Parties thus both take the view that the fundamental principle in this area is expressed in the terms employed in Article 2, paragraph 4, of the United Nations Charter.". Note however the dissenting opinion of Judge Jennings in the case. While acknowledging that a multilateral treaty may be declaratory of customary law he argues that this was not so in the case. In the judge's view, Article 3.4 of the Charter was not merely a codification of customary law since it made important innovations in the law (cited by Dixon and McCorquodale op cit 41).

[939] Both during the preliminary hearing and the merits hearing it was accepted that some provisions of the UN Charter such as Article 2.4 reflected existing customary law on the use of force paras 173- 174 and 188 *Nicaragua* case. The Court also made reference to the Charter of the Organisation of American States in order to ascertain the content of the customary law at issue para 183 and the Montevideo Convention on the Rights and Duties of States 1933 para 189.

[940] Mendelson op cit 77-79.

law[941]. The assumption by the Committee appears to be contradicted by the practice of states themselves. There are numerous examples where treaties have simply codified existing rules of customary law and as we have seen this is one of the mandates of the UN GA[942].

The general presumption that a treaty does not codify a rule of customary law does not, however, according the Committee **"**exclude the possibility of a treaty containing specific provisions which do represent existing customary law.." and in each case; ".it is a question..of examining the evidence."[943]. This principle reflects the various instances in which a treaty codifies customary law but the mere fact that a treaty is "declaratory" of customary law is not conclusive of that fact as some provisions of the treaty might have that effect while others do not. In the *North Sea Continental Shelf* cases the Court found that Article 6 of the Convention in question did not reflect existing customary because it allowed for reservations to be made to it. In this regard the Court stated:

> "..speaking generally, it is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted;-whereas this cannot be so in the case of general or customary 1aw rules and obligations which, by their very nature, must have equal force for al1 members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour."[944].

This reasoning of the Court has been heavily criticised both in the literature and by the dissenting judges in the case[945]. The main thrust of the attack is that the mere fact that a

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[941] Section 20 of the Statement.
[942] Examples of such treaties are the Vienna Convention on the Law of Treaties, the Convention on the Law of the Sea 1982, the Convention on the Continental Shelf 1958 and Article 2.4 of the UN Charter regarding the prohibition on the use of force see *Nicaragua* case op cit paras 187-188. Article 13 of the UN Charter empowers the UN GA to initiate studies and make recommendations *inter alia* to promote the progressive development of international law and its codification.
[943] Section 21 of the Statement.
[944] *North Sea* cases para 63
[945] See Mendelson op cit 73 where the writer states: "Furthermore, it could well be argued that, just because the drafters decide for a variety of possible diplomatic reasons to permit reservations to a treaty, this need

treaty for whatever reason permits reservations to be made to all or some of its provisions should not be conclusive of the fact that the treaty does not codify customary law. The arguments are sound in principle and the Committee has confirmed this by departing from the reasoning of the ICJ in laying down the principle that:

> "The fact that a treaty permits reservations to all or certain of its provisions does not of itself create a presumption that those provisions are not declaratory of existing customary law."[946].

The Committee's final principle on the role of treaties as evidence of customary is to the effect that a treaty concluded to settle a specific issue does not of itself provide any indication that the general customary law is (or is not) the same as that laid down in the treaty. This principle is derived from the finding of the ICJ in the *Barcelona Traction* case where the Court considered whether the lifting of the corporate veil in agreements for compensation arising from nationalization of foreign owned property could be considered as establishing a customary to that effect[947].

That a treaty can contribute to or serve as to the impetus for the formation of customary law is indisputable. On several occasions the ICJ has alluded to this important role which treaties can play in serving as the "material source" for the formation of customary law[948]. This occurs when after the conclusion of a treaty, state practice backed by the necessary *opinio juris*, develops along the treaty lines but independently of the treaty such that even states which are not party to the treaty engage in the practice. In the *North Sea Continental Shelf* cases the Court remarked:

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not prejudice the issue whether or not the provisions in question reflect customary law." See also the Committee's comments to the same effect Final Report op cit 44-45 where the Committee also refers to the dissenting opinions in the *North Sea* cases.

[946] Section 22 of the Statement.

[947] *Barcelona Traction, Light and Power Company, Limited (New Application:1962) (Second Phase) (Belgium v Spain)* ICJ Reports 1970 3 40 the Court states: "Specific agreements have been reached to meet specific situations, and the terms have varied from case to case. Far from evidencing any norm as to the classes of beneficiaries of compensation, such arrangements are *sui generis* and provide no guide in the present case."

[948] See Final Report op cit 46-48.

> "In so far as this contention is based on the view that Article 6 of the Convention has had the influence, and has produced the effect, described, it clearly involves treating that Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general *corpus* of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention. *There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed*. At the same time this result is not lightly to have been regarded as having been attained."[949](my emphasis)

On the facts the Court found that the provision of the treaty in question had not given rise to new customary law. However, in the *Nicaragua* case the Court found that the UN Charter, the treaty at issue, had influenced the development of customary law along its lines. The Court stated:

> "However, so far from having constituted a marked departure from a customary international law which still exists unmodified, the Charter gave expression in this field to principles already present in customary international law, and that law has in the subsequent four decades developed under the influence of the Charter, to such an extent that a number of rules contained in the Charter have acquired a status independent of it."[950]

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[949] Ibid para 71. In the Sothern African national context the court was prepared to accept that multilateral treaties can create customary law. In *S v Petane* op cit 61 the judge acknowledges: "Mr. Donen contended that the provisions of multilateral treaties can become customary international law under certain circumstances. I accept that this is so. There seems in principle to be no reason why treaty rules cannot acquire wider application than among the parties to the treaty."

[950] *Nicaragua* case para 181.

The Committee acknowledges that treaties can contribute to the formation of customary law and in that respect it developed two principles. The first principle is that "multilateral treaties can provide the impulse or model for the formation of new customary rules through state practice."[951] In this sense the treaty becomes the historic or material source of the customary law although there is no presumption that this is so. In addition the Committee is of the view that conduct which is referable to the treaty should not count as state practice[952]. This logically follows from the fact that if the practice is by state parties to the treaty then their conduct would be in compliance with treaty obligations. This was the case in the *North Sea Continental Shelf* cases where the Court found that over half the of the states whose conduct was in question "were or shortly became parties to the Geneva Convention, and were therefore presumably, so far as they were concerned, acting actually or potentially in the application of the Convention."[953]. In respect of those states which were not party to the Convention but whose conduct was consistent with the Convention, the Court further stated that:

> "As regards those States, on the other hand, which were not, and have not become parties to the Convention, the basis of their action can only be problematical and must remain entirely speculative. Clearly, they were not applying the Convention. But from that no inference could justifiably be drawn that they believed themselves to be applying a mandatory rule of customary international law."[954]

It then found no evidence to support the view that they had the necessary *opinio juris* as to the rule in question. The correctness of the Court's finding in this regard is debatable as it is a matter of speculation. Another court might have concluded that their conduct was consistent with acceptance of a new rule of law emanating from the treaty since they could not have been acting in compliance with treaty obligations.

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[951] Section 20 of the Statement.
[952] Ibid.
[953] *North Sea* cases para 76.
[954] Ibid.

The second principle developed by the Committee in this regard is that there is no presumption that a succession of similar treaty provisions gives rise to a new rule of customary law[955]. The effect of this principle is similar to that relating to treaties as evidence of customary law discussed earlier and nothing further needs be said.

The other way in which treaties can impact on customary is that they can “crystallize” an emerging customary rule into law. In the *North Sea* cases the contention of Denmark and the Netherlands was that the process of the definition and consolidation of the emerging customary law took place through the work of the International Law Commission, the reaction of governments to that work and the proceedings of the Geneva Conference and this emerging customary law became "crystallized in the adoption of the Continental Shelf Convention by the Conference"[956]. On the facts of the case this contention was rejected by the Court which was of the view that there was no “ emerging” rule of customary law as such relating to the principle of equidistance. This was confirmed by the fact that the International Law Commission proposed the principle “with considerable hesitation, somewhat on an experimental basis, at most *de lege ferenda***,** and not at all *de lege lata* or as an emerging rule of customary international law.”[957] Despite this finding by the ICJ, the Committee adopted the principle that “multilateral treaties can assist in the “crystallization” of emerging rules of customary international law.”[958] However, there is the *caveat* that there is no presumption that they do so.

In the *North Sea* cases the ICJ appeared to indicate that apart being evidence of customary law, contributing towards the formation of customary law and crystallizing an emerging practice into customary law, treaties may of their own impact create customary law. The Court referred to the contention put forward by Denmark and the Netherlands that “even if there was at the date of the Geneva Convention no rule of customary law in favour of the equidistance principle, and no such rule was crystallized in Article 6 the Convention, nevertheless such a rule has come into being since the Convention, *partly*

[955] Section 25 of the Statement.
[956] Ibid para 61.
[957] Ibid para 62.
[958] Section 26 of the Statement.

because of its own impact, partly on the basis of subsequent state practice."[959](my emphasis). Here the Court accepted the possibility that a treaty could create instant customary law through its own impact but held in the case that this had not happened because doing so would amount to treating the relevant article "as a norm-creating provision" which was not the case. Once again the reasoning of the Court has been subjected to criticism in both respects. The idea of a treaty creating instant law for non-parties to the treaty is considered to be objectionable while the concept of a "fundamentally norm-creating character" used by Court has been questioned[960]. The Committee however concedes that it is possible that a treaty can create instant customary law provided that it is the states' clear intention to accept more than a merely conventional norm. It cites several examples of this happening including the prohibition on the use of force contained in Article 2.4 of the UN Charter. The Committee's view is that Article 6 of the Charter which requires the UN to "ensure that States which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security" extends treaty obligations to non-parties to the treaty and in this way creating instant customary law binding on parties and non-parties to the treaty. However the Committee developed the principle that "in exceptional cases, it may be possible for a multilateral treaty to give rise to new customary rules (or to assist in their creation) "of its own impact" if it is widely adopted by States and it is the clear intention of the parties to create new customary law."[961] The Committee acknowledges that this can occur only in "exceptional" cases and that there should be a presumption that this has not occurred. The cautious approach of the Committee is premised on the notion that states party to a particular treaty cannot through that treaty create instant customary law for states which are not party to the treaty and this is understandable.

Questions often arise as to what happens if there is conflict between customary law and treaty law over the same matter. The view is often expressed that if the treaty is later in

[959] Ibid para 70.
[960] Mendelson op cit 73-74 and Final Report 52-53.
[961] Section 27 of the Statement.

time it must prevail over existing customary law on the subject[962]. This is so because treaties often represent the express consent of states to particular law which is not the case with custom which mainly revolves on implied consent. This general view is subject to the rules relating to norms considered to be *jus cogens*. The Vienna Convention on the Law of Treaties 1969 specifically renders void any treaty whether entered into before or after the convention if the treaty conflicts with a peremptory norm of general international law also known as *jus cogens*[963].

The position regarding a custom superseding a treaty is less clear. The view supported by some commentators seems to be that the treaty must prevail as it contains obligations freely entered into by states as opposed to customary law which is often implied[964]. The ICJ strives to avoid a conflict between the two obligations by attempting to interpret the treaty as complementary to the new custom as far as possible. For example, in the *Danube Dam*[965] case the ICJ was able to synthesise later developments in customary law with obligations contained in the earlier disputed treaty between Hungary and Slovakia. The case concerned the Treaty on the Construction and Operation of the Gabcikovo-Nagymaros Barrage System of 1977 under which the two states were to construct and operate the barrage system. One of the five grounds advanced by Hungary justifying termination of the treaty was "the development of new norms of international environmental law" which were allegedly in conflict with the obligations assumed under the treaty[966]. The Court dismissed these contentions holding that:

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[962] Dixon op cit 38. The view is confirmed by the ICJ in the *North Sea* cases when it noted in relation to the Convention on the Continental Shelf:"Clearly, if this is so, then the provisions of the Convention will prevail in the relations between the Parties, and would take precedence of any rules having a more general character, or derived from another source."

[963] Article 53 of the Convention reads: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character" while Article 64 reads: "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.".

[964] Dixon op cit 39. The writer states: "The better view is that the treaty continues to govern the relations between parties even though a new practice has developed."

[965] *(Hungary v Slovakia)* ICJ Reports 1997 7.

[966] Ibid paras 92 and 97 where the Court states: "Finally, Hungary argued that subsequently imposed requirements of international law in relation to the protection of the environment precluded performance of

> "The Court does not consider that new developments in the state of environmental knowledge and of environmental law can be said to have been completely unforeseen. What is more, the formulation of Articles 15, 19 and 20, designed to accommodate change, made it possible for the parties to take account of such developments and to apply them when implementing those treaty provisions. The changed circumstances advanced by Hungary are, in the Court's view, not of such a nature, either individually or collectively, that their effect would radically transform the extent of the obligations still to be performed in order to accomplish the Project. A fundamental change of circumstances must have been unforeseen; the existence of the circumstances at the time of the Treaty's conclusion must have constituted an essential basis of the consent of the parties to be bound by the Treaty."[967]

3.8.2.11 The impact of resolutions of international organizations on customary law

The role which resolutions of international organizations, in particular those of the UN General Assembly, play in the development or formation of customary has been the subject of much debate and controversy[968]. Despite the controversy, international tribunals, including the ICJ, have had recourse to resolutions of international or regional organization especially those of the GA. What can be deduced from judicial opinion and academic debate is that resolutions of international organizations contribute to the development of customary law broadly in similar ways as treaties. Resolutions can constitute evidence of customary law, contribute to the formation of customary law, "crystallize" emerging customary law and in some instances, create "instant" customary law for states. Although the effect of resolutions of international organizations on the

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the Treaty. The previously existing obligation not to cause substantive damage to the territory of another State had, Hungary claimed, evolved into an *erga omnes* obligation of prevention of damage pursuant to the "precautionary principle".

[967] Ibid para 104.

[968] See generally Shaw op cit 107-114, Dugard op cit 34-37, Dixon op cit 47-49, Mendelson op cit 85-88 and Dixon and McCorquodale op cit 48-51. See also the Final Report Part V 54-66 which deals mainly with GA resolutions.

development of customary law is similar to those of the GA, in this study I consider resolutions of the GA only.

3.8.2.12 Resolutions of the GA

We have noted that the GA is mainly a political advisory body with no legislative powers[969]. Resolutions of the GA, by whatever name they are called, are generally speaking, mere recommendations to member states of the UN or to the Security Council and are therefore not legally binding. Resolutions made in relation to the internal matters of the GA such as the budget or admission or expulsion are, however, binding on member states. However, resolutions of the GA play an important role in the development or formation of customary law. Resolutions of the GA can constitute evidence of existing customary law and the ICJ and other courts have resorted to them on various occasions. In the *Western Sahara* opinion[970] the ICJ relied on resolutions of the UN in order to establish the existence of a right to self determination and these included the Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960 and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States of 1970. Also in the *Nicaragua* case, the Court expressed the view that the *opinio juris* requirement of customary law could be deduced from a GA resolution stating that:

> "This *opinio juris* may, though with al1 due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations'. The effect of consent to the text of such resolutions cannot be understood as merely that of a "reiteration or elucidation" of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as

[969] See section on the General Assembly *supra.*
[970] ICJ Reports 1975 12 paras 55-59.

> an acceptance of the validity of the rule or set of rules declared by the resolution by themselves."[971]

In that case the ICJ did not require proof of state practice in order to show that the prohibition on the use of force was contrary to customary international law. Ten years later the Court reiterated its position, although more cautiously, in the *Legality of the Threat or Use of Nuclear Weapons* Opinion when it stated:

> "General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris.* To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradua1 evolution of the *opinio juris* required for the establishment of a new rule.
>
> Examined in their totality, the General Assembly resolutions put before the Court declare that the use of nuclear weapons would be "a direct violation of the Charter of the United Nations"; and in certain formulations that such use "should be prohibited". The focus of these resolutions has sometimes shifted to diverse related matters; however, several of the resolutions under consideration in the present case have been adopted with substantial numbers of negative votes and abstentions; thus, although those resolutions are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons."[972]

[971] Ibid para 188.
[972] ICJ Reports 1996 226 paras 70-71.

After examining the various resolutions on the matter the Court concluded that they did not establish the necessary *opinio juris* to support a customary rule on the illegality of the use of nuclear weapons. In the earlier *South West Africa* cases[973] Liberia and Ethiopia contented before the ICJ that a customary rule of non-discrimination had arisen from a repetition of GA resolutions condemning the apartheid policies of South Africa. The South African government opposed these contentions on the basis that doing so would amount to conferring legislative powers on the GA. In a separate opinion the South African appointed judge rejected Liberia and Ethiopia's contentions stating:

> "As 1 have said, Applicants did not seek to apply the traditional rules regarding the generation of customary law. On the contrary Applicants' contention involved the novel proposition that the organs of the United Nations possessed some sort of legislative competence whereby they could bind a dissenting minority. It is clear from the provisions of the Charter that no such competence exists, and in my view it would be entirely wrong to import it under the guise of a novel and untenable interpretation of Article 38 (1) (b) of the Statute of this Court." [974]

However, in a dissenting judgment Judge Tanaka opined that such a customary rule on non-discrimination had developed stating:

> "Of course, we cannot admit that individual resolutions, declarations, judgments, decisions, etc., have binding force upon the members of the organization. What is required for customary international law is the repetition of the same practice; accordingly, in this case resolutions, declarations, etc., on the same matter in the same, or diverse, organizations must take place repeatedly.
>
> Parallel with such repetition, each resolution, declaration, etc., being considered as the manifestation of the collective will of individual participant States, the will of the international community can certainly be formulated more quickly and

[973] ICJ Reports 1966 6.
[974] Ibid 170.

> more accurately as compared with the traditional method of the normative process. This collective, cumulative and organic process of custom-generation can be characterized as the middle way between legislation by convention and the traditional process of custom making, and can be seen to have an important role from the viewpoint of the development of international law.
>
> In short, the accumulation of authoritative pronouncements such as resolutions, declarations, decisions, etc., concerning the interpretation of the Charter by the competent organs of the international community can be characterized as evidence of the international custom referred to in Article 38, paragraph 1 (b).”[975]

South African national courts adopted a restrictive approach to GA resolutions and even went to the extent of casting doubt over the capability of GA resolutions ever making law in the absence of state practice. In *S v Petane* it was argued that state practice through several resolutions of the UN GA condemning the apartheid policies of South Africa, had made the provisions of the first Protocol part of customary international law. The judge disagreed stating that:

> “In the first place, it is doubtful whether resolutions passed by the United Nations General Assembly qualify as State practice at all…..It does not follow, however, that such resolutions or declarations can be classified as *usus* giving rise to custom. They may constitute *opinio juris* which, if expressed with respect to a rule sufficiently delineated through *usus*, may create a customary rule of international law….. But, if there is no preceding *usus*, such a declaration cannot give birth to a customary rule, unless, of course, the declaration itself is treated as *usus* at the same time. However, it takes too wide a stretching of the concept of *usus* to arrive at the latter conclusion. As was rightly observed, 'repeated announcements at best develop the custom or usage of making such pronouncements.”[976]

[975] Ibid 292.
[976] Ibid 58.

In the case the court held that there was insufficient evidence of state practice to support the creation or show the existence of customary law. The judge also went further to cast doubt on whether some principles embodied in the UN Universal Declaration of Human Rights of 1948 represented or had become part of customary law. The judge stated:

> "The Universal Declaration on Human Rights may be taken as an example in this respect. It has been asserted that in the course of time its provisions have grown into rules of customary international law. This view is often substantiated by citing abstract statements by States supporting the Declaration or references to the Declaration in subsequent resolutions or treaties. Sometimes it is pointed out that its provisions have been incorporated in national constitutions. But what if States making statements like these or drawing up their constitutions in conformity with the Universal Declaration at the same time treat their nationals in a manner which constitutes a flagrant violation of its very provisions, for instance, by not combating large-scale disappearances, by practicing torture or by imprisoning people for long periods of time without a fair trial? Even if abstract statements or formal provisions in a constitution are considered a State practice, they have at any rate to be weighed against concrete acts like the ones mentioned."[977]

It is clear that the attitude of South African courts towards resolutions of the UN GA was, prior to 1994, quite hostile as shown in the approaches of the SA judge in the *SWA* cases and the national court in the *Petane* case. This approach can be contrasted to that taken by a USA court regarding the 1948 Declaration. In *Filartiga v Pena-Irala* one of the issues before the US Court of Appeals was whether the UN Declaration of 1948 and other GA declarations on the subject of the prohibition against torture had attained the status of customary law. The court had no hesitation in making an affirmative finding stating:

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[977] *Petane* case op cit 58.

> "The prohibition has become part of customary international law, as evidenced and defined by the UN Universal Declaration of Human Rights…which states, in plainest of terms, "no one shall be subjected to torture". The General Assembly has declared that the Charter precepts embodied in this Universal Declaration "constitute basic principles if international law… These declarations are significant because they specify with great precision the obligations of member nations under the Charter.."[978]

Apart from serving as evidence of customary law, GA resolutions can also contribute to the formation of customary law if they prescribe a course of conduct which is subsequently adopted by states in practice. One example which is often cited in this regard is the Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960. That resolution calls on all colonial powers to take steps to grant independence to their colonial people and asserts the right of people under colonial domination to self-determination. This declaration together with the 1970 Declaration on Principles of International Law as well as subsequent state practice of decolonization became the basis on which many countries attained their independence[979].

The Committee in its deliberations acknowledged the three main roles that GA resolutions can play in the development of customary law. To that extend it developed the main principle that "…resolutions of the United Nations General Assembly may in some instances constitute evidence of the existence of customary international law; help to crystallize emerging customary law; or contribute to the formation of new customary law."[980]. However, the Committee notes that as a general rule, they do not *ipso facto* (own their own impact) create new rules of customary law. The qualification is in line with the theory that the GA is not a world legislative body which makes law for the

[978] 630 F 2d 876 (1980) 882-4. This view on the impact of the declaration on customary law was confirmed by the ICJ in the US *Diplomatic Staff in Tehran (USA v Iran)* case ICJ Reports 1980 3 42 para 91 when it referred to "fundamental principles enunciated in the Universal Declaration of Human Rights" which could be interpreted as attributing more than evidential value to that resolution.
[979] Shaw op cit 109 and Dugard op cit 35.
[980] Section 28 of the Statement.

international community of states. The Committee notes that not all statements contained in the resolution purporting to declare customary law has the effect of crystallising or declaring existing law as the label attached to the resolution is not conclusive[981]. The Committee does not expand on the concept of "crystallization" as this might, unlike with treaties, prove difficult to identify in case of GA resolutions. A UN resolution would usually incorporate elements of all processes of law-formation such that it would be difficult to say which particular process applies. Lastly, though GA resolutions contribute to the formation or constitute evidence of customary law they are not usually binding like treaties which are intended to create legal obligations or rights for states. The Committee further develops the principle that "Resolutions of the General Assembly expressly or impliedly asserting that a customary rule exists constitute rebuttable evidence that such is the case."[982]. This principle simply reiterates the view that the labeling of a resolution is not conclusive of its effect but creates a rebuttable presumption that the law is indeed as declared. The presumption can be rebutted by having regard to the circumstances surrounding the passing of the resolution, voting patterns and explanations and the attitude of states that have a special interest in the matter. The Committee confirms, as with treaties, that GA resolutions can be the historic or material source of customary law, i.e. the impetus leading to the emergence of new law[983]. It also develops the principle that "resolutions of the GA can in appropriate cases themselves constitute part of the process of formation of new rules of customary international law."[984] This principle is supported by the views of the ICJ as expressed in the *Nicaragua* case. When referring to the effect of the Declaration in question[985], the Court said:

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[981] See Sloan "General Assembly Resolutions Revisited" (1987 58 *BYBIL* 93(cited by Dixon and McCorquodale op cit 49) The writer categories the various instruments emanating from the GA as decisions, recommendations, declarations and determinations, interpretations and agreements. Of declarations he notes that they are *sui generis* in that they are not specially authorised by the Charter. He states: "While the effect of declarations remains controversial, they are not recommendations and are not to be evaluated as such…..Where, however there is an intent to declare law, whether customary, general principles or instant, spontaneous or new law, and the resolution is adopted by unanimous or nearly unanimous vote or by genuine consensus, there is a presumption that the rules and principles embodied in the declaration are law."

[982] Section 26 of the Statement.

[983] Ibid Section 30.

[984] Ibid Section 31.

[985] Resolution 2625 (XXV), the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations.

> "The effect of consent to the text of such resolutions cannot be understood as merely that of a 'reiteration or elucidation' of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution *by* themselves."[986]

This *dictum* can be understood to imply that by voting in favour of the resolution states consent to be bound by the principles or rules contained in the resolution. We have noted earlier that voting in itself can constitute both state practice and the *opinio juris* regarding the law, and in principle the Committee accepts this scenario. This is emphasized in the Committee's final principle on the effect of GA resolutions which appears to be contrary to contemporal views on the effect of such resolutions. The Committee proposes that:

> "Resolutions accepted unanimously or almost unanimously, and which evince a clear intention on the part of their supporters to lay down a rule of international law, are capable, very exceptionally, of creating general customary law by the mere fact of their adoption."[987]

This principle is similar to the one relating to treaties. The principle envisages the creation of "instant customary law" through GA resolutions in very rare cases[988] .While in principle there is agreement that if the intention of the states to create or declare law is clear from the resolution law is created the position is not always clear. For example, while many commentators[989] regard the GA Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space 1963 as having created

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[986] Ibid para 188.
[987] Section 32 of the Statement.
[988] This principle was acknowledged by Conradie J in the *Petane* case where he stated: "I am prepared to accept that, as might happen in rapidly developing fields of technical or scientific endeavour, like space exploration, if all the States involved share an understanding that a particular rule should govern their conduct, such a rule may be created with little or no practice to support it. Indeed, the opportunity for putting the understanding into practice may not arise. It may be,….., that it would be better to regard customary international law so created as not emanating from custom but from a new and different source. I am also prepared to accept that customary international law may in this way be created very quickly,.."57.
[989] Shaw op cit 109. See also Dugard op cit 31 states of the resolution "When a the GA unanimously approved …which was promoted by only two states capable of placing objects in outer space…there was widespread agreement that a new rule of customary law had been created."

instant law, not all agree that that resolution created instant law regulating activities in the outer space[990].

The idea of GA resolutions creating "instant" customary law is subjected to stringent conditions by the Committee. The first condition is that there must be a clear intention that states intend to declare that a rule exists or that they wish to create customary law through the resolution. This intention is usually not forthcoming and unanimity or near unanimity appears to be insufficient as shown by the experience of the resolution on the outer space above. However, by relying on the Declaration on Friendly Relations in the *Nicaragua* case the ICJ appears to acknowledge that there was an intention on the part of states to create law through that resolution[991]. The ICJ also relied on the resolution of the Sixth International Conference of American States condemning aggression of 18 February 1928 and resolution 78 of the General Assembly of the Organization of American States of 21 April 1972 in finding that the USA had the necessary *opinio juris* regarding the prohibition of the use of force[992]. The requirement for unanimity or near unanimity has implications for the formation of customary law. If some states express their consent to be bound by a rule through the GA resolution while others do not this might result in the creation of particular customary law for those who consented. Secondly, if there is lack of unanimity, failure to get the support from the states whose interests are specially affected could prevent the resolution from attaining the status of law. This appears to have occurred in case of two GA resolutions relating to economic matters namely; the Declaration on the Establishment of a New International Economic Order[993] and the resolution on Permanent Sovereignty over Natural Resources[994] In the *Texaco v Libya* arbitration the arbitrator could not rely on the former declaration which was adopted without vote but with opposition from capital-exporting countries whose interests were specially affected by any customary law arising from it[995]. The countries

[990] See the contrary views of Cheng "United Nations Resolutions on Outer Space: "Instant" International Customary Law?" 5 *Indian Journal of International Law* (1965) 23 cited by the Committee Final Report 62 and Dugard op cit 31.
[991] *Nicaragua* case op cit paras 188 and 191.
[992] Ibid paras 189 and 192.
[993] Resolution 3201 (S-VI).
[994] Resolution 1803 (XVII).
[995] (1977) 53 *Int, Law Rep*. 389. The case is discussed by the Committee see Final Report 58.

concerned had resisted the alteration of the rules regarding compensation for expropriation of foreign owned property embodied in the latter resolution. The other implication of the Committee's principle is that a state which persistently objects to the resolution or a non-member of the UN which is opposed to the creation of the rule will benefit from the persistent objector rule.

3.8.2.13 Conclusion

The long discussion on international custom as source of law for the ICJ has important implications for the SADC region and the Tribunal in particular. We have noted the difficulties associated with having custom as a source of international law and how the ICJ has grappled with the concept. It is debatable whether that Court has succeeded in laying down clear guidelines on the subject which can be used by other international tribunals such as the Tribunal. However, comfort should be drawn from the fact that a body of international experts on the subject in the form of the Committee of the ILA has produced a concise statement of the principles applicable to customary international law. It is hoped that the Tribunal when faced with difficulties may have recourse to these principles. The other important implication for SADC is the question of particular customary law as opposed to general customary. We have seen that according to judicial and academic opinion it is possible to have particular customary law be it regional or local (between two or more states). Both forms of customary law can develop in the SADC region. The principles relating to the development of customary law through state practice, treaties and resolutions of international organizations do apply.

It is quite apparent from the above discussion on custom as a source of law that the subject is fraught with difficulties. The Tribunal should therefore approach the subject of customary law as expounded by the ICJ with caution as the ICJ itself has not been very consistent in its approach when dealing with the elements of customary law. However the Tribunal should be at liberty to improve on the experience of the ICJ by clarifying certain aspects of customary law having regard to the principles discussed in this section.

3.8.3 General principles of law[996]

Article 38 of the ICJ Statute lists "general principles of law recognized by civilised nations" in third position after treaties and customary law. What is significant is that while treaties and to some extent, customary law are said to be based on the consent of states, general principles of law are arguably non-consensual[997]. The concept of general principles is not peculiar to the ICJ but does exist whether expressly or impliedly in both national and other international legal systems[998]. For example, we shall see that even though the ECJ is not specifically authorised by any of the EU treaties to apply general principles as a source of law, that court has developed its own version of general principles of law. This has been achieved through creative interpretation of the EU treaties. We have seen that the CJ of the AU is authorized to apply the "general principles of law recognized universally or by African states" as a source of law"[999]. In the SADC context we have also seen that Article 21 of the Protocol authorizes the Tribunal to have regard to both "general principles and rules of public international law" and "any rules or principles of the law of member states" in developing its own regional jurisprudence based on the Treaty and protocols[1000]. Similarly, in national legal systems general principles are usually applied to fill gaps left out by legislation or judicial decisions though terminology may differ[1001]. There has been debate, however, as to whether general principles have an independent existence as a source of law or solely exist to supplement gaps left by treaty or customary law. However, there appears to be agreement that the main function of general principles in the international arena is to act as a "gap-

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[996] See generally Shaw op cit 92-10, Dixon op cit 40-43, Janis op cit 55-80, Dugard op cit 38-39, Dixon and McCorquodale op cit43-47 and Mendelson op cit 79-81.

[997] Writers such as Janis op cit 55 consider general principles to be among some of the non-consensual sources of international. Under the head "Non-Consensual Sources of International Law" the writer discusses general principles of law, natural law, *jus cogens* and equity.

[998] For, example the so called rules of natural justice comprising the right to be heard by an impartial court or other body which are found in many legal systems can be regarded as general principles of law. See Hahlo and Kahn op cit 62-63 and Burns and Beukes op cit 320. See also Chap 4 *infra* section on general principles of law as applied by the ECJ.

[999] Article 20.1 CJ Protocol.

[1000] This specific reference to the 'principles and rules of the law of states" resolves the ambiguity created by the reference to "general principles of law" in Article 38.1(c) ICJ Statute.

[1001] Janis op cit 56-57. In common law jurisdictions statute and common law are the main sources of law supplemented by equity or equitable principles.

filler" or a supplementary source of law where treaty, customary law or judicial decisions do not provide a solution to the problem at hand[1002].

The other debate pertaining to general principles as a source of law is what is envisaged in the concept general principles itself. The debate centres around the competing naturalist theory of international law which seeks to extend law beyond the control of states and the positivist theory which seeks to confine law to positive law made by consent of states[1003]. The ICJ itself has never defined or attempted to indicate what is encompassed in the concept therefore there is no conclusive view on the controversy[1004]. For purposes of this study a broad approach of general principles is taken to include general principles of international law which include concepts of natural law and *jus cogens* and equity, principles of municipal law, and principles common to legal systems in general. Each of these categories of principles shall be considered in the next sections.

3.8.3.1 General principles of international law

[1002] Janis op cit 55. The writer notes "Rather general principles of law are usually used merely to fill gaps or, occasionally, to substantiate determinations of customary law." See also Shaw op cit 92 -93 and von Glahn "*Law Among Nations*" (1986) 22-24 (cited by Dixon and McCorquodale op cit 43) who writes "…..It may well have been their purpose (the Committee of Jurists which drafted the provision equivalent to Article 38.1(c) in 1920) to avoid having an international court not hand down a decision because no 'positive applicable rule' existed. The phrase 'general principles' does enable a court, however, to go outside the generally accepted rules of international law and resort to principles common to various domestic legal systems."

[1003] See Dixon op cit 40, Shaw op cit 93-94 and Mendelson op cit who disregards natural law and cites principles of municipal law, principles of international law and principles common to legal systems generally as constituting general principles within the meaning of Article 38.1(c).

[1004] In a dissenting opinion in the *SWA* cases op cit Judge Tanaka made the following useful remarks in relation to the content of Article 38.1(c): "To decide this question we must clarify the meaning of "general principles of law". To restrict the meaning to private law principles or principles of procedural law seems from the viewpoint of literal interpretation untenable. So far as the "general principles of law" are not qualified, the "law" must be understood to embrace al1 branches of law, including municipal law, public law, constitutional and administrative law, private law, commercial law, substantive and procedural law, etc …..Accordingly, the general principles of law in the sense of Article 38, paragraph 1 (c), are not limited to certain basic principles of law such as the limitation of State sovereignty, third-party judgment, limitation of the right of self-defence, *pacta sunt servanda*, respect for acquired rights, liability for unlawful harm to one's neighbour, the principle of good faith, etc. The word "general" may be understood to possess the same meaning as in the case of the "general theory of law", "théorie générale de droit", "die Allgemeine Rechtslehre", namely common to al1 branches of law." paras 294-5.

As noted above, the concept encompasses principles of international law proper, natural law and *jus cogens* and equity and I therefore consider each of them in turn.

3.8.3.1.1 General principles of international law proper

On several occasions the ICJ has made reference to these principles without specifically mentioning the concept of general principles of international law. In the *Nicaragua* case the principle of prohibition on the use of force was referred to in some instances as being "…not only a principle of customary international law but also a fundamental or cardinal principle of such law."[1005] The principle was also described as constituting a "…conspicuous example of a rule in international law having the character of *jus cogens*", a "universal norm", a "universal international law", a "universally recognized principle of international law", and a "principle of *jus cogens.*"[1006]

In the same case, a related principle, that on non-intervention was found by the Court to be a principle of international law[1007]. The principle of *pacta sunt servanda*, or the notion that international agreements are binding and must be performed in good faith can also safely be considered as a general principle of international with possible *jus cogens* status[1008]. The ICJ has also alluded to the principle of good faith as a basic principle of international law. In the *Nuclear Tests* cases the Court noted[1009]:

> "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration."

[1005] *Nicaragua* case op cit para 190.
[1006] Ibid.
[1007] Ibid para 202.
[1008] Shaw op cit 97 and Janis op cit 66-67.
[1009] *Nuclear Test (Judgment) (Australia v France)* ICJ Reports 1974 253 267 para 46.

Other general concepts of international law such as the 'sovereign equality of nations' and the exclusiveness of a state's jurisdiction in its own territory have been said to comprise political goals rather than enforceable legal rules[1010]. For these principles to be enforceable further action is required through conclusion of treaties or creation of customary rules[1011]. It is interesting to note that examples of such principles are contained in Article 4 of the Treaty and these are "sovereignty equality of all member states, human rights, democracy and the rule of law" as well as "peaceful settlement of disputes". There should be no doubt that even if these principles do not constitute legally enforceable rules they can be applied in the interpretation of Treaty provisions. The Tribunal in its ruling in the *Campbell* case[1012]specifically referred to the obligation on SADC collectively and individual member states 'to respect and protect human rights of SADC citizens' and 'to ensure that there is democracy and the rule of law within the region.'[1013]. This case being the first to be considered by the Tribunal is a clear indicator that the Tribunal is prepared to apply the concept of general principles of law in giving effect to specific Treaty provisions.

*3.8.3.1.2 Natural law and **jus cogens** and **erga omnes***[1014]

That modern day international law has deep roots in the naturalist theory of law cannot be seriously disputed[1015]. Following from the naturalist theory of international law some writers such as Verdross believe that Article 38.1(c) has natural law origins[1016]. Janis traces international law principles such as equality of nations to natural law[1017]. The writer also cites Montesquieu as stating that 'the law of nations is naturally founded on

[1010] Dixon op cit 42-43.
[1011] Ibid.
[1012] *Campbell v Republic of Zimbabwe* Case No SADCT: 2/07.
[1013] *Campbell* op cit 3-4.
[1014] See generally Janis op cit 59-67, Dugard op cit 43-46 and Shaw op cit 115-119.
[1015] Modern day international is usually traced back to Hugo Grotius the Dutch scholar who published the *work De Jure Belli ac Pacis* between 1623 and 1624. He is reputed to have separated theological issues from legal issues remarking that the law of nature would be valid even if there were no God. See Shaw op cit 22-26. See also Janis op cit 59 for a discussion on some principles of international law with origins in natural law.
[1016] Dixon op cit 40.
[1017] Janis op cit 59-60.

the principle that many nations ought to do to each other, in times of peace the most good, and in times of war the least bad, that is possible without injuring their genuine interests.'[1018] Some writers however deny that paragraph 1(c) of Article 38 has origins in natural law. For example Dixon argues that "certainly, this was not the original intention of para. 1(c) because states were (and are) reluctant to give up control over the creation of 'law.'"[1019] The writer then goes on to state that in practical terms the source of states' concrete obligations is based on treaty and custom[1020]. However Judge Tanaka had a different view as propounded in his dissenting opinion in the *South West Africa* cases when he stated:

> "[I]t is undeniable that in article 38(1)(c) some natural law elements are inherent. It extends the concept of the source international law beyond the limit of legal positivism according to which, the states being bound only by their own will, international law is nothing but the law of the consent and auto-limitation of the states."[1021]

Although modern day writers such as Oppenheim and Lauterpatcht acknowledge the contribution that natural law made or makes to the development of international law, they have also been forced to refuse to recognize natural law as a source of international law[1022]. Despite these reservations, Janis maintains that the basic idea is that natural law represents "a law so natural that it is to be found in any community, including the community of states"[1023] He uses this natural law basis concept to explain the rationale behind the concept of the *jus cogens*. The writer states: "it makes better sense to view *jus cogens* as a form of natural law, a viewpoint supported both in history and by function."[1024]

[1018] *The Spirit of Laws* cited by Janis 60.
[1019] Ibid 38.
[1020] Ibid.
[1021] *South West Africa Cases Second Phase (Ethiopia and Liberia v South Africa)* ICJ Reports 1966 6 298.
[1022] Janis op cit 62.
[1023] Ibid.
[1024] Ibid 64.

For sake of completeness the concept of *jus cogens* shall be considered here since it hinges on all sources of international law be they conventional, customary or general principles of law in general. The concept of *jus cogens* envisages some rules transcending treaty or customary law which are so fundamental to the international community that such community would not exist without them. Shaw explains that "[T]he concept of *jus cogens* is based upon an acceptance of fundamental and superior values within the system and in some respects is akin to the notion of public order or public policy in domestic legal orders" and acknowledges at the same time its natural law origins[1025]. The public policy dimension noted by Shaw was echoed by Lauterpacht when he introduced the norm in the International Law Commission saying "[T]he test was not inconsistency with customary international law pure and simple, but inconsistency with such overriding principles of international law which may be regarded as constituting principles of international public policy."[1026] Janis describes the concept from a functional point when he states that " a rule of *jus cogens* is, by its nature and utility, a rule so fundamental to the community of states as a whole that the rule constitutes a basis for the community's legal order."[1027]

As noted by the ILC in its report[1028] to the UN GA the rules of *jus cogens* are comparatively recent but they appear to have received widespread acceptance to the extent that no one can seriously dispute their existence[1029]. The concept of the *jus cogens* eventually found positive expression in the Vienna Convention on Treaties and two articles are of particular importance. Article 53 provides that:

[1025] Shaw op cit 117. Dixon op cit 39 describes the rules in similar terms when he states "Rules of *jus cogens* are rules of customary international law that are so fundamental that they cannot be modified by treaty."

[1026] Schwelb "Some Aspects of International Jus Cogens in International Law" 60 *American Journal International law* (1967) 946 949.

[1027] Janis op cit 65.

[1028] Report of the International Law Commission to the General Assembly *Yearbook of the International Law Commission* (1966) vol II 172 247-248. cited by Dixon and McCorquodale op cit 91-92.

[1029] For example Sunclair "The Vienna Convention on the Law of Treaties" (1984) 222-22 cited in Dixon and McCorquodale op cit 92) notes in relation to positivists jurists who might naturally be inclined to dispute the validity of the rules of the *jus cogens* unless they are rooted in custom or treaty "But they would be constrained to admit that the validity of a treaty between two states to wage a war of aggression against a third State could not be upheld; and, having made this admission, they may be taken to have accepted the principle that there may exist norms of international law so fundamental to the maintenance of an international legal order that a treaty concluded in violation of them is a nullity."

> "[A] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

In relation to emerging future rules of *jus cogens* Article 64 provides that:

> "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."

While Article 53 describes what constitutes a peremptory norm of *jus cogens* it does not however give examples. The ILC gave two the reasons for omitting specific examples of norms of the *jus cogens*[1030]. First, mentioning some norms might lead to misunderstanding as to the status of the omitted norms. Secondly, listing the norms would involve the ILC in a prolonged study of matters which fell outside its mandate. The ICL considered therefore that the "right course would be to provide in general terms that a treaty is void if it conflicts with a rule of *jus cogens* and to leave the full content of the rule to be worked out in state practice and in the jurisprudence of international tribunals[1031]. The ICL however mentioned examples of what it thought were norms which qualified as *jus cogens*[1032]. Examples are treaties which contemplate the unlawful use of force or an act which constitutes a crime under international law or a treaty contemplating slave trade, piracy or genocide. While there is lack of agreement on some norms which meet the criteria of *jus cogens* some of those mentioned by the ILC and others have been put forward by commentators. For example Shaw mentions the prohibition against aggression, genocide, slavery, racial discrimination, torture and the right to self

[1030] ILC Report op cit para 3.
[1031] Ibid.
[1032] Ibid.

determination[1033]. Dixon mentions some of these norms but includes the sovereign equality of states and freedom of the high seas[1034].

The ICJ has not specifically[1035] dealt with the question of which norms form part of the *jus cogens* but it has pronounced itself on a related concept that of *erga omnes*. In the *Barcelona Traction, Light and Power Company* case the ICJ coined and described the concept of *erga omnes* as follows:

> "In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of al1 States. In view of the importance of the rights involved, al1 States can be held to have a legal interest in their protection; they are obligations *erga omnes.*
>
> Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law;..others are conferred by international instruments of a universal or quasi-universal character."[1036].

[1033] Shaw op cit 116. Dugard op cit 43 mentions similar norms while Janis op cit 66-67 mentions some of these including the principle of *pacta sunt servanda* as being one of the fundamental principles of the international law with the possible status of *jus cogens*.
[1034] Dixon op cit 39.
[1035] In the *North Sea* cases op cit para 72 the Court remarked: "Without attempting to enter into, still less pronounce upon any question of ,*jus cogens*, it is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases, or as between particular parties,-but this is not normally the subject of any express provision, as it is in Article 6 of the Geneva Convention."
[1036] *Barcelona Traction* case op cit 32 paras 33-34.

In later cases such as the *East Timor* case the Court accepted that the right to self determination has an *erga omnes* character"[1037] while in the *Legal Consequences of The Construction of a Wall on Occupied Palestinian Territory* the Court noted:

> "The Court would observe that the obligations violated by Israel include certain obligations *erga omnes.* As the Court indicated in the *Barcelona Traction* case, such obligations are by their very nature 'the concern of al1 States' and, 'In view of the importance of the rights involved, all States can be held to have a legal interest in their protection' …The obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law."[1038]

The ICL has given recognition to the principles of *jus cogens* and *erga omnes* by including them in its 2001 Draft Articles on State Responsibility for Internationally Wrongful Acts[1039] and this demonstrates the importance which the international community attaches the concepts of *jus cogens* and *erga omnes*. Article 26 of the Draft Articles provides that nothing in the chapter (on defences) precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law. Chapter 3 of Part 2 of the Draft Articles applies to the international responsibility which is entailed by a serious breach by a state of an obligation arising under a peremptory norm of general international law. Article 40.2 provides that a breach of an obligation arising under a peremptory norm is serious if it involves a gross or systematic failure by the responsible state to fulfill the obligation. Article 48.1(b) provides that any state, other than the injured state, may invoke the responsibility of another state if the obligation breached is owed to the international community as a whole. The combined effect of these provisions is to give recognition to the concepts of *jus cogens* and *erga omnes* as fundamental principles of international law.

[1037] In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, was irreproachable. para 29.

[1038] *Legal Consequences of The Construction of a Wall on Occupied Palestinian Territory (Advisory Opinion)* ICJ Reports 2004 90 102 para 155.

[1039] *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10* (A/56/10), chp.IV.E.1) (2001).

It is therefore difficult to imagine how the views of the South African Court in *Azanian People's Organisation (AZAPO) v Truth and Reconciliation Commission*[1040] could receive acceptance either nationally, regionally or internationally. In that case the court after citing article 232 of the SA Constitution[1041] said:

> "These subsections of the Constitution would, it would seem, enable Parliament to pass a law even if such law is contrary to the *jus cogens*. The intention to legislate contrary to the *jus cogens* would, however, have to be clearly indicated by Parliament in the legislation in question because of the *prima facie* presumption that Parliament does not intend to act in breach of international law."[1042]

3.8.3.1.3 Equity[1043]

For purposes of Article 38.1(c) of the ICJ Statute the term equity should be understood in two different ways. First, is the question of whether equity forms part of the general principles described in that article. The second aspect is that Article 38.2 of the Statute specifically provides that sub-article 1 shall not "prejudice the power of the Court to decide a case *ex aequo et bono* if the parties agree thereto." This provision is understood to mean that if the parties agree the Court can decide a case on grounds other than international law. The Court may decide a case on what it considers to be just or fair under this head. The Court has to date never decided a case in this basis. We are here concerned with the first aspect of the inquiry namely whether equity forms part of general principles of law and, if so, what is that is entailed in the concept. The concept of equity can best be understood by describing it in functional terms. Shaw's[1044] description of equity is instructive in this regard. According to him:

[1040] 1996(4)SA 562(C).
[1041] The article reads 'The rules of customary international law binding on the Republic shall, unless inconsistent with this Constitution or an Act of Parliament, form part of the law of the Republic."
[1042] *Azanian* case op cit 574.
[1043] See generally Shaw op cit 99-103, Janis 67-80, Dixon 41 and Dixon and McCorquodale op cit 43-47.
[1044] Shaw op cit 99-100.

> "[E]quity generally may be understood in the contexts of adapting law to particular areas or choosing between several different interpretations of the law (equity *infra legem*), filling gaps in the law (equity *praetor legem*) and as a reason for not applying unjust laws (equity *contra legem*)."[1045]

This description summarises the views expressed by Akehurst[1046] on the concept of equity in international law, and is supported by Janis[1047] who also describes the concept of equity in functional terms. The content of equity as a doctrine of international law can best be illustrated by considering cases and situations where it has been applied by national and international tribunals, in particular, the ICJ. Janis opines that equity can be applied in international law either as a form judicial discretion (procedural sense) or as a form of distributive justice (in a substantive sense)[1048]. In the first sense equity can be used to fill gaps left in the law by way of modifications, exceptions and additions in order to ensure procedural fairness. The application of equity in substantive form results in some form of distributive justice which is described by Aristotle as "the just share [which] must be given on the basis of what one deserves, though not everyone would name the same criterion of deserving."[1049] Although the ICJ has not really indicated that it is applying equity in either of the senses discussed presently, the example which is often given is that of the *North Sea* cases. After finding that the equidistance method of delimitation was not binding because it did not form part of customary law, the Court then directed that the delimitation be effected by "agreement in accordance with equitable principles" and this can be considered as equity in the procedural sense[1050]. The Court continued that if there were discrepancies in applying the suggested method the overlapping areas "are to be divided between them in agreed proportions or, *failing*

[1045] Ibid fn 135.
[1046] Akehurst "Equity and General Principles of law" 25 *ICLQ* (1976) 801 (cited in Dixon and McCorquodale op cit 44). Akehurst discusses the three functions if equity *vis a vis* the law, equity as a source of international law and the dangers of applying equity in resolution of disputes.
[1047] Janis op cit 67. The writer states that equity like other non-consensual sources of law, "is sometimes employed to supplement or modify the rules of conventional and customary international law."
[1048] Janis op cit 67.
[1049] Aristotle: *Nicomachean Ethics* 118-119 (bk 5 ch 3) quoted by Janis op cit 73.
[1050] *Nicaragua* case op cit para 101.

agreement, *equally*, unless they decide on a régime of joint jurisdiction, user, or exploitation for the zones of overlap or any part of them."[1051] (my emphasis). It can be argued that the last part of the Court's directive implies distributive justice as described above in the sense that each party will ultimately get what they deserve.

That equity forms part of general principles of both national and international law is confirmed in both judicial and academic opinion[1052]. A starting point could perhaps be the separate opinion of Judge Hudson in the *River Meuse* Case[1053] when he stated:

> "What are widely known as principles of equity have long been considered to constitute a part of international law, and as such they have often been applied by international tribunals….Article 38 of the Statute expressly directs the application of 'general principles of law recognized by civilized nations' and in more than one nation principles of equity have an established place in the legal system. The Court's recognition of equity as part of international law is in no way restricted by the special power conferred upon it 'to decide a case ex aequo et bono, if the parties agree thereto..It must be concluded, therefore, that under Article 38 of the Statute, if not independently of that Article, the Court has some freedom to consider principles of equity as part of the international law which it must apply."

In later cases the ICJ has continued to apply or refer to equitable principles when deciding cases before it, in particular, in matters relating to delimitation of the continental shelf. In the *Tunisia/ Libya Continental Shelf* case[1054] the Court reiterated the application of equitable principles when it noted that:

> "it is bound to apply equitable principles as part of international law, and to balance up the various considerations which it regards as relevant in order to

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[1051] Ibid.
[1052] Equity is a concept familiar to many legal systems and the UK, Commonwealth and other countries which follow the common law tradition use equity as a source of law. See Hahlo and Kahn op cit 133-138 for discussion of equity as a source of law and its development under both English and Roman-Dutch laws.
[1053] *River Meuse* Case *(Netherlands v Belgium)* PCIJ Ser A/B (1937) No 70 76-77.
[1054] *Continental Shelf (Tunisia v Libya)* ICJ Reports 1982 18 60.

> produce an equitable result. While it is clear that no rigid rules exist as to the exact weight to be attached to each element in the case, this is very far from being an exercise of discretion or conciliation; nor is it an operation of distributive justice."

The Court has also applied equitable principles to delimitation of non-maritime boundaries such as in the *Frontier Dispute* case[1055] where the parties submitted their frontier dispute to a Chamber of the ICJ. The Chamber considered the application of equity to the case and the manner in which it was to do this. It stated:

> "[I]t is clear that the Chamber cannot decide *ex aequo et bono* in this case. Since the Parties; have not entrusted it with the task of carrying out an adjustment of their respective interests, it must also dismiss any possibility of resorting to equity *contra legem.* Nor will the Chamber apply equity *prueter legem.* On the other hand, it will have regard to equity *infra legem,* that is, that form of equity which constitutes a method of interpretation of the law in force, and is one of its attributes. As the Court has observed : "It is not a matter of finding simply an equitable solution, but an equitable solution derived from the applicable law"[1056].

Tribunals other than the ICJ have also applied equity as a principle of international law. In the *Rann of Kutch Arbitration* between India and Pakistan the Tribunal confirmed that equity forms part of international law, therefore the parties were free to present their cases with reliance on principles of equity[1057].

While it accepted that the ICJ and other tribunals regard equity as part of international law, not all however agree that this is desirable[1058]. For example while Akehurst accepts that equity has been applied by international courts as part of international law, he also

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[1055] *(Burkina Faso v Mali)* ICJ Reports 1985 6.
[1056] Ibid para 28.
[1057] 50 *ILR* 2 18.
[1058] Akehurst op cit 45-46.

points out the dangers of doing so[1059]. He identifies some of the dangers as the ease with which states can avoid their legal obligations by simply relying on an equitable exception to a binding legal rule. He also points out the uncertainty which can be created since the "ideas of equity often vary according vary according to the interests and culture of the states concerned."[1060] He also points to the subjective nature of the concept itself by giving analogy to the national approaches such as in English law where it is said to 'vary with the length of the Chancellor's foot."[1061]. While these criticisms are valid, they have not deterred international tribunals from using principles of equity as gap-fillers where conventional or customary rules do not provide an answer to a particular problem. To this extent there is no reason why the Tribunal should not do the same.

3.8.3.2 General principles of municipal law

The ICJ has on several occasions resorted to concepts of municipal law in order to fill gaps which cannot be filled by treaty or customary law. In a separate opinion in the *International Status of South West Africa*[1062] case Judge McNair stated:

> "International Law has recruited and continues to recruit many of its rules and institutions from private systems of law. Article 38(1)(c) of the Statute of the Court bears witness that this process is still active…"[1063].

The judge went on to consider the position of South Africa in relation to the mandate granted to it by the League of Nations[1064]. He noted that South Africa's position could be equated to that of a trustee in the sense of English or US law[1065]. The rights of a trustee were limited to administering the trust property for the benefit of another. He was not entitled to take the property to be his. Applying these principles to South Africa he felt that that country could not absorb the territory of SWA into South Africa without the

[1059] Akehurst op cit 45.
[1060] Ibid.
[1061] Ibid.
[1062] *International Status of SWA* opinion op cit 128.
[1063] Ibid 148-151.
[1064] Ibid 148.
[1065] Ibid 148-149.

consent of the UN[1066]. The ICJ has applied the municipal law principles of estoppel[1067], *res judicata*[1068] and equality of parties[1069] in international litigation. In other cases the Court applied the municipal law principles of *nemo judex in re sua*[1070] and the limited liability of a corporation[1071]. It is worthwhile to note at this stage that the ECJ, has in the context of filling gaps using municipal concepts, adopted a similar approach to the ICJ. For example, in the *AM and S v Commission*[1072] case the court had to decide whether certain documents could be protected from inspection by the EU Commission on the basis of them being privileged communications between lawyers and their clients. The EU treaties did not cater for that situation but the ECJ nevertheless took into account the principles and concepts common to the laws of the member states on confidentiality and concluded that there was some common criteria among those laws which allowed for protection of such communications subject to certain conditions[1073].

3.8.3.3 General principles common to legal systems in general[1074]

Closely linked to principles which originate from municipal law, are principles which may be thought to be common to all legally systems generally. Principles common to legal systems generally are thought to comprise those rules and principles, particularly relating to judicial and other legal procedures, which are common to all legal systems because they are part of the structure of the law[1075]. It is maintained that if international law is to be accepted as a system of law, it must incorporate these procedural and administrative rules which are inherent in the concept of every legal system[1076]. There are

[1066] Ibid 151.
[1067] *Temple of Preah Vihear* case ICJ Reports 1962 6 23, 31 and 32, *ELSI* case ICJ Reports 1989 15 43-4.
[1068] *Effect of Awards of Compensation made by the UN Administrative Tribunal* ICJ Reports 1954 47 53.
[1069] *Judgments of the ILO Administrative Tribunal* ICJ Reports 1956 77 85-6.
[1070] *Mosul Boundary* case (1925) PCIJ, Series B, No 12 32.
[1071] *Barcelona Traction* case op cit 53.
[1072] *AM and S v Commission* Case C-155/79.[1982] 2 Common Market Law Rep 264.
[1073] Ibid 297-318, 322-323.
[1074] In practice it may be difficult to tell whether a particular principle is common to municipal systems, to international law proper or to all legal systems in general but for purposes of this study these principles are discussed separately.
[1075] Dixon op cit 41-42 and Mendelson op cit 79.
[1076] Ibid Dixon op cit.

so many examples which can be cited in this regard and these include, the right to effective judicial remedies, the right to a fair judicial process and evidential rules.

In the *Chorzow Factory* case which involved the seizure of a nitrate factory in Upper Silesia by Poland, the PCIJ declared that 'it is a general conception of law that every violation of an engagement involves an obligation to make reparation'[1077]. As to the nature of the reparations the Court considered it as:

> "a principle of international law that the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured state has suffered as a result of the act which is contrary to international law."[1078]

This case could serve as an example of the right to effective judicial remedy which imposes an obligation on a wrongdoer to provide reparation to an injured party and fair or adequate compensation. Instances of a fair judicial process are provided for in the process of the Court itself. In the *Nicaragua* case the US which had initially appeared before the court in the preliminary stages subsequently refused to participate further in the main proceedings after an adverse ruling had been given against it. Commenting on this and the effect of Article 53 of the ICJ Statute which empowers the Court to determine the case in favour of the other party the Court said:

> "When a State named as party to proceedings before the Court decides not to appear in the proceedings, or not to defend its case, the Court usually expresses regret, because such a decision obviously has a negative impact on the *sound administration of justice.*."[1079](my emphasis).

The Court went on to stress that in situations where Article 53 applied, the Court was still obliged to satisfy itself, not only that it has jurisdiction in accordance with Articles 36

[1077] PCIJ Series A no. 17 1928 29.
[1078] Ibid.
[1079] *Nicaragua* case op cit para 27 and the Court went on to cite cases where similar situations had occurred.

and 37, but also as to the claim[1080]. The Court then spelt out its obligations in such situations which in essence is to ensure a fair judicial process to both parties[1081]. It cited with approval its own jurisprudence in the *Fisheries Jurisdiction* case[1082] where it stated:

> "The Court, however, as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required in a case falling under Article 53 of the Statute, as in any other case, to consider on its own initiative al1 rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court."[1083]

With regard to cases where a state purports to withdraw from a matter in which the jurisdiction of the Court has been established, the Court noted in the *Rights of Passage* case that:

> "it is a rule of law generally accepted, as well as one acted upon in the past by the Court , that, once the Court has been validly seized with a dispute, unilateral action by the respondent state in terminating its Declaration, in whole or in part, cannot divest the Court of jurisdiction."[1084]

Finally, in respect of evidential matters the ICJ used circumstantial evidence in the *Corfu Channel* case arguing that such evidence was "admitted in all systems of law"[1085].

[1080] Ibid para 28.
[1081] Ibid paras 29-30.
[1082] *Fisheries Jurisdiction (Germany v Iceland)* ICJ Reports 1974 17.
[1083] Ibid 181 para 18.
[1084] *Rights of Passage over Indian Territory (Preliminary Objections) (Portugal v India)* ICJ Reports 1957 125 141-2.
[1085] *Corfu Channel (Merits) (UK v Albania)* ICJ Reports 1949 4 18. The Court remarked: "Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in al1 systems of law, and its use is recognized by international decisions."

The Tribunal when developing its own jurisprudence under Article 21 of the Protocol may have regard to some or all of the principles discussed in this section. These could be used to fill in the gaps left by the Treaty, for example in relation to damages for unlawful acts by SADC institutions which we have noted are not specifically provided for in the Treaty[1086]. We shall see that in this regard that, while the TFEU provides for recovery of compensation for loss or damage caused by unlawful acts of EU institutions, it did not have specific remedy for unlawful acts by member states causing loss or damage[1087]. The ECJ in turn developed the principle of state liability for loss or damage resulting from members states failing to fulfill their obligations under the TFEU.

3.8.4 Judicial decisions

The ICJ is authorized by Article 38.1(d) of the ICJ Statute to apply 'judicial decisions" as " subsidiary means for the determination of rules of law," subject to Article 59 of the Statute which states that "the decision of the Court has no binding force except between the parties and in respect of the particular case." Article 21 of the Protocol does not specifically refer to judicial decisions but makes reference to "general principles and rules of public international law" and I have already argued that this omnibus provision must be interpreted to include principles and rules of international law which have been identified or developed by other international tribunals such as the ICJ. It follows from this argument that rules and principles of public international law whatever their source may be applied by the Tribunal thus the 'judicial decisions' referred to in Article 38 of the ICJ Statute could form the *corpus* of such principles and rules. The application of Article 38 by the ICJ therefore constitutes a source of law for the Tribunal subject of course to the application of Article 59 of ICJ Statute. The Protocol also contains a provision which is identical to Article 59 of the ICJ Statute in the form of Article 32.3 of the Protocol which provides that decisions of the Tribunal "shall be binding upon the

[1086] Cha 2.
[1087] Chap 4 *infra* section on the principle of state liability for unlawful acts.

parties to the dispute in respect of that particular case." The interpretation which has been given by the ICJ to Article 59 is also of relevance to the Tribunal.

For purposes of this study some issues regarding the application of Article 38.1(d) by the ICJ need to be considered in relation to the future work of the Tribunal. One of the issues is the question of the identity of the courts or tribunals whose decisions should be taken into account. I therefore discuss the judicial decisions of the ICJ being the main international court and, where relevant, those of other tribunals with particular reference to the question of precedent or *stare decis* (abide by previous decisions), creation of law for the parties and their role in the formation of customary law.

3.8.4.1 Precedent in the ICJ

The issue of whether decisions of the ICJ can be used as precedents by that Court itself has been the subject of much academic debate[1088]. The debate arises in view of the wording of Article 38.1(c) which reads in part ".subject to the provisions of Article 59, judicial decisions…as subsidiary means for determination of rules of law." Article 59 provides that "[T]he decision of the Court has no binding force except between the parties and in respect of the particular case." Despite contrary views on the interpretation of Article 59, the more accepted view is that its effect is not merely to expressly state the principle of *res judicata* but to rule out a system of binding precedent in the ICJ[1089]. This view was confirmed by the PICJ in the *German Interests in Polish Upper Silesia* case where it said: "The object of [Article 59] is simply to prevent legal principles accepted by the Court in a particular case from being binding on other States or in other disputes."[1090] Therefore strictly speaking the ICJ does not observe the doctrine of precedent, but in actual practice it does follow its previous decisions for sake of consistency. Thus in the *Exchange of Greek and Turkish Populations* opinion the Court referred to 'the precedent afforded by its Advisory Opinion No. 3 in the *Wimbledon* case' when expressing the

[1088] Dixon op cit 43-46 and Brownlie op cit 19-24.
[1089] Dixon op cit 43-46, Brownlie op cit 19-24 and Mendelson op cit 81.
[1090] (1926) PCIJ Ser A no. 7 19.

view that the incurring of treaty obligations was not an abandonment of rights[1091]. In the *Reparations* opinion[1092] the ICJ referred to its opinion in a previous case in support of the principle of effectiveness in interpreting treaties. The Court noted:

> "Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties. This principle of law was applied by the Permanent Court of International Justice to the International Labour Organisation in its Advisory Opinion No. 13 of July 23rd 1926…and it must be applied to the United Nations."[1093]

Again in the same judgment the Court declared that "it is a principle of international law that a breach of an engagement involves an obligation to make reparation in an adequate form" as was stated by the PCIJ in its judgment of July 26 1927[1094]. The Court went further than this to distinguish its earlier decision in a previous case. In the *Interpretation of Peace Treaties Opinion* the Court said[1095]:

> "In the opinion of the Court, the circumstances of the present case are profoundly different from those which were before the Permanent Court of International Justice in the Eastern Carelia case when the Court declined to give an Opinion because it found the question put to it was directly related to the main point of dispute actually pending between two Sates, so that answering the question would substantially equivalent to deciding the dispute between the parties, and that at the same time it raised a question of fact which could not be elucidated without hearing both parties."

[1091] (1925) PCIJ Ser B no 10 21.
[1092] *Reparation for Injuries Suffered in the Service of the UN (Advisory Opinion)* ICJ Reports 1949 174.
[1093] Ibid 182-183. There many other cases in which the ICJ has referred to its previous decisions such as the *North Sea* cases 47-49 where the Court referred to several of its decisions in both contentious and advisory opinions. In the *Nicaragua* case the Court referred to principles enunciated in its previous decisions especially the *Corfu Channel* and the *North Sea* cases and others 84, 95-7, 106, 109 and 114.
[1094] Ibid 184.
[1095] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Advisory Opinion)* ICJ Reports 1950 65 72.The *Eastern Carelia* case was also distinguished in the *Namibian Opinion* ICJ Reports 1971 16 23.

The above cases make it clear that the ICJ regards the principles developed in previous cases as authority for deciding future cases otherwise it would not have gone to the extent of distinguishing previous decisions. The rationale behind following previous decisions is to ensure judicial consistency and predictability of decisions hence ensuring legal certainty. We shall see that the ECJ which is similarly not bound by the doctrine of precedent in practice follows its previous decisions[1096].

3.8.4.2 Impact of judicial decisions on international law

Apart from establishing principles which may be followed in future cases, judicial decisions also have an impact on the development of international generally or in particular cases. A decision of the Court can create law for the parties to the dispute because by virtue of Article 59 the parties are bound by the decision. In addition, a decision of the Court may have implications for other states which may have to be content with the legal state of affairs created by the judgment of the Court. The Court's advisory opinion in the *Legal Consequences for Sates of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970*)[1097] is pertinent in this regard. In that opinion the Court declared that the Security Council resolution declaring SA's continued presence in Namibia was valid and that certain legal consequences ensued from such finding. The Court spelt out the legal consequences for SA itself as follows:

> "South Africa, being responsible for having created and maintained a situation which the Court has found to have been validly declared illegal, has the obligation to put an end to it. It is therefore under obligation to withdraw its administration from the Territory of Namibia. By maintaining the present illegal situation, and occupying the Territory without title, South Africa incurs international responsibilities arising from a continuing violation of an international obligation.

[1096] Chap 4 *infra.*
[1097] ICJ Reports 1971 16.

> It also remains accountable for any violations of its international obligations, or of the rights of the people of Namibia."[1098]

The Court went on to outline the consequences of its decisions for other states as follows:

> "The member States of the United Nations are, for the reasons given in paragraph 115 above, under obligation to recognize the illegality and invalidity of South Africa's continued presence in Namibia. They are also under obligation to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia, subject to paragraph 125 below."[1099]

The recent advisory opinion on the *Legal Consequences of the Construction of a Wall in Palestinian Territory*[1100] provides another good example of how a decision of the ICJ can create obligations for the state concerned and create a legal situation which other states are bound to recognize. With regard to Israel's responsibility the Court found as follows:

> "The Court notes that Israel is first obliged to comply with the international obligations it has breached by the construction of the wall in the Occupied Palestinian Territory.. Consequently, Israel is bound to comply with its obligation to respect the right of the Palestinian people to self-determination and its obligations under international humanitarian law and international human rights law..Israel accordingly has the obligation to cease forthwith the works of construction of the wall being built by it in the Occupied Palestinian Territory, including in and around East Jerusalem..Moreover, given that the construction of the wall in the Occupied Palestinian Territory has, *inter alia,* entailed the requisition and destruction of homes, businesses and agricultural holdings, the

[1098] Ibid 54 para 118.
[1099] Ibid para 119.
[1100] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* ICJ Reports 2004 paras 149-153.

> Court finds further that Israel has the obligation to make reparation for the damage caused to al1 the natural or legal persons concerned."[1101]

With regard to the position of Israel's responsibility towards other states the Court observed:

> "The Court would observe that the obligations violated by Israel include certain obligations *erga omnes.* As the Court indicated in the *Barcelona Traction* case, such obligations are by their very nature "the concern of al1 States" and, "In view of the importance of the rights involved, all States can be held to have a legal interest in their protection… The obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law.
>
> ..As regards the first of these, the Court has already observed……. that in the *East Timor* case, it described as "irreproachable" the assertion that "the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character."[1102]

The Court's finding that Israel's conduct was contrary to international law placed Israel under obligation to comply with obligations imposed by the decision at the pain of incurring international responsibility. Other states are obliged to recognise the new legal position created by the decision and if necessary, to take action against Israel should she fail to comply with obligations imposed by the judgment.

Judicial decisions can also contribute to the formation of customary law. Like treaties or resolutions of international organizations, judicial decisions can crystallize emerging customary law, confirm the existence of customary law or influence the emergence of new customary law. For example, in the *Anglo-Norwegian Fisheries* case the issue of

[1101] Ibid paras 149, 151 and 152.
[1102] Ibid paras 155-6.

whether the method of delimiting the fisheries zone contained in Norway's national law was contrary to international law the Court framed the issue thus:

> "The Court must ascertain precisely what this alleged system of delimitation consists of, what is its effect in law as against the United Kingdom, and whether it was applied by the 1935 Decree in a manner which conformed to international law."[1103]

The Court then went on to consider the various activities which took place as evidence of state practice and concluded that the method of delimitation of its fisheries zones contained in the Norwegian law as well as the base-lines used for delimiting were not contrary to international law as alleged by the UK. Similarly, the Court found after examining state practice on the issue that the 10 mile rule used to delimit the zones though used by some states had not acquired the authority of general international law because other states used a different method[1104]. In some cases the decisions of the ICJ have confirmed that principles contained in a treaty have or have not acquired the status of customary law. Notable among these are the *North Sea* cases[1105], the *Nicaragua* case[1106] and the *Palestinian Wall* case[1107]. A decision of the Court can also influence state practice such as the concept of equitable principles in delimiting the continental shelf directed by the Court in the *North Sea* cases. This principle is now embodied in some provisions of the Law of the Sea Convention of 1982[1108]. In other cases the ICJ has also determined that a rule of customary law does not exist such as the *Nuclear Weapons Opinion* where the Court found that ".although those resolutions are a clear sign of deep

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[1103] *Anglo-Norwegian Fisheries* case op cit 134.
[1104] Ibid para 131.
[1105] The Court found that the principle of equidistance used in delimiting the continental shelf had not attained the status of customary law.
[1106] The Court found that the prohibition on the use of force contained in the UN Charter and other regional treaties formed part of customary law.
[1107] Confirming that Article 31 of the Vienna Convention on Treaties forms part of customary law. Also the *Danube Dam* case ICJ Reports 1997 7 paras 46 and 99 confirm a similar point.
[1108] See articles 59, 74 and 83 which all make reference to equity or equitable principles in delimiting the zones or resolving disputes.

concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons."[1109]

3.8.4.3 Decisions of which courts or tribunals?

Article 38.1(d) of the ICJ Statute does not specify the courts or tribunals whose decisions are to be applied leaving it open to the ICJ to apply decisions of whatever court or tribunal it considers appropriate. The case law of the Court seems to indicate that the ICJ may have regard to decisions of other international courts or tribunals, and national courts or tribunals. Situations where these decisions can become relevant have been identified in the literature[1110]. One situation arises when the decision of the court or tribunal itself is the issue before the ICJ such as when a decision of the UN Administrative Tribunal is being reviewed by the ICJ. In the *Land, Island and Maritime Frontier Dispute*[1111]one of the issues was the effect to be given to a decision of the Central American Court of Justice while an order of a national court was at issue in the *ELSI* case[1112]. The decisions of other courts or tribunals can also be treated in the ICJ as evidence of state practice or the *opinio juris* for purposes of determining whether a rule of customary international law has been established[1113]. Decisions of other courts may also be used by the ICJ as analogies in trying to determine a principle of international law and in this sense they may be regarded as general principles of law discussed above. Lastly, the decisions of other courts may be relied on for the persuasiveness of their reasoning and in this sense they are treated as precedents.

However, I must note that the ICJ rarely cites the specific decisions of other international courts or tribunals and never those of national courts[1114]. Various reasons have been advanced for this reluctance such as that the decisions of such courts are conditioned by

[1109] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* ICJ Reports 1996 226 para 71.
[1110] Mendelson op cit pgs 81-82. Brownlie op cit 19-24 lists arbitral tribunals, decisions of the ICJ and its predecessor, decisions of the Court of Justice of the European Communities (now Union), decisions of national courts and decisions of ad hoc international tribunals.
[1111] *Land, Island and Maritime Frontier Dispute (Merits)(El Salvador v Honduras)* ICJ Reports 1992 35.
[1112] ICJ Reports 1989 15.
[1113] See discussion on the objective element of customary law above.
[1114] Mendelson op cit 82-83.

the terms of instruments establishing them and that those of national courts could be influenced by national law[1115]. Other reasons are that the other courts are not of equal standing making it difficult to choose among them and of more significance is the standing of the Court itself: it would seem demeaning for the ICJ being the supreme tribunal on international law, to be seen to rely too heavily on decisions of other courts[1116]. While these matters might be of concern to the ICJ they need not be necessarily of concern to the Tribunal. The Tribunal is not a supreme court on matters of international law or for that matter, of continental or regional law, hence it need not be constrained in resorting to decisions of other courts as the ICJ. The Tribunal should thus be able to have regard to decisions of international courts such as the ICJ, other regional economic courts such as the ECJ, COMESA and the CJ of the AU when it becomes functional[1117]. Similarly the Tribunal can also have regard to decisions of international arbitration panels and other regional specialised courts such as the African Court of Human Rights, the Inter-American Court of Human Rights, the European Court of Human Rights and others. On the issue of decisions of national courts, the Tribunal should be able to resort to them since it is specifically empowered by the Protocol to have regard to the principles of law of SADC member states[1118].

3.8.5 Writings of publicists[1119]

Article 38.1(d) of the ICJ Statute also authorises the ICJ to have regard to the writings of the most highly qualified publicists of various nations as a subsidiary means for the determination of rules of law. Today the writings of even the most respected international lawyers cannot create law but textbooks may be used for reference on particular points of

[1115] Mendelson op cit 83.
[1116] Ibid.
[1117] In the *Campbell* case op cit 28-36 the Tribunal made reference to decisions of several national and international tribunals. It referred to decisions of the European Court of Human Rights, Inter-American Court of Human Rights, African Commission on Human and Peoples' Rights, Constitutional Court of South Africa and the Judicial Committee of the Privy Council of the UK.
[1118] Article 21(b) Protocol.
[1119] See Mendelson op cit 83 and Shaw op cit 105-7.

law[1120]. Despite this, the writings still have some influence on international law and are often cited by counsel in pleadings before the Court and by the Court itself. In the *Land, Island and Maritime Frontier Dispute*[1121]case the ICJ cited the writings of Oppenheim, H Lauterpacht and Gidel in its judgment. While the writings have not been readily resorted to by the ICJ they continue to have a significant impact on the evolution of international law in general such that the Tribunal may have recourse to them. Writers may provide evidence of law, especially customary law, in that they usually elucidate the nature, history and practice of international law. Some writers such as Gidel provide evidence of state practice on law of the sea[1122] Writers also present a forum for stimulating thought about the values and aims of international law as well as identifying defects in international law. Their reasoning can also be of use to both practitioners and jurists in that it provides some coherence and order into the structure of international law. Even national courts such as the Supreme Court of the USA have had recourse to writers in order to seek clarity such as happened in the *Paquete Habana*[1123]. In that case the court gave a classic statement on the role of writers when it stated:

> "We turn to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is".[1124]

Of course, a certain amount of judgment must be used when choosing which publicist to rely on and much will depend on time of writing, skill, diligence, intellectual honesty, independence and political orientation of the author and even his or her nationality. In the *Spanish Zone of Morocco Claims* case[1125], Judge Huber warned that writers 'are

[1120] Dixon op cit 46-47.
[1121] *Land, Island and Maritime Frontier Dispute* op cit ICJ Reports 593-4 para 394.
[1122] *Droit International Public de la Mer*. Chateauroux. 3 vols 1932-4.
[1123] 175 US 677 (1900).
[1124] Ibid 700.
[1125] (1925) 2 RIAA 615.

frequently politically inspired' and caution must be exercised when the country of the author has a special interest in a particular matter. These limitations on the supposed prejudices of the writers are refuted by Shaw who states "..but it is an allegation which has been exaggerated. It should not lead us to dismiss the value of writers, but rather to assess correctly the writer within his particular environment."[1126] While, there is very little evidence as to the degree to which judges of the ICJ rely on the writing of jurists apart from their own, but it may be that they are used more frequently in the actual practice of international law than Article 38 would actually suggest. Other valuable academic works are the reports of the International Law Association discussed in the section on customary law and those of the International Law Commission which are discussed in the next section. While they can only be material or evidential sources they may have a tangible effect on state practice as well as being the everyday first point of reference for those practicing international law.

The Tribunal shouldn't encounter difficulties in applying the writings or teachings of publicists as part of its own general rules and principles of public international law[1127]. The only limitation in this regard might be the paucity of material on international law in the SADC region. Most major works on international law are either of American or European origin[1128] although some major works are beginning to emerge from the region[1129]. Studies such as the current one could also provide another source of reference material for the Tribunal[1130].

3.8.6 Other sources of law

[1126] Shaw op cit 106-7.
[1127] In the *Campbell* case op cit 25, 27 the Tribunal referred to the works of several writers. It referred to books by Shaw *International Law* and De Smith *Judicial Review*.
[1128] Classic writers such as Grotius, Vattel and Gentili, Pudendorf and Bynkershoek are of European origin. Modern classical writers such as Oppenheim, Roussaeu, Shaw, Janis and Brownlie are also either of European or American origin.
[1129] A major work is by Dugard "*International Law –a South African Perspective*" 2006 which is cited in this study.
[1130] Other material on international law may be available in publications such as the "*African Yearbook of International Law*" and the "*South African Yearbook of International Law*".

Article 38 ICJ of the Statute lists the sources of law discussed above but this has not prevented the ICJ from resorting to other sources of law than those listed. These other sources include resolutions of international organisations such as the GA of the UN[1131], draft reports of the International Law Commission and what is often described as "soft law". Another source of international law proposed in some quarters are unilateral acts of states[1132]. Strictly speaking these should not be regarded as sources of general international law but possibly as sources of obligations for the states performing the acts therefore they are not discussed here[1133]. As for the other sources, provided that they are relevant, there appears to be no good reason why the Tribunal cannot, have recourse to them under the general rubric of "general principles and rules of public international law."[1134]. I therefore make a brief note only two of these (resolutions have been discussed in the section on custom as a source of law) sources of law irrespective of whether the source has been used by the ICJ or not.

3.8.6.1 International Law Commission[1135]

The work of the International Law Commission (ILC) as a source of rules and principles of public international law deserves some mention in this study since the ICJ has had recourse to it[1136]. The ILC was established by the GA in 1948 with the object of promoting the progressive development of international law and its codification[1137]. It consists of thirty-four members drawn from the various regions of the world namely Africa, Asia, America and Europe and is aided by bodies of eminent jurists from the same regions. The work of the ILC consists of drafts, reports and studies on topics of international law. In case of drafts, the ILC prepares a draft which is submitted to various states for comments and this is usually followed by an international conference convened

[1131] These have been discussed in relation to their relationship with treaties.
[1132] Dugard op cit 40-41, Shaw op cit 114-5 and Mendelson op cit 85.
[1133]Mendelson op cit 85 expresses the view that these acts should be considered against the background under which they are made in other words they are not "free standing" as independent sources of law. Shaw states "Unilateral acts, while not sources of international law as understood in Article 38(1)…may constitute sources of obligation." 115.
[1134] Article 21(a) Protocol.
[1135] Shaw op cit 112.
[1136] *Danube Dam* case *infra*.
[1137] The ILC was established by GA Resolution A-RES-174(11) of 21 November 1947.

by the UN. Many international conventions have been adopted following this procedure and these include, the Conventions on the Law of the Sea 1958, Diplomatic Relations in 1961 and the Law of the Sea in 1982. The ILC has produced draft articles on jurisdictional immunities in 1991, a draft statute on the international criminal court in 1994 and draft articles on state responsibility in 2001. These draft articles are often referred to in the judgments of the ICJ and in a speech to the UN General Assembly the president of the court referred to the *Gabcikovo-Nagymaros Danube Dam* case[1138] and obeerved that the judgment:

> "is notable, moreover, because of the breadth and depth of the importance given in it to the work product of the International Law Commission. The Court's judgment not only draws on treaties concluded pursuant to the Commission's proceedings: those on the law of treaties, of State succession in respect of treaties, and the law of international watercourses. It gives great weight to some of the Commission's Draft Articles on State Responsibility, as did both Hungary and Slovakia. This is not wholly exceptional; rather illustrates the fact that just as the judgments and opinions of the Court have influenced the work of the International Law Commission, so the work of the Commission may influence that of the Court."

There appears to be no reason why the work of the ILC should not, in appropriate cases influence the work of the Tribunal when applying general principles of public international law derived from the work of the ILC. Thus the work of the ILC can form the basis of international treaties which bind states parties to them and can afford evidence of state practice which may constitute new rules of customary law.

3.8.6.2 Soft law[1139]

[1138] *Danube Dam (Gabcikovo-Nagymaros Project) (Hungary v Slovakia)* ICJ Reports, 1997 7.

[1139] See generally Dixon op cit 50, Janis op cit 52-53 and Shaw op cit 110-112. See also Weil "Towards Relative Normativity in International law" 77 *AJIL* 413(1983) (cited by Dixon and McCorquodale op cit 51-52).

The term "soft law" has assumed different meanings depending on the perception of the writer concerned. The term has been used with reference to resolutions of international organizations[1140] which are neither strictly binding nor completely void of any legal significance[1141]. GA resolutions which could fall under this category include the Declaration on the Establishment of a New International Economic Order of 1 May 1974 and the Charter of Economic Rights and Duties of States of 12 December 1974. Examples of resolutions of other bodies which have been cited include the Helsinki Final Act of 1975 which was not a binding agreement, but influenced the development of law on international human rights in Central and Eastern Europe[1142]. Another example is the Stockholm Conference of 1972 and the UN Environment Programme which have given birth to norms on environmental law including conventions such as the Vienna Convention for the Protection of the Ozone Layer of 1985 and the 1992 Convention on Biodiversity[1143]. Of course whether a resolution can be classified as soft law should depend on its intention or purpose and the language used. These resolutions are not law *per se* but could form the basis for the development of new legal norms be they conventional or customary based. These resolutions could also be used by international tribunals as evidence of existing or new customary law and as aids to interpretation of legal instruments derived from them. This should prove true in the SADC context where apart from the Treaty and protocols, there are a host of other documents under different names. Examples are the MOUs on Macroeconomic Convergence and Taxation and Related Matters, Charter of Fundamental Social Rights, Declaration of Gender Development, Declaration of Aids and HIV and many others[1144]. These documents, unlike protocols, are not legally binding but are meant to serve as guidelines to states in certain policy areas. It is submitted that they constitute soft law as described in this

[1140] Resolutions here is used in a broad sense to include resolutions of the UN, recommendations, declarations, Acts. guidelines, codes of practice or standards by whatever name they are known.
[1141] Janis op cit 52-53 and Shaw op cit 110. Weil op cit says of resolutions "Even if resolutions do not attain full normative stature, they nevertheless constitute 'embryonic norms' of 'nascent legal force' or 'quasi-legal rules'".
[1142] Dixon op cit 50 and Shaw op cit 111.
[1143] Shaw op cit 755 and Janis op cit 53.
[1144] See Appendix I for a list of SADC legal instruments including protocols and declarations MOUs etc.

section and can be used by the Tribunal as aids to interpretation of customary or treaty norms associated with them.

The terms "soft law" has also been used to refer to non-binding treaties or provisions in treaties. Examples given include Article 2 of the Covenant on Economic, Social and Cultural Rights 1966 which obliges state parties to 'take steps, individually and through international assistance with a view to achieving progressively the rights recognized in the treaty'[1145]. Another example cited[1146] is the 1963 Moscow Treaty banning certain nuclear weapons tests Article 1 of which provides that 'each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country.' These treaty provisions do not impose enforceable obligations or create rights but could influence the development of state practice which could ripen into customary law. Many of the SADC protocols fall under this category of soft law as they do not create specific legal rights or obligations for states. For example, the Protocol on Legal Affairs in Article 5.3 provides that state parties shall cooperate and share information with one another and with the coordinating unit with a view to contributing to the attainment of the objectives of the legal sector. It is not clear what will happen in case of non-cooperation by a member state. Another example is article 4.5 of the Protocol on Forestry which provides that "State parties shall endeavour to protect and where possible, restore natural forests, to maintain the essential ecological functions of these ecosysytems." The language used in such treaties or agreements is often vague or ambiguous. Weil gives examples of expressions such as where states undertake to 'seek to', 'make efforts to', 'promote', 'avoid' and ' take all steps with a view to'[1147].

As with soft law deriving from resolutions, these treaties or treaty provisions are not without significance and can be used to develop legal norms or as an aid to interpretation.

[1145] Dixon op cit 50.
[1146] Weil op cit 51.
[1147] Ibid.

3.9 Enforcement[1148]

Once given, a decision of the ICJ is final and without appeal under Article 60 of the ICJ Statute. Under Article 59 of the ICJ Statute, the decision is binding as between the parties involved but although it does not bind third parties it is very influential in the evolution of new rules of international law. The Court itself is not concerned with compliance and takes the view that "once the Court has found that a state has entered into a commitment concerning its future conduct it is not the Court's function to contemplate that it will not comply with it"[1149].

However, under Article 94 of the UN Charter all member states undertake to comply with the decision of the Court in any case in which they are party. In case of failure, the other party may approach the Security Council which may then make recommendations or take binding decisions. These provisions, as we have seen, resemble those applicable in SADC[1150]. The Tribunal, as we have noted, cannot enforce its own judgment through judicial methods but in case of non-compliance must refer the matter to the SADC Summit for appropriate action[1151].

Generally, states have complied with decisions of the ICJ but there are several instances where states have refused or failed to comply with Court's judgment. For example, in the first contentious case before the Court, the *Corfu Channel* case[1152], the Albanian government of the day refused to pay the damages awarded to the UK. Recourse was not sought from the Security Council but the UK resorted to other means which finally resulted in payment being made in 1992[1153]. Iran refused to participate in proceedings

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[1148] See Rosenne op cit 42-49.
[1149] *Nuclear Tests (Merits) (Australia v France)* ICJ Reports, 1974 253 272 para 60.
[1150] See Chapter 2 section on enforcement.
[1151] Article 32.5 Protocol.
[1152] ICJ Reports 1949 4.
[1153] There were arbitral proceedings which culminated in proceedings before the Court in the *Monetary Gold Looted From Rome in 1943* ICJ Reports 1954 19 case in which the Court declined jurisdiction, Meanwhile gold belonging to Albania and the subject matter of the arbitration was by kept by a Commission which subsequently returned it to Albania in 1992. Payment to the UK was made be a new government of Albania.

brought against it by the USA in the *Hostages* case[1154] and it subsequently refused to comply with the judgment of the Court requiring immediate release of American diplomats held hostage. The matter was finally resolved through diplomatic channels in the form of the Algiers Accord. The matter had been referred to the Security Council which issued resolution 461 of 31 December 1979 which took account of the Court's order indicating provisional measures and threatened enforcement action under Chapter VII of the Charter. Until 1991, the USA refused to accept the jurisdiction of the Court as well as the judgment on the merits in the *Nicaragua* case[1155]. Nicaragua subsequently brought the matter before the Security Council under Article 94 of the Charter. The SC could not adopt a resolution on the matter because of a negative USA vote. This compelled Nicaragua to resort to the GA which adopted resolution 41/31 in November 1986 which called for compliance with the Court's judgment of 1986. Further resolutions by the GA on the matter did not help until 1991 when the USA accepted the Court's jurisdiction. These few cases of non-compliance with judgments of the Court and the difficulties which can be encountered in enforcing them through the political organs of the UN illustrate problems which are inherent in a system which lacks judicial methods of enforcement[1156]. We shall see that the EU has attempted to resolve the problem of non-compliance with ECJ judgments through imposition of financial penalties on the defaulting state[1157]. A situation akin to the ICJ appears to be developing in SADC with the refusal by Zimbabwe to comply with the decision of the Tribunal in the first case decided by it[1158].

However, on a more positive note, states do and have generally complied with judgments of the ICJ even in sensitive cases such a the *Kasikili/Sedudu Island* case[1159] where

[1154] *US Diplomatic Staff in Tehran* case op cit.
[1155] *Nicaragua* case op cit.
[1156] Some commentators attribute the problems to absence of unanimity among the SC permanent members especially during the Cold War era when east-west tensions were high. Rosenne op cit 46-47.
[1157] Lump sum or periodic penalty payments can now be imposed by the ECJ against recalcitrant member states under Article 228 EC Treaty. See Chap 4 *infra*.
[1158] *Campbell* case op cit. Zimbabwe now contents that the Tribunal was not properly constituted since the Protocol had not been ratified by two-thirds of the member states as required by the Treaty. On 24 September 2009 the Secretary General of SADC announced that the case had been referred to SADC for an opinion.
[1159] *Kasikili/Sedudu Island (Botswana v Namibia)* ICJ Reports 1999 1045.

Namibia agreed to comply with an ICJ judgment over a boundary dispute between it and Botswana. Various reasons have been advanced for both states' compliance and non-compliance with ICJ judgments. As for non-compliance, one reason is that some of the judgments were given when the defendant states had either refused to accept the Court's jurisdiction in the first place or had subsequently withdrawn from the proceedings for one reason or the other[1160]. One reason given for the high level of compliance is the consensual nature of the ICJ's jurisdiction meaning that once a state has consented to the jurisdiction of the Court it is hard to imagine that the same state would refuse to comply with the Court's judgment[1161].

It is difficult to foretell what the attitude of SADC states could be towards compliance with judgments of the Tribunal, but one thing which can be stated with certainty is that non-compliance on the basis of refusal to accept the Tribunal's jurisdiction should not arise because the jurisdiction of the Tribunal is compulsory in relation to the Treaty and to those protocols which a state is party. The Zimbabwe situation should be taken as an exception since the challenge to the legitimacy of the Tribunal itself presents an arguable case[1162].

[1160] Rosenne op cit 42- 47.
[1161] Dugard op cit 470-472.
[1162] See J Gauntlet's legal opinion in response to the Zimbabwe government's contention that the Tribunal is not properly constituted. The opinion is available on most of Zimbabwe's online publications such as http://www.zimbabwemetro.com/. and http://www.thezimbabwean.com (visited 25/11/09).

CHAPTER 4

4 THE EUROPEAN UNION AND THE EUROPEAN COURT OF JUSTICE[1163]

4.1 Introduction

The story of the European Court of Justice (ECJ)[1164] cannot be told and understood properly without an understanding of the history, nature and legal order of the European Union (EU) and European Communities (communities). For the sake of clarity, for purposes of this study I refer to the EU legal order as opposed to the EC legal order[1165]. I do so despite the fact that much of the legal regime within the EU was applicable to the European Communities especially the European Community (EC). However, I use the EU for two main reasons. First, the original three communities no longer exist after the expiry of one of them, hence there were two remaining communities the dominant one being the EC[1166]. These remaining communities were further subsumed into the EU by the Treaty of Lisbon which amended both the Treaty on European Union (TEU) and the Treaty establishing the European Communities (EC Treaty) which is now known as the Treaty on the Functioning of the European Union (TFEU)[1167]. We shall see that some aspects of EU policies which fell outside the scope of the EC were gradually subsumed under the EC regime thus heralding an integrated EU. After the coming into force of the Lisbon Treaty, the EU is now the single legal entity under which the former communities

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[1163] See generally Fairhurst op cit, Wyatt and Dashwood op cit, Steiner and Woods and Weatherill *Cases and Materials on EU Law* (2006).

[1164] See Brown and Jacobs op cit.

[1165] Currently most legal texts refer to European Union law as opposed to European Community law e.g. Fairhurst *Law of the European Union* (2006), Wyatt and Dashwood *European Union Law* (2006), Weatherill *Cases and Materials on EU Law*(2006) etc.

[1166] The European Coal and Steel Community expired after 50 years in 2002.

[1167] Article 1 of the TEU which replaced the former Article 1 now reads in part: "The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties'). Those two Treaties shall have the same legal value. The Union shall replace and succeed the European Community."

and the other two areas of intergovernmental cooperation are subsumed[1168]. Even though some of the decisions and other acts made under the latter two areas of cooperation are not legally binding, they, on the whole, comprise the entire legal order of the EU. For these reasons, in this study I refer to the entity, the EU and its structures, unless for historical reasons or otherwise it is specifically necessary to make reference to the community or communities or to community law. For the same reason reference is also made in this study to "EU law" though, for all intents the main law applicable in the EU is that emanating from the former EC Treaty which is now the TFEU. In addition, the numbering of former EC Treaty and TEU provisions was substantially changed due to amendments introduced by the Lisbon Treaty[1169]. For avoidance of confusion I shall refer to the provisions of the amended TEU and TFEU together with references, where necessary, to the provisions of the old TEU and EC Treaty.

This chapter outlines those aspects of the EU legal order as they are pertinent to this study namely the jurisprudence of the ECJ which can be of use to the Tribunal. The first section outlines the history and nature of the EU legal order and briefly explores the legal developments taking place up to the time of writing. It also outlines the relationship between the EU and the communities. The second section is an outline of the political institutions of the EU which are important for the purposes of this study namely, the European Council (EC), the Council of Ministers (Council), the European Commission (Commission) and the European Parliament (EP).

The next section discusses the main focus of this study, the European Court of Justice (ECJ) which is now formally called the Court of Justice of the EU comprising the Court of Justice, the General Court (formerly known as the Court of First Instance (CFI)) and the specialized courts[1170] touching on its organisation and methods of interpretation. The

[1168] The Lisbon Treaty came into force on 1 December 2009. The two areas of intergovernmental cooperation were set out in the Treaty of the European Union and these are "Common foreign and security policy" (Title V of the TEU) and "Police and Judicial Cooperation in Criminal Matters" (Title VI of the TEU).

[1169] Consolidated versions of both the TEU and TFEU can be accessed on the EU website europa.eu/Lisbon_treaty.(visited 15/01/10).

[1170] The ECJ is now known as the Court of Justice of the European Union after the amendments made by the Lisbon Treaty while the former CFI is now known as the General Court. See Article 19 TEU.

subsequent sections tackle the identified areas of study namely, access to the court, basis of jurisdiction, sources of law, and enforcement methods. Under the section on sources of law, some fundamental principles peculiar to EU law which have been developed by the ECJ are explored in depth. These are the principles of supremacy of EU law, direct effect and indirect effect of EU law, and the principle of state liability. In addition, the chapter touches on a few aspects of the substantive law of the EU on free movement of goods. This area of substantive law has been selected because it was at the centre of the creation of the EU common market[1171] and more or less similar provisions are found in SADC law. The purpose is to demonstrate how the ECJ has contributed to the attainment of the objectives of the EU through creative interpretation of the law. The final section deals with the methods used to enforce EU law. The discussion on this topic is confined to the actual enforcement of the judgments of the ECJ by the both the Commission and the ECJ as opposed to enforcement of EU law in general which aspects are covered in the sections dealing with parties before the court and jurisdiction.

4.2 History and nature of the EU legal order

The history of the institution currently termed the EU dates back to 1950 during the aftermath of the disastrous World War Two. In that year the French Foreign Minister[1172] issued a statement to the effect that future war between the European powers, in particular Germany and France, could be avoided if the then main armourers of the war machinery - coal and steel - were removed from the control of individual states and brought under the control of a supranational body which was independent of the member states. Such a move would ultimately lead to a future United Europe characterized by peace and economic progress. The ideal was realized a year later on 18 April 1951 when France, Italy, Germany and the Benelux countries, Netherlands, Belgium and Luxembourg, negotiated and signed the Treaty Establishing the European Coal and Steel

[1171] Amendments introduced by the Lisbon Treaty replaced the term “common” by “internal” market.

[1172] See Wyatt and Dashwoods op cit Chap 1. The French Foreign Minister Mr. Robert Schuman made the historic proposal (commonly called the Schuman Plan) to a ministerial meeting in London on May 9, 1950. His proposal was nothing less than the fusion of the coal and steel industries in France and Germany, and other countries wishing to participate, under a supranational High Authority. The Plan was to have far reaching implications constituting “the first concrete foundation for a European Federation which is indispensable for the preservation of peace.”

Community (ECSC) also known as the "Treaty of Paris", Paris being the city where it was signed. This treaty which established one of the three original communities had a lifespan of 50 years and thus expired in 2002. The main objective of this treaty was to bring the production, distribution and sale of coal and steel among the six states under the control of a common community. This community had legal personality and was composed of five institutions namely; the High Authority, a consultative committee attached to the Authority, an Assembly, a Special Council of Ministers and a Court of Justice.

The ECSC created the impetus for further European integration which resulted in the establishment of two more communities by the same six states in 1957. In that year the states signed at Rome, the Treaty Establishing the European Economic Community (EEC) and the Treaty Establishing the European Atomic Energy Community (Euratom). The EEC aimed at establishing a community in goods, labour, services and capital among the six states while the Euratom aimed at cooperation in the use of atomic energy among the same states. The three communities then came to be collectively known as the European Communities and, of these, the most ambitious was the EEC (later renamed the European Community (EC)). The EEC aimed at creating a common market for the whole economic field (except areas covered by the ECSC and Euratom) for the six states. This involved the creation of a customs union which required the abolition of all customs duties and quantitative restrictions between member states, a common external customs tariff and provision for the free movement of goods, services, labour, business and capital resulting in the creation of a single market[1173].

The EEC was empowered to pursue various other economic activities such as the adoption of a common agricultural and transport policy and the creation of a community competition policy and approximation of laws of member states to the extent required for the functioning of the common market[1174]. The EEC and Euratom had institutions modeled on the ECSC namely, the Commission, the Council of Ministers, the Assembly

[1173] Article 3EEC Treaty.
[1174] Ibid.

and the Court of Justice. At the signing of the EEC Treaty and the Euratom Treaty it was agreed that the three communities would share two of the institutions namely the Assembly and the Court of Justice. Subsequently in 1965 a Merger Treaty was signed by the member states which resulted in the creation of a single institutional framework for the three communities consisting of a Council, a European Commission, an Assembly (later renamed the European Parliament (EP)) and a European Court of Justice. These institutions which served what remained of the original three communities are now integrated as institutions of the EU.

The first major amendment to the three original treaties came in 1986 with the signing of the Single European Act (SEA). The aim of the SEA was to transform relations between the member states which then numbered fifteen into a European Union[1175]. The union was characterized by the addition, to the existing economic integration process, of political cooperation among the member states. Political cooperation was to be achieved by provisions falling outside the existing treaties through the establishment of a body known as the "European Council" consisting of an assembly of the heads of state or government of the member states assisted by their foreign ministers. Political cooperation was to be by way of intergovernmental non-binding arrangements. Economic policies were to be or continue to be implemented through the structures of the EEC and amendments were made to the EEC Treaty to that effect. The SEA amended the EEC by setting deadlines for the completion of the internal market (common market) and expanding the competence of the EEC to legislate on a whole range of matters some of which originally fell outside the economic field, e.g. environment, health and safety matters, education and consumer protection. The internal market would be completed by the removal of the remaining obstacles to the free movement provisions of the EEC Treaty by January 1993. Apart from that, the SEA also attempted to address the "democratic deficit" in the communities which was characterised by the lack of legislative powers on the part of the now only directly elected institution of the communities, the EP. This was achieved by way of enhancing the powers of the EP in the

[1175] The commitments to transform the region into a Union were contained in the preamble to the SEA and now the provisions relating to the Union are contained in Title I Articles 1-8 of the TEU (former Articles 1-7).

legislative process. The enhancement involved introduction of the "cooperation procedure" whereby in the law-making process the other political institutions of the EEC, the Council and Commission, had to cooperate with the EP in certain policy areas such as prohibition of discrimination, free movement of workers and measures to complete the internal market[1176].

The next major change in the history of the EU was the signing at Maastricht on 7 February 1992 of the Treaty on European Union (TEU). The TEU introduced the three "pillars" of the EU which have now been integrated into the single structures of the EU by the Lisbon Treaty. The three pillars were based on Article 1 of the TEU which read:

> "The union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty".

The first pillar was the three communities (reduced to two in 2002), while the second pillar comprised the common foreign and security policy[1177] and the third pillar comprised cooperation in justice and home affairs[1178]. The TEU also introduced the notion of respect for fundamental human rights and freedoms as general principles of EU law[1179]. The second and third pillars constituted areas of intergovernmental cooperation and remained outside the ambit of the formal structures of the community treaties and these two pillars covered the political dimension of EU integration. The TEU also amended the EEC by changing its title from EEC to European Community Treaty (EC Treaty) to reflect its now multipurpose nature as opposed to being a purely economic treaty. From now on I refer to it as the EC Treaty. The EC Treaty was further amended by the TEU to cater for the creation of EU citizenship, creation of a common economic and monetary policy and common currency, adoption of the principle of subsidiary, changes

[1176] Articles 19, 45, 46 and 50 TFEU (former 13, 39, 40 and 44 EC Treaty).
[1177] Title V of the TEU titled "General Provisions on the Union's External Action and Specific Provisions on Common Foreign and Security Policy" (former Title V of the TEU 1992).
[1178] Title VI TEU 1992.
[1179] Article 6TEU 1992 these are now contained in Article 6 TEU.

to the decision making process and introduction of new tasks and activities for the EC specifically to include new political and social goals[1180].

While all these developments were taking place, membership of the EU was also growing. In 1973 the original six members were joined by three other states, the United Kingdom of Great Britain (UK), Denmark and Ireland. This was followed by the accession to the community treaties of Greece in 1981, Spain and Portugal, in 1986 and Finland, Austria and Sweden in 1995. The largest recent expansion took place in 2004 when ten states namely, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia joined the EU to increase membership to twenty-five. The last addition took place in January 2007 when Bulgaria and Romania joined the EU to bring the total membership to twenty-seven. With each accession of members Treaties of Accession were signed between the original communities and those joining and such treaties become an integral part of the original treaties.

The successive enlargements of the membership of what is now the EU necessitated restructuring of the EU institutions in order to accommodate the new enlarged membership. An attempt to achieve this was made through the Treaty of Amsterdam (TOA) which was signed in June 1997[1181]. The TOA, however, failed to address the various challenges brought about by the enlargement of the EU except that it set a limit on members of the EP and specified the powers of the President of the Commission. The TOA also broadened the objectives of the EU to include commitments on non-economic goals such as rights and duties of EU citizens, human and civil rights, as well as respect for the principles of democracy and the rule of law. The issues of sexual equality and combating of discrimination were also addressed. The TEU brought about the three pillar structure of the EU with the first pillar comprising the communities whose institutions could take legally binding decisions, and the two other pillars composed of intergovernmental cooperation where no legally binding decisions could be taken. The TOA, however, transferred a large part of the third pillar (JHA) to the framework of the

[1180] The amendments were effected in Title II TEU.
[1181] Amendments made by the TOA to the TEU and EC treaties are contained in Part one of the TOA.

first pillar and renamed what remained of the third pillar, police cooperation in criminal matters. What was transferred to the first pillar is now subject to the formal structures of the communities and jurisdiction of the ECJ. The second pillar remained intact, outside the jurisdiction of the community institutions.

The other major change to the EU treaty regime was in 2000 when the Treaty of Nice (ToN) was adopted and subsequently signed in 2001. The ToN amended both the EC Treaty and the TEU in several respects. The most significant change was the increase in membership of the EP to cater for the anticipated increase in membership of the EU. A further constitutional change in the EU was the adoption of the Treaty establishing a Constitution for Europe which was signed at Rome in 2004. This treaty has not been ratified, but if ratified by the twenty-seven member states of the EU it could have made far reaching changes to the constitutional structure of the EU because it would have replaced the EC Treaty, the SEA, the TEU, the ToA and the ToN. After the Constitutional Treaty failed to be ratified by all the member states, further changes were introduced by the Reform Treaty (later renamed the Lisbon Treaty) which was signed at Lisbon in December 2007. This treaty was a modified version of the Constitutional Treaty and it was intended to amend the EC Treaty and TEU and to introduce the Charter of Fundamental Rights as a legally binding document into the EU legal order.

The Lisbon Treaty came into force on 1 December 2009 following its ratification by the last of the twenty-seven members of the EU. This treaty brought about some major changes especially to the political institutions of the EU. The Lisbon Treaty formally abolished the pillar system to introduce a single legal person the European Union[1182]. Through amendments to the TEU and the TFEU, the Lisbon Treaty introduced values on which the EU is based namely, those relating to respect for human rights and non-discrimination[1183]. The amended TEU sets out the objectives of the EU which are

[1182] Article 1 TEU reads: "The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties'). Those two Treaties shall have the same legal value. The Union shall replace and succeed the European Community." and Article 47 TEU reads: "The Union shall have legal personality."

[1183] Article 2 TEU reads: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging

basically the establishment of an internal market and the establishment of an economic and monetary union whose currency is the euro[1184]. The principles of subsidiarity and proportionality are given prominence and explained in the TEU and accompanying protocols[1185]. Of particular importance to this study is the incorporation of the Charter of Fundamental Rights of the European Union[1186] as an integral part of the Treaties and the proposed accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms[1187]. Article 7 of the TEU provides for the enforcement of fundamental human rights contained in Article 2 through determinations of breaches by the Council or the European Council and suspension of the rights of members for serious and persistent breaches of their obligations under Article 2. EU citizenship is enshrined as additional to national citizenship while principles of democracy are introduced into the EU through representation of EU citizens in the European Parliament, the European Council and the Council[1188]. National parliaments are to actively participate in the affairs of the EU through involvement in the EU legislative process and having a say in the implementation of the principle of susbsidairity, areas of freedom, security and justice and the accession of new members to the EU Treaties[1189]. Also of importance to this study are the TEU provisions establishing institutions of the EU and their respective powers and competences[1190]. The following institutions are established as institutions of

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to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

[1184] Article 3 TEU.

[1185] Article 5.3TEU reads: "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level." and Article 5.4 reads: "Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties."

[1186] Article 6.1 reads: "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties." The UK, Poland and the Czech Republic by separate protocols opted for the exclusion of the application of the Charter from their domestic laws unless they have specifically provided for its application.

[1187] Article 6.2 TEU obliges the EU to accede to the ECHR while Article 6.3 provides that: "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

[1188] Articles 9, 10 and 11 TEU.

[1189] Article 12 TEU.

[1190] Articles 13-19 TEU.

the EU: the European Parliament, the European Council, the Council, the European Commission (referred to as 'the Commission'), the Court of Justice of the European Union, the European Central Bank, and the Court of Auditors and the powers and competences of these institutions are discussed in the following sections[1191]. The amended TFEU now spells out the specific areas where the EU shall have exclusive competence, shared competence and where competence may be exercised by the EU to support, coordinate or supplement actions of member states[1192]. The decision-making process in the EU also received attention in the Lisbon Treaty with the EP gaining more powers in the legislative process through the co-decision procedure which is renamed the ordinary legislative procedure[1193]. The provisions on common and security policy previously contained in the TEU are included in modified form in the TEU and they now cover the EU's external relations and security and defence matters[1194].

4.3 EU Institutions[1195]

In this section I consider the main political institutions of the EU namely, the European Council, the Council of Ministers (Council), the European Commission (Commission) and the European Parliament (EP) and their respective functions in particular in the law-making process. Article 13 of the TEU establishes the institutional framework of the EU which shall "aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the member states, and ensure the consistency, effectiveness and continuity of its policies and actions." The institutions of the EU are the European Parliament, the European Council, the Council, the European Commission (referred to as 'the Commission'), the Court of Justice of the European Union, the European Central Bank, and the Court of Auditors[1196]. It should be noted that the Lisbon Treaty also

[1191] Article 13-19 TEU.
[1192] Articles 1, 3, 4 and 6 TEU.
[1193] See Article 2 of the Lisbon Treaty which amended various terms and expressions used in the TFEU.
[1194] Title V TEU.
[1195] Provisions relating to institutions of the EU were contained in Part five (Articles 113-139) of the EC Treaty while those relating to the European Council were found in the TEU Article 4. These provisions are now contained in Articles 14-19 of the TEU and other relevant provisions of the TFEU. See Article 13.3 TEU.
[1196] Article 13.1 para 1.

expanded the concept of "institutions" of the EU in Articles 15.3, 228.1, 265, 266 and 267 (former 255.3, 195.1, 232, 233 and 234 EC Treaty) of the TFEU to include "bodies, offices or agencies." Article 13.2 of the TEU further provides that each of the institutions shall act within the limits of the powers conferred on it by the Treaties, and in conformity with the procedures, conditions and objectives set out in them[1197]. This principle is referred to as "attribution of powers" meaning that the institutions have only the powers given to them expressly or impliedly by the treaties[1198]. The European Council was not part of the formal structure of the communities but has now become part of the EU structures and is discussed in this section as it provided crucial support to the functioning of the communities and the EU. There are other institutions of the EU, some of which act in an advisory capacity, but these together with the Court of Auditors, are not discussed here as they play no major role in the law-making process of the EU.

4.3.1 European Council[1199]

The legal bases for the functioning of the European Council is the TEU. Article 15.1 of the TEU provides that the European Council shall provide the EU with necessary impetus for its development and shall define the general political guidelines thereof but it shall not exercise legislative functions. Article 15.2 of the TEU provides that the European Council shall consist of the heads of state or government of the member states and its President and the President of the Commission. The High Representative of the Union for Foreign Affairs and Security Policy (High Representative) shall take part in its work. The European Council meets twice every six months at meetings convened by its President and decisions shall be taken by consensus unless the Treaties provide otherwise. The European Council shall elect its President by qualified majority, for a term of two and a half years and may end the term through the same procedure. A point to note here is that the President, unlike under previous arrangements, shall not hold national office. The President is entrusted with several administrative functions such as chairing the council,

[1197] Article 13.2 TEU.
[1198] See Wyatt and Dashwoods op cit 85 for a discussion on the principle of attribution of powers within the EU.
[1199] Provisions relating to the European Council are found in Article 15 TEU and Articles 235 and 236 TFEU.

ensuring continuity of the work of the European Council and reporting to the European Parliament. He also ensures external representation of the EU on matters of common and security policy without usurping the powers of the High Representative who is a member of the Commission. The European Council has no formal decision making powers but acts in an advisory capacity in cases where there is deadlock between the Council and the EP during the legislative process. In such cases the matter is referred to the European Council which either refers the matter back to any of the institutions or to the Commission in which case a new proposal is introduced[1200]. The main function of the European Council is to give guidelines and political direction to the activities of the EU[1201] and on several occasions it has helped to resolve sticky issues arising from the operations of the EU[1202].

The role of the European Council can be contrasted to that of the SADC Summit. We noted that the Summit consists of SADC heads of state or government and is the highest policy making organ of SADC with power to take legally binding decisions[1203]. While the European Council cannot, in general, take legally binding decisions, or enact legislative measures, in practice it plays a vital role in approving the proposed programmes of the other EU institutions[1204]. As for the Summit, we have seen that it is the supreme policy-making organ of SADC and also possess law-making powers, and in both respects the decisions of Summit are binding[1205].

4.3.2 Council of Ministers[1206]

[1200] See for example, Articles 48 (social security legislation), 82and 83 (criminal justice system), 86(combating of crime) and 87 (police cooperation) of the TFEU.
[1201] Article 15.1 TEU.
[1202] See Wyatt and Dashwoods op cit 30-31 for instances where the European Council has resolved difficult political matters. For example in 1984 the European Council contributed to developments which led to the adoption of the SEA 1986, in 1988 the same Council contributed to the establishment of the economic and monetary union as well as laying down the criteria for new membership between 1993 and 1999.
[1203] See discussion of SADC Summit in Chap 2.
[1204] See Fairhurst op cit 81-82.
[1205] Article 10 Treaty and discussion in Chap 2.
[1206] Provisions relating to the Council are found in Article 16 TEU and Articles 237-243 TFEU (former 202 to 210 EC Treaty).

Article 16.2 of the TEU provides that the Council shall consist of a representative of each member state who may commit the government of the member state in question and cast its vote. The Council represents the interests of the governments of the member states in the EU both at political and legal level. Article 16.1 of the TEU provides that the Council shall, jointly with the European Parliament, exercise legislative and budgetary functions and that it shall carry out policy-making and coordinating functions as laid down in the Treaties. Amendments brought about by the Lisbon Treaty have clarified certain matters pertaining to the legal status of the Council. The practice was that Council met in various formations depending on the matter under discussion. Thus, if the matter under discussion is agriculture, the Council will consist of the relevant ministers of agriculture of the member states. However, in certain matters under the EC Treaty such as the economic and monetary union and the establishment of the single currency and the nomination of the President of the Commission, decisions had to be taken by the Council "meeting in the composition of the Heads of State or Government on recommendation of the Council meeting in its ordinary formation[1207]. There was, however, a distinction in law between Council acting under the cited provisions, and acting in its ordinary formation[1208]. In the former case, its decisions were legally binding, while under the latter they are not. Under the Article 16.6 of the TEU, the Council shall meet in different configurations the list of which shall be adopted by the European Council under Article 236 of the TFEU. Two configurations, the General Affairs Council, and the Foreign Affairs Council, are specifically mentioned in the TEU, while the others will be established by the European Council by qualified majority. The previous practice whereby Council could meet as a formation of heads of state or government no longer applies as there is an EU institution, the European Council, which meets in that role[1209]. The Council is now required to meet in public when it deliberates and votes on draft legislative acts and meetings of the Council are to be divided accordingly, those dealing with legislative acts, and those dealing with non-legislative acts[1210].

[1207] See Articles 121 and 214 EC Treaty.
[1208] See Wyatt and Dashwood op cit 33.
[1209] Article 2 of the Lisbon Treaty which replaces the words "Council meeting in the composition of the Heads of State or Government" by "European Council".
[1210] Article 16.8 TEU.

The Presidency of Council configurations, other than that of foreign affairs, shall be held by member state representatives on the Council on the basis of equal rotation as determined by the European Council in accordance with the TFEU[1211]. The work of Council is prepared by a Committee of Permanent Representatives consisting of senior national officials from each member state[1212].

The tasks of the Council which were set out in Article 202 of the EC Treaty have now been replaced by the TEU general provision which gives the Council, acting jointly with the EP, legislative and budgetary functions[1213]. The Council also has a general task of policy-making and coordinating functions of the various institutions. The specific functions of the Council, as was the case before, are to be found in the detailed provisions of the TEU and the TFEU relating to the functions of the Council. The Council and the EP have to agree to the acceptance by the EU of new international obligations with third countries or organizations[1214]. The Council authorizes the Commission or the High Representative to open negotiations with third countries and finally, jointly with the EP, takes the decision to conclude agreements[1215]. These functions and powers of the Council are significant to the extent that they are legally binding and therefore subject to the jurisdiction of the ECJ. We shall see that the ECJ has played a vital role in trying to shape the institutional balance of powers between the Council and other institutions of the EU.

The position of the Council can be contrasted to that of the SADC Summit which, as we have noted, is the supreme policy and law-making organ in SADC. The slight variation here is that the Council when legislating, acts at the initiation of the Commission and, in most cases, with the consent or concurrence of the EP while in SADC there appears to be no need for Summit to obtain the consent or concurrence of any other SADC institution before adopting legal instruments except that the Summit must approve protocols on the

[1211] Article 16.9 TEU.
[1212] Article 16.7 TEU and Article 240 TFEU (former 207 EC Treaty).
[1213] Article 16.1 TEU and Article 272 TFEU which deals with the budget of the EU.
[1214] Articles 216-218 TFEU deal with the conclusion of internationals agreements by the EU.
[1215] Procedures for negotiation and conclusion of treaties are set out in Article 218 TFEU (former 300 EC Treaty).

recommendation of the SADC Council[1216]. The position of the Council can also be compared to that of the SADC Council. We have noted that the SADC Council is responsible for overseeing the functioning of SADC and the implementation of the policies of SADC. In addition, the SADC Council has authority to adopt subsidiary legal instruments under delegated powers from the SADC Summit. The exercise of these powers by the SADC Summit or Council should be subject to the same scrutiny by the Tribunal as powers of the EU Council are subject to scrutiny by the ECJ. To this extent the experience of the ECJ in scrutinising the acts of the Council may be useful to the work of the Tribunal.

4.3.3 European Commission[1217]

Unlike the European Council and the Council, the Commission does not consist of representatives of the governments of the member states of the EU as such but consists of persons chosen on grounds of their general competence and European commitment and whose independence is beyond doubt"[1218]. Members of the Commission shall act in the general interest of the EU, and shall be completely independent in the performance of their duties[1219]. Subject to the powers of the High Representative, the members of the Commission shall neither seek nor take instructions from any Government or other institution, body, office or entity, and they shall refrain from any action incompatible with their duties or the performance of their tasks[1220]. They may not seek or take instructions from the any government or other body and each member state has undertaken to respect that principle and not seek to influence the Commissioners in the performance of their duties[1221]. As from 1 December 2009 to 1 November 2014, the Commission shall consist of one national of each member state, including its President

[1216] Article 10.2 Treaty read with Article 22 Treaty.
[1217] Provisions relating to the Commission are set out in Article 17 TEU and Articles 244-250 TFEU (former 211 to 219 EC Treaty).
[1218] .Article 17.3 para 1 TEU (former 213 EC Treaty).
[1219] Article 17.3 para 2 TEU.
[1220] Ibid See also Article 245 TFEU for the duties and obligations imposed on members of the Commission by the Treaties.
[1221] Article 245 TFEU (former 213 para 2 EC Treaty).

and the High Representative who shall be one of its vice-presidents[1222]. Unless the European Council decides otherwise, as from 2014, the Commission shall consist of a number corresponding to two-thirds of the number of member states, including its President and the High Representative[1223]. The members of the Commission shall be chosen then on the basis of a system of equal rotation between member states, reflecting the demographic and geographical range of all the member States[1224].

The functions of the Commission which were set out in Article 211 of the EC Treaty are now contained in Article 17.1 of the TEU. These are listed as to ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them, to oversee the application of EU law under the control of the Court of Justice of the European Union, to execute the budget and manage programmes, to exercise coordinating, executive and management functions, as laid down in the Treaties and with the exception of the common foreign and security policy, and other cases provided for in the Treaties, to ensure the EU's external representation. The Commission shall initiate the EU's annual and multiannual programming with a view to achieving interinstitutional agreements. In addition, EU legislative acts may only be adopted on the basis of a proposal from the Commission unless the Treaties provide otherwise[1225]. All other acts shall be adopted on the basis of such proposal where the Treaties so provide[1226]. The Commission is headed by its President who is responsible for laying down guidelines for its work, deciding on internal organisation to ensure efficiency as a collegiate body and appointments of the vice-Presidents other than the High Representative[1227]. Commissioners may resign from office or be removed from office in accordance with the procedures laid in the TEU[1228]. The Commission as a body is answerable to the EP which has power to pass a motion of censure in which case the whole Commission as a body must resign[1229]. The President of

[1222] Article 17.4 TEU. In essence, this means that the Commission will be composed of 18 members which constitutes two thirds of the current 27 member states.
[1223] Article 17.5 TEU.
[1224] Article 17.5 para 2 TEU. The principles to be applied by the European Council in choosing commissioners are as laid down in Article 244 TFEU.
[1225] Article 17.2 TEU.
[1226] Ibid.
[1227] Article 17.6 TEU.
[1228] Article 17 TEU.
[1229] Article 17.8 TEU.

the Commission is elected jointly by the European Council and the EP while the High Representative is appointed by the European Council with the agreement of the Commission[1230].

The position of the Commission can be compared to that of the SADC Secretariat which is described as the principal executive institution of SADC and likewise member states of SADC have made similar undertakings not to interfere with the work of the SADC Secretariat[1231]. The major difference is that the Commission wields extensive powers and responsibilities which are specified in the Treaties including the power to initiate legislation. In addition, the appointment of Commissioners is by way of complex procedures while that of the Executive Secretary and his deputy are simply made by the Summit on the recommendation of the SADC Council[1232].

4.3.4 European Parliament[1233]

The European Parliament (EP) is currently the only institution of the EU composed of directly elected representatives of the citizens of the EU. In the original EEC Treaty, the EP was known as an Assembly whose task was to exercise advisory and supervisory powers conferred on it by that treaty. This institution has undergone successive changes throughout the evolution of the EU and now enjoys considerable power and influence over the activities of the EU. Although it bears the epitaph "Parliament" it lacks the various features which characterize traditional national parliaments such as the power to initiate legislation and to impose taxes. These traditional powers of a parliament are shared with the other institutions of the EU which are the Council and the Commission. I can again contrast the position of the EP with that of the SADC-PF which as we have seen is an institution of SADC whose role is primarily observary and advisory. We shall

[1230] Articles 17.7 and 18.1 TEU.
[1231] See Chapter 2 and Article 17 Treaty.
[1232] Article 10.7 Treaty. The appointment of other Secretariat staff are done by the SADC Council Article 14.4 Treaty.
[1233] Provisions relating to the EP are contained in Article 14 of the TEU and Articles 223-234 of the TFEU (former 189 -201 EC Treaty).

see that the ECJ has through its creative interpretation and application of the TFEU helped to enhance the position of the EP within the institutional framework of the EU.

Article 14 of the TEU provides that the EP shall be composed of representatives of the EU citizens and it shall not exceed seven hundred and fifty in number plus the President. Representation shall be proportional with a minimum of six seats and a maximum of ninety-six seats per state. Members of the EP are elected for a term of five years by universal suffrage in a free and secret ballot[1234]. The EP shall, jointly with the Council, exercise the legislative and budgetary functions of the EU[1235]. In addition, the EP shall exercise political control and consultation as set out in the Treaties and elect its President[1236]. The detailed functions of the EP are set out in specific provisions of the TEU and TFEU and in particular it is responsible for supervision of the Commission[1237]. The EP shall also elect a European Ombudsman who is empowered to receive complaints of and investigate cases of maladministration by institutions, bodies, offices and agencies of the EU except for the ECJ acting in its judicial role[1238]. Other matters relating to functioning and powers of the EP are set out in Articles 223 to 227 of the TFEU.

4.4 The decision making process[1239]

Before concluding this section on the political institutions of the EU, I must briefly discuss the decision-making process in the EU. Decisions pertaining to the EU may relate to a variety of issues ranging from implementation of a policy such as enlargement of the EU, adoption of international agreements or the adoption of legislative measures. The type of procedure to be used will be determined by the subject matter of the decision as determined by the Commission. The Commission will choose the appropriate legal bases under the treaties and that choice will determine which other institutions of the EU will be involved, the voting process to be used in the Council and the extent to which the EP

[1234] Article 14.2 TEU read with Article 223 TFEU.
[1235] Article 14.1 TEU and Article 272 TFEU.
[1236] Ibid.
[1237] Article 225 TFEU (former192 EC Treaty).
[1238] Article 228 TFEU (former 195 EC Treaty).
[1239] See Fairhurst op cit chapter 4 for a discussion on the decision making process in the EU.

will be involved. Apart from a few instances when the EP or Council initiates proposals for action, in almost all cases the Council acts on a proposal from the Commission. This is implicit from many provisions of the TFEU which refer to the Council acting on a proposal from the Commission adopting measures to achieve the objectives laid out in the treaty[1240]. The Commission being the initiator of the EU's progammes produces its annual work programme each year. The programme contains a framework of policy and legislative objectives for that year. Once a proposal has been agreed by the Commission, dialogue then commences with the Council or EP depending on the subject matter. Before drafting the proposal, the Commission must find the correct legislative base in the treaties, e.g. in case of legislation relating to free movement of workers Articles 45 and 45 (former 39 and 40 EC Treaty) of the TFEU will be the base. Much litigation has emanated on challenges to the legislative bases used by the Commission. Decisions are taken by a simple majority of the Commissioners[1241].

Decisions of the EP are taken by an absolute majority of the votes cast. In some cases the Treaties may specify the majorities required, e.g. Article 252 of the former EC Treaty provided that there must be an absolute majority of its component members meaning that a minimum of 367 votes is needed (half the number of MEPs 366 plus 1). In the Council there exist three different voting procedures which are simple majority, qualified majority and unanimity.

Prior to the entry into force of the Lisbon Treaty there were four main decision-making procedures in use in the EU and these are co-decision, assent, consultation and cooperation. These procedures have been largely streamlined by the Lisbon Treaty which introduced two broad categories of decision-making in the EU. First, is the co-decision procedure (also referred to in the EC Treaty as the "procedure referred to in Article 251") which has been renamed the "ordinary legislative procedure". The few remaining areas

[1240] For example Articles 22, 26, 40, 42, 44, 46 and 52 of the former EC Treaty all made reference to the Council acting on a proposal from the Commission or in terms of Article 251 or 252 EC Treaty. The last two articles themselves require the Commission to make legislative proposals to the Council.
[1241] Article 250 TFEU (former 219 EC Treaty).

where unanimity, the consent of the EP is required or where consultation with the EP or another institution is required have been renamed the "special legislative procedure."

4.4.1 Ordinary legislative (co-decision) procedure

The ordinary legislative procedure (formerly known as the procedure "referred to in Article 251") is the main legislative procedure by which directives and regulations are adopted. The Lisbon Treaty extended the application of this procedure to virtually all the policy areas where the unanimity, qualified majority or the Article 251 procedures applied[1242] as well as to new policy areas[1243]. Where the ordinary legislative procedure was introduced in policy areas or where the EP had limited or no power in the legislative process, the result is that the EP has enhanced or new legislative powers in the policy area in question.

The procedure was introduced by the TEU of 1992 and was initially intended to replace the cooperation procedure discussed below. The co-decision procedure was amended by the ToA of 1997 and the number of legal bases where the procedure applied was greatly increased by both the latter treaty and the ToN of 2000. The new Article 294 of the TFEU (former 251 EC Treaty) which was introduced by the Lisbon Treaty now governs the ordinary legislative procedure. In summary the procedure involves presentation of a proposal by the Commission to both the Council and the EP. The EP must adopt a position which it must submit to the Council. If the position is approved by Council the act is adopted, but if rejected, the Council must adopt a position which must be communicated to the EP with reasons. The EP must within three months either approve the Council's position failing which the act is deemed to be adopted. If the EP rejects the

[1242] Examples of the policy areas where changes were made are Articles 16(286), 18(12), 19), 24(21), 43(37), 46(40), 48(42), 51(45), 59(52), 64(57), 75(60), 77(62), 78 and 79(63), 81(65), 91(71), 100(80), 114(95), 116(96), 121(99), 129(107), 149(129), 153(137), 157(141), 164(148), 165(149), 166(150), 167(151), 168(152), 169(153), 172(156), 173(157), 159(175), 177(161), 178(162), 182(166), 188(172), 192(175), 207(133), 209(179), 212(18a), 224(19), 257(225a), 281(245), 322(279), 325(280), 336(283) and 338(285) TFEU(former EC Treaty) This list is not exhaustive and is intended to demonstrate the magnitude of the policy areas where the new procedure applies.

[1243] Examples of new policy areas where the new procedure was introduced are Articles 19, 82, 87, 133, 194, 195, 196, 197, 214 and 333 TFEU.

Council's position by majority of its members, the act fails. If by majority of its members, the EP proposes amendments to the Council's position, the amended text shall be submitted to the Council and the Commission for their opinion. If within three months of receiving the EP's amendments, the Council approves them the act is adopted. If during that period the Council rejects the amendments, the Presidents of the Council and the EP shall jointly convene a conciliation committee consisting of equal number of persons from the Council and the EP. If the conciliation committee fails to approve a joint text the proposed act fails but if they agree on a joint text they shall refer it to the EP and Council who may approve it within six weeks failing which the act fails.

4.4.2 Special legislative procedures

As noted in the section above, all other procedures for the adoption of EU acts, other than the ordinary legislative procedure, shall be termed the special legislative procedure according to amendments made by the Lisbon Treaty. The procedure was introduced in existing policy areas as well as in new policy areas[1244].

4.4.3 Consent (assent) procedure

Under this procedure which was also part of the Article 251 of the EC Treaty procedure, the Council can adopt legislation based on a proposal by the Commission after obtaining the consent of the EP. The amended Treaties have done away with the word "assent" which is replaced by "consent," "after consultation" or "ordinary legislative procedure." The procedure was used for issues concerning EU membership (Article 49 of the TEU), economic and social cohesion (Article 177 TFEU (former 161 of the EC Treaty)), and amendments to the Statute of the European Central Bank (Article 129 TFEU (former 107(5) EC Treaty). Thus, the EP has the legal power to accept or reject any proposal but no legal mechanism exists for proposing amendments. The EP has, however, provided for

[1244] Examples where the special legislative procedure applies are Articles 19(13), 21(18), 22(19), 23(20), 25(22), 64(57), 77(62) and 113(93) TFEU (former EC Treaty) and Articles 83 and 86(31) TFEU (TEU).

a conciliation committee and a procedure for giving interim reports where it can address its concerns to the Council and threaten to withhold its consent unless its concerns are met.

4.4.4 Consultation procedure

Before the SEA 1986, the consultation procedure was the most widely used legislative procedure in the then EC. Under this procedure the Council, acting either unanimously or by a qualified majority depending on the policy area concerned, can adopt legislation based on a proposal by the Commission after consulting the EP. While being required to consult the EP on legislative proposals, the Council is not bound by the EP's position. Consultation is still used for legislation concerning: the harmonisation of indirect taxation affecting the establishment and the functioning of the internal market (Article 113 of the TFEU (former 93 EC Treaty)), the approximation of laws which relate directly to the establishment and functioning of the common market (Article 115 TFEU (former 94 EC Treaty)), objectives of the EU which relate to the common market but which lack an explicit legal basis in the treaties (Article 352 of the TFEU (308 EC Treaty)[1245], competition law (Article 103 TFEU (Article 19 TFEU (former 83 EC Treaty)), fiscal measures relating to the environment (Article 192 TFEU (former 175 EC Treaty)), certain decisions related to visas, immigration and asylum policy, discrimination (Article 13 EC Treaty)[1246], and liberalising specific services (Article 59 TFEU (former 52 EC Treaty).

The procedure is also used in relation to the EU's advisory bodies such as the Committee of the Regions and the Economic and Social Committee that are required to be consulted under a range of areas under the treaties affecting their area of expertise. Such a procedure takes place in addition to consultation with the EP or the other legislative procedures.

[1245] Under the new Article 352 TFEU the consent of the EP must be obtained before such measures are adopted.

[1246] Under the new Article 19 TFEU the consent of the EP must be obtained before appropriate action is taken.

4.4.5 Cooperation procedure

The cooperation procedure (also known as the Article 252 of the EC Treaty procedure) used to be a very important procedure which covered a wide variety of legislation, notably in relation to the creation of the single market. Under this procedure the Council can, with the support of the EP and acting on a proposal by the Commission, adopt a legislative proposal by a qualified majority, but the Council can also overrule a rejection of the particular proposed law by the EP by adopting a proposal unanimously.

The procedure was introduced by the SEA 1986. It was amended by the ToA when its replacement with the co-decision procedure failed to be agreed. It was previously used for a large range of topics, but changes to the treaties brought about by the TEU, ToA and ToN have limited it to certain aspects of economic and monetary union. The procedure now exists in a modified form after the Lisbon Treaty amendments in Article 295 of the TFEU which reads:

> "The European Parliament, the Council and the Commission shall consult each other and by common agreement make arrangements for their cooperation. To that end, they may, in compliance with the Treaties, conclude interinstitutional agreements which may be of a binding nature."

4.4.6 Commission and Council acting alone

Under this procedure the Council can adopt laws proposed by the Commission without requiring the opinion of EP. After the Lisbon Treaty it appears that this procedure is no longer used as it was abolished in the policy areas where it applied namely; the freedom of movement of capital (Article 64 of the TFEU (former 57 of the EC Treaty)[1247] and the

[1247] Under the new Article 64 of the TFEU the consent of the EP through the ordinary legislative procedure is now required instead of a qualified majority on a proposal from the Commission.

Common Commercial Policy (Part Five Title II (former Title IX EC Treaty) of the TFEU.

4.4.7 Commission acting alone

Under this procedure the Commission can adopt legislation without consulting or obtaining the consent of anyone. The Commission can adopt laws on its own initiative concerning monopolies and concessions granted to companies by member states (Article 106(3) TFEU (former 86(3) EC Treaty) and concerning the right of workers to remain in a member state after having been employed there (Article 45(3)(d) TFEU (former 39(3)(d) EC Treaty).

4.5 The European Court of Justice[1248]

4.5.1 Overview of the Court

The Court of Justice of the European Union (usually called the European Court of Justice (ECJ)) was originally established by the Treaty establishing European Coal and Steel Community as the Court of Justice of the European Communities in 1951. It became an institution of the communities when the Treaties of Rome established the European Economic Community (EEC) and the European Atomic Energy Community (Euratom). Although all three communities were separate, under the Convention of 25 March 1957 they shared some common institutions; these being the Parliamentary Assembly and the Court of Justice. It was with this that the Court of the ECSC became the Court of Justice of the European Communities. When in 1992 the TEU created the EU, the name of the Court of Justice did not change with its powers primarily being over the communities pillar of the EU. The name was formally changed to the Court of Justice of the European Union by the Lisbon Treaty. The main provisions relating to the ECJ are now contained

[1248] See Brown and Jacobs op cit for an in depth study of the organization, jurisdiction and role of the European Court of Justice. Information on the ECJ can be accessed at its website http://curia.europa.eu .(visited 15/01/10).

in the amended TEU[1249], the TFEU[1250] and the Protocol on the Statute of the Court of Justice of the European Union (ECJ Statute) annexed to the TEU, TFEU and the Treaty establishing the Atomic Energy Community[1251]. The ECJ is based in Luxembourg, unlike most other EU institutions which are based in Brussels. The ECJ shall include the Court of Justice, the General Court and specialized courts and its main role is to ensure that in the interpretation and application of the Treaties the law is observed[1252]. Article 19 of the TEU imposes an obligation on EU member states to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

The Court of Justice shall consist of one judge from each member state and the Court shall be assisted by eight advocates-general[1253]. The number of advocates-general may be increased by the Council acting unanimously at the request of the Court[1254]. The system of advocates-generals is not familiar to common law jurisdictions, including in SADC states, thus it is not surprising that no provision is made for them in the Treaty or Protocol. The duty of an advocate-general is to act with complete impartiality and independence, in making reasoned submissions in open court on cases which, in accordance with the ECJ Statute, require his involvement[1255].

Judges of the Court of Justice and advocates-general of the Court and judges of the General Court are chosen from persons whose independence is beyond doubt[1256]. Judges of the Court of Justice and advocates-general must possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence[1257]. Judges of the General Court must possess the ability required for appointment to high judicial office[1258]. Judges of both Courts and

[1249] Article 19 TEU.
[1250] Articles 251-253 TFEU (former 220-245 EC Treaty).
[1251] See the preamble and Article 1 of the ECJ Statute.
[1252] Article 19 TEU. For purposes of this study I refer to these courts collectively as the ECJ unless expressly otherwise stated.
[1253] Article 19.2 TEU and Article 252 TFEU.
[1254] Article 252 TFEU.
[1255] Ibid.
[1256] Article 19.3 TEU read with Articles 253 and 254 TFEU (former 223 and 224 EC Treaty).
[1257] Article 253 TFEU.
[1258] Article 254 TFEU.

advocates-general are appointed by common accord of the governments of the member states for a term of six years, after consultation with a panel of seven persons comprising former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognized competence[1259]. Both Courts must respectively elect their Presidents, appoint their Registrars and establish their rules of procedure[1260]. The number of judges of the General Court shall be determined by the ECJ Statute, and the Statute may provide for the General Court to be assisted by advocates-general[1261]. At the request of the Court of Justice, the EP and the Council may, acting in accordance with the ordinary legislative procedure, provide for the appointment of assistant rapporteurs and lay down the rules governing their service[1262]. The assistant rapporteurs may be required, under conditions laid down in the rules of procedure, to participate in preparatory inquiries in cases pending before the Court and to cooperate with the judge who acts as rapporteur[1263]. Assistant rapporteurs are chosen from persons whose independence is beyond doubt and who possess the necessary legal qualifications[1264].

Article 19.3 spells out the main functions of the ECJ which are to -

(a) rule on actions brought by a Member State, an institution or a natural or legal person;

(b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;

(c) rule in other cases provided for in the Treaties.

[1259] Articles 253 and 254 TFEU.
[1260] Articles 253 and 254 TFEU.
[1261] Article 254 TFEU.
[1262] Article 13 ECJ Statute.
[1263] Ibid.
[1264] Ibid.

In performing its functions the ECJ must act in accordance with the Treaties, and is guided by the principle that it must ensure that in the interpretation and application of the Treaties the law is observed[1265]. The principle of ensuring observance of the law is taken over from the former Article 220 of the EC Treaty which, as we shall see, has been given a very liberal interpretation by the ECJ. This provision is meant to ensure that EU-level legislation is interpreted and applied in the same manner across the whole of the EU. This is to avoid national courts interpreting the same legislation differently. The other functions and powers and the jurisdiction of the ECJ are spelt out in various provisions of the TFEU and these provisions are considered in the ensuing sections of this chapter. The ECJ might be considered as the highest court in the EU on matters pertaining to EU law. This is so because it has the ultimate say on matters of EU law and this is meant to ensure equal application of the law across the various EU member states. The ECJ has the final say on matters of EU law, but not national law with each member having its own legal system.

The ECJ shall sit in chambers consisting of three and five judges or in a grand chamber consisting of thirteen judges[1266]. The Court may also sit as a full court in the very exceptional cases exhaustively provided for by the ECJ Statute and where the Court considers that a case is of exceptional importance[1267].

The quorum for the full Court is fifteen judges, a grand chamber nine judges and other chambers three judges[1268]. Other detailed matters relating to the judges and advocates-general of the ECJ organization of the Court, procedure before the Court and the General Court are provided for in the ECJ Statute.

4.5.2 Methods of interpretation and precedent

[1265] Article 19. 1 and 3 TEU.
[1266] Article 251 TFEU (former 221 EC Treaty) and Article 16 ECJ Statute. Article 13 further provides that the Court shall sit in a grand chamber when a member state or an institution of the EU so requests.
[1267] Under Article 16 ECJ Statute a full court sits in cases brought under Articles 228(2)(dismissal of Ombudsman), 245(2) and 247 (compulsory retirement of member of Commission) and 286(6) (removal of a member of the Court of Auditors) TFEU.
[1268] Article 17 ECJ Statute.

4.5.2.1 Precedent[1269]

Before considering the various methods of interpretation which have been devised by the ECJ, I must first consider the effect of the doctrine of precedent on the functioning of the ECJ. The principle of precedent or *stare decisis* (abiding by previous decisions) is considered to be a fundamental principle in most legal systems especially those following the common law tradition such as the UK and most of the SADC countries. The essence of the principle is that like cases should be treated alike as inconsistency in judicial decisions undermines basic notions of justice. In countries based on the civil law such as France, the doctrine of precedence is not applicable, it is actually prohibited[1270]. The ECJ has managed to blend traditions from both systems to come up with its own version of the doctrine of precedent. One former judge of the Court observed that "although the Court's way of formulating principles, or general propositions of law, is closely akin to methods used by the French *Conseil d'Etat*, its techniques of relying on previous cases, of invoking the authority of its own case law and of determining the *ratio decidendi* of earlier judgments are not dissimilar to those used by the English common law courts."[1271]

The doctrine of precedent assumes a position of great importance in the EU legal order where many important doctrines of EU law as well as clarifications of the texts of the treaties are developed by the Court itself. It is also important because the national courts of the member states are also required to apply EU law hence the need for an authoritative court to have a final say on EU law which must then be applied uniformly in the national courts. This uniformity will not be possible if the doctrine of precedent is not followed. The same principles should apply in case of the Tribunal. The Tribunal is expected to develop its own jurisprudence in interpreting and applying SADC law and that jurisprudence needs to be consistently and uniformly applied by the Tribunal itself as well as by national courts if the objectives of SADC are to be attained. The experience of the ECJ in this regard is useful to the Tribunal.

[1269] Generally see Brown and Jacobs op cit Chap 16.
[1270] Article 5 of the French Civil Code.
[1271] Koopmans "Stare decis in European Law", *Essays in European Law and Integration* (ed Keeffe and H Schermers) Kluwer (1982) 27.

The doctrine of precedent arises in three respects in the EU legal order namely, in the ECJ itself, in the General Court and in the national courts of member states. For purposes of this study I consider the application of the doctrine in the ECJ and the national courts.

The doctrine of precedent does not formally apply in the ECJ, but as a matter of practice, the Court generally follows its previous decisions for sake of legal certainty. The Court may however, on its own volition or after persuasion by the advocate-general, deviate from its past case law. For example in *Criminal Proceedings against Keck and Mithouard*[1272] the Court stated "…the Court considers its necessary to re-examine and clarify its case law on this matter, …contrary to what has been decided …"[1273] and went on to set out new principles of law.

The application of the doctrine of precedent on matters of EU law in the national courts is subject to limitations. In the EU legal order, there is no hierarchy of courts such as exists in national legal systems, e.g. federal systems where you have federal courts being final courts. The judicial systems of the member states thus remain autonomous and the EU institutions have to respect that independence. However, member states, including organs of the states and the courts, are obliged to comply with EU obligations which include decisions of the ECJ. Thus the national courts are obliged to apply authoritative decisions of the ECJ otherwise the member state will be found liable for breach of its EU obligations. Secondly, while the national courts remain independent judicially, it is only the ECJ which can give an authoritative ruling on matters of EU law. The application of this principle is considered further in the discussion on the preliminary rulings procedure.

4.5.2.2 Methods of interpretation

[1272] Cases C-267 and 268/91.
[1273] Ibid paras 14 and 16.

Article 19.1 of the TEU provides that the ECJ shall "….ensure that in the interpretation and application of the Treaties the law is observed."[1274] We have noted in Chapter 2 that a similar task of ensuring the interpretation of the Treaty is imposed on the Tribunal. We also noted that the Tribunal will be expected to devise its own methods of interpretation, hence a brief survey of the methods used by the ECJ could serve as guidelines to the Tribunal. The provisions of the EU Treaties and secondary legislation made under them are, like most international legal instruments, cast in broad terms leaving it up to the relevant institutions or member states of the EU to fill in the gaps. In this regard, the ECJ (and no doubt the Tribunal will play) plays a crucial role in developing the law and constitution of the EU through interpretation. The ECJ itself spelt out its role in its submission to the Intergovernmental Conference of 1996 as follows:

> "The Court….carries out its tasks which, in the legal systems of the Members States, are those of constitutional courts, the courts of general jurisdiction or the administrative courts, as the case may be.
>
> In its constitutional role, the Court rules on the respective powers of the Communities and the Member States, and on those of the Communities in relation to other forms of cooperation within the framework of the Union and, generally determines the scope of the provisions of the Treaties whose observance it is its duty to ensure. It ensures that the delimitation of powers between the institutions is safeguarded, thereby helping to maintain the institutional balance. It examines whether fundamental rights and general principles of law have been observed by the institutions, and by the Member States when their actions fall within the scope of Community law. It rules on the relationship between Community law and national law and on the reciprocal obligations between the Member States and the Community institutions. Finally, it may be called upon to judge whether international commitments envisaged by the Communities are compatible with the Treaties."

[1274] This principle was contained in Article 220 EC Treaty which has now been repealed by the Lisbon Treaty.

The ECJ has devised its own ways of interpreting the EU Treaties and secondary legislation made under the EU Treaties but it does not depart from the traditional methods of interpretation of treaties or legislation in the national context. In relation the ECJ's approach to the methods of interpreting EU law, Brown and Jacobs state:

> "The Court of Justice has no special methods of its own but uses those with which national courts are familiar. But the Court's use of traditional methods should not deceive us: the distinctive nature of Community law when compared with national laws on the hand and international law on the other, as well as the manner in which the Treaties are drafted, have led the Court to evolve its own particular style of interpretation." [1275]

These traditional methods include the literal, historical, contextual and teleological approaches [1276]. We have noted that the ICJ uses the same approaches placing more reliance on the contextual and teleological approaches[1277]. These methods of interpreting treaties as we have noted are to some extent, codified in the Vienna Convention on the Law 1969 which comprises some elements of all the aspects of the three approaches[1278]. Article 31 Vienna Convention provides that a treaty shall be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." We have noted that the ICJ more or less applies all these methods when interpreting international treaties, and there can be no doubt that the Tribunal when faced with interpretation of the Treaty or subsidiary legal instruments emanating from the Treaty will employ any of these methods and would not necessarily follow the national methods of member states which may differ from international law methods. One English judge, Lord Denning, when trying to draw a

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[1275] Brown and Jacobs op cit 323.

[1276] Brown and Jacobs op cit 324 and Fitzmaurice op cit 84.See also Botha *Statutory Interpretation -An Introduction for Students* (1998) for an overview of the various methods of statutory interpretation applied in South Africa and other countries whose legal systems is based on common law.

[1277] Chap 3 *supra* section of international conventions as a source of law for the ICJ.

[1278] See discussion on this treaty in Chap 2 *supra* section on sources of law for the Tribunal: Development of Community jurisprudence based on applicable treaties and in Chap 3 section on international conventions as a source of law for the ICJ.

distinction between the English way of interpretation of statutes and the ECJ's "own particular style of interpretation" described above stated in *Bulmer v Bollinger* [1947] 3 WLR 202 as follows:

> "The Treaty is quite unlike any enactments to which we have become accustomed….It lays down general principles. It expresses its aims and objectives and purposes. All in sentences of moderate length and commendable style. But it lacks precision. It uses words and phrases without defining what they mean. An English lawyer would look for an interpretation clause, but he would look in vain. There is none. All the way through the Treaty there are gaps and lacunae. These have to be filled by the judges, or by regulations or directives.
>
> It is the European way ….. Seeing these differences, what are the English courts to do when they are faced with a problem of interpretation? They must follow the European pattern. No longer must they argue about the precise grammatical sense. They must look to the purpose and intent……*They must divine the spirit of the Treaty and gain inspiration from it. If they find a gap, they must fill it as best as they can*…These are the principles, as I understand it, on which the European Court acts."(my emphasis)

This vivid description of how the ECJ goes about its task of ensuring a proper interpretation of the treaties can be equally said of the SADC Treaty. We have noted that the Treaty is cast in very broad terms leaving gaps which are to be filled by subsidiary legal instruments as well as one might say, through interpretation by the Tribunal. There are many terms and concepts which are used in the Treaty without being defined, such as the concepts of sovereign equality of rights, human rights, rule of law, and peaceful settlement of disputes[1279]. The objectives of the Treaty, like those of the EU Treaties, are also cast in broad general terms setting out the aims of SADC. It would not be far fetched to suggest that when interpreting the Treaty, protocols and subsidiary legal instruments, the Tribunal could be guided by the "European way" described above and for this to be

[1279] Article 4 Treaty.

understood properly one must take a look in a bit more detail at this European way. I thus consider the methods used by the ECJ in turn.

4.5.2.3 Literal interpretation[1280]

This rule is mainly used in legal systems based on the common law and involves looking at the words used in the text of the document and giving them their natural, plain meaning[1281]. The ECJ has at times refused to follow this approach even where the words of the measure in question are perfectly clear[1282]. The task of the ECJ is made even more difficult by the absence of interpretation provisions in the Treaties and some secondary legislation. For example, terms and concepts used in the TFEU such as 'charges having equivalent effect", "worker", "public policy" or " abuse of dominant position" [1283] are not defined but have been left to be interpreted by the ECJ in the course of its tasks. The ECJ may however apply any of the methods including the literal approach when interpreting the TFEU[1284]. There is no reason why the Tribunal should not do the same in similar circumstances. The Tribunal should not be bound to follow any special rules of treaty interpretation and should be at liberty to use all the available methods including the literal approach.

4.5.2.4 Historical interpretation[1285]

This method of interpretation which is also common to many national legal systems including those in the SADC region, involves a consideration of the subjective intention

[1280] Brown and Jacobs op cit 324 for a discussion of the ECJ's approach to the literal interpretation of the EU law.
[1281] Botha C op cit Chap 2.
[1282] *Commission v Council* Case 22/70 paras 42 and 55. Here the Court held that a Council resolution amounted to an "act" of a Community institution if it was intended to produce legal effects and was thus capable of judicial review by the ECJ. This was so despite the clear wording of Article 189 EC Treaty which did not include Council resolutions among the acts of the Community which were listed as regulations, directives and decisions.
[1283] Articles 28 (former 23) and 30(former 25), 45 (former 39) and 102 (former 82) TFEU (EC Treaty) respectively refer to these concepts.
[1284] In *Van Gend en Loos* Case 26/62 the ECJ stated: "To ascertain whether the provisions of an international treaty[Articles 12 (now Article 25)EC Treaty] extend so in their effects it is necessary to consider the spirit, the general scheme and the wording of those provisions."
[1285] Brown and Jacobs op cit 330.

of the author of the text especially at the time that he or she authored the text[1286]. This subjective intention can be ascertained by having recourse to parliamentary debates which preceded the legislation, in case of national legislation, or the work preparatory to the conclusion of a treaty, in case of interpretation of a treaty. Most intergovernmental negotiations leading to the adoption of an agreements are usually covered by a veil of secrecy hence it is often difficult, if not impossible, to have access to the details of what was said during negotiations[1287]. This lack of access to material or the non-availability of such material is often the reason why international courts would not have recourse to the historical context in order to ascertain the intention of the negotiators. In addition, even if the material were available it may not be of much use since the final version of an agreement does not necessarily reflect the actual intention of the negotiating parties but is rather a reflection of compromises reached on various points of disagreement.

Perhaps for these and other reasons, the ECJ has not been very keen on using the historical method of interpretation[1288]. However, with moves towards more transparency in the functioning of the EU institutions, more material is likely to be readily available to the public which can then be used if necessary to show the intentions of the negotiators[1289]. In the case of EU secondary legislation, such as regulations, directives and decisions, Article 296 of the TFEU (former 253 of the EC Treaty) requires that reasons be given for their enactment and these reasons are usually contained in the preamble to the legislation. The ECJ has often been guided by these historical reasons in ascertaining the intention of the legislature and has often done so.

In the case *Markus v Hauptzollamt Hamburg-Jonas*[1290] the ECJ referred to the provisions of the preamble to a regulation in order to ascertain the intention of its authors. In the

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[1286] E.g. common systems use the "mischief" rule which was laid down in the English *Heydon's* Case (1584) 3 Co. Rep 7a which essentially entails and examination of the mischief which led to the enactment of the legislation. See Botha op cit 31.
[1287] Brown and Jacobs op cit 331.
[1288] Ibid.
[1289] See Article 15 TFEU which requires EU institutions to do their work openly, regulates public access to documents of EU institutions, requires public meetings of the EP and Council in certain cases, requires transparent proceedings and publication of documents relating to legislative procedures.
[1290] Case 14/69 paras 8 and 9.

context of the Tribunal the same concerns raised above are pertinent. The negotiations in institutions of SADC, in particular the Summit and Council, are not open to the public. They are held in secret and what is usually made public are the resolutions reached therein. It would be thus extremely difficult to determine the intention of the parties with precision unless the instrument resulting from the discussions contains a preamble giving reasons for the decision. However, the SADC Treaty, and almost all SADC protocols, contain preambles which can be used to ascertain the subjective intention or historical reasons which led to the adoption of the protocol[1291].

4.5.2.5 Contextual interpretation

This method of interpretation is extensively used by the ECJ and involves the placing of a provision within its context and interpreting it in relation to the other provisions of the instrument[1292]. Thus a particular provision of the Treaties or a regulation must not be considered in isolation but within the general scheme of the treaty as a whole, in the case of an article, or of the whole instrument in the case of a regulation. In *Commission v Luxembourg and Belgian*[1293] the ECJ relied upon the general scheme of the relevant provisions of the TFEU and the TFEU as a whole in order to give a wide interpretation to the words "charges having equivalent effect." This was in relation to Article 30 of the TFEU (former 25 EC Treaty) which read in part "Customs duties on imports and exports and charges having equivalent effect…" The words "charges having equivalent effect" were given a broad interpretation as opposed to a restrictive interpretation which would have been confined the "charges" to charges which are similar to customs duties. The ECJ, in adopting the wider interpretation, used the expression as a catch-all provision, looking at the provision in context and in relation to the TFEU as a whole the aim of which was to abolish all restrictions on the free movement of goods.

[1291] The Protocol does not contain a preamble.
[1292] Brown and Jacobs op cit 334, Fairhurst op cit 160 and see also Botha op cit 31.
[1293] Case 2 &3/62 [1962] ECR 425 432.

This contextual method has also been used by the ICJ[1294] and in the national legal systems of SADC member states and its use by the Tribunal should therefore not be considered novel. This could of course, have far reaching consequences. For instance, provisions of the Treaty and other subsidiary legal instruments would have to be interpreted in light, for example, of the principles contained in Article 4 of the Treaty among which are the notions of "human rights", "democracy" and the "rule of law." The concepts stated here are undefined and elastic in nature: they may be used by the Tribunal, for example, to incorporate a culture of human rights into the scope of the application of the Treaty. This the Tribunal has already achieved in the *Campbell* case where it found that the principles contained in Article 4(c) of the Treaty can be given effect to without the need for a SADC protocol on human rights to be in place[1295]. The Tribunal also noted that member states are obliged by Article 4(c) of the Treaty to respect the principles of human rights, democracy and the rule of law and that Article 6(1) of the Treaty obliges them to refrain from taking measures which are likely to jeopardize the attainment of SADC objectives[1296]. In essence the Tribunal found that the provisions of Article 4 and 6 of the Treaty have direct effect in SADC member states such that SADC citizens can rely on these provisions before the Tribunal, and possibly before national courts. Although the Tribunal was not called upon to interpret the provisions of Article 5 of the Treaty, it is clear from the approach taken in the *Campbell* case that the broad objectives set out in that article could also be used to give direct effect to other provisions of the Treaty.

4.5.2.6 Teleological interpretation[1297]

[1294] For example, in the *La Grand* case ICJ Reports 2001 466 502-503 the Court said: "The context in which Article 41 has been seen within the Statute is to prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved. It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on necessity, when the circumstances call for it, to safeguard, and avoid prejudice to, the rights of the parties as determined by the final judgment of the Court."

[1295] *Campbell* case op cit 24.

[1296] Ibid 26-27.

[1297] Wyatt and Dashwood op cit 404-408 and Brown and Jacobs op cit 339-343.

This method of interpretation involves the interpretation of a treaty provision in furtherance of the purpose or objectives of the treaty in question[1298]. We have noted that the ICJ has used this method of interpretation on many occasions[1299]. The ECJ has extensively used this method of interpretation for purposes of furthering the aims and objectives of the EU. The TEU and the TFEU, like their counterpart the SADC Treaty, set out a broad programme of action for the EU. The preamble to the TEU and the TFEU as well as Article 3 of the TEU and Articles 1 to 17 of the TFEU (former 2 and 3 EC Treaty) set out the broad aims and objectives of the EU. When interpreting the Treaties or other EU legislation, the ECJ is often guided by the overall aims and objectives of the EU. In this context the Court can go outside the actual provision and consider the whole purposes of the EU.

In *Parliament v Council*[1300] the ECJ had to consider whether the European Parliament had a right to bring annulment action against the Council under Article 263 of the TFEU (former 230 EC Treaty) which then specifically provided that only member states, the Council, the Commission and affected individuals could bring such action before the ECJ. The ECJ, having regard to the whole scheme of the EC Treaty and its broad aims and objectives held that not to imply such a right for Parliament would deprive it of the legal means with which to protect its privileges against incursions by other institutions[1301]. The ECJ has also used the same technique of interpretation to extend the right of freedom of movement of workers to those seeking work even though Article 45 (former 39 EC Treaty) TFEU conferred the right on those to whom an offer of work has actually been made[1302]. The ECJ reasoned that the object of the treaty to secure free movement of labour would not be achieved if only those with an offer of employment from another state were enabled to move. In many other cases the ECJ has used its

[1298] Brown and Jacobs op cit 339 and Fairhurst op cit 161.
[1299] This approach was used by the ICJ in the *SWA* cases where ambiguities in the mandate were resolved by finding that even though the Charter did not specifically transfer supervisory powers over the mandates to the UN, this could be implied from the general scheme of the mandate system itself. The Court adopted a similar approach in the *Reparation*s case when it held that though not explicitly stated in the UN Charter, the UN had legal personality to lodge international claims for injuries suffered by its servants in the line of duty see Chapter 3 section on international treaties as a source of law for the ICJ.
[1300] Case C-70/88.
[1301] Ibid paras 25-27.
[1302] *Procureur du Roi v Royer* Case 48/75 para 31.

creative interpretative powers to fill in the gaps and lacunae in the TFEU to great effect. This has sometimes led to strong criticism from some quarters and in some cases defiance from national courts of the member states[1303].

A close analysis of the decisions of the ECJ reveals that there are underlying policy objectives behind decisions of the ECJ. The ECJ uses its creative interpretation powers to achieve its broad policy objectives which can be stated as to strengthen the EU's structures, to increase the scope and effectiveness of EU law, to give and guarantee effective legal protection to the EU citizen and to enhance the powers of EU institutions[1304]. The last objective is illustrated by the *Parliament* case cited above. In so far as enhancing effectiveness of EU law and legal protection are concerned, the EJC has attained this by creating the doctrine of direct effect under which provisions originally intended to bind governments only of member states become means by which individuals could secure their rights in national courts. In addition, certain remedies which were originally considered to be of purely national concern and outside the ambit of EU law are now considered by the Court in terms of their effectiveness to secure implementation of EU law. If such measures are not effective or contrary to EU law they are set aside and effective remedies provided, e.g. in *Secretary of State for Transport, ex parte Factortome*[1305] the Court held that a UK law which was discriminatory in nature thus deprived nationals of other member states of certain benefits could be set aside by a national court.

4.4.2.7 Conclusion

What lessons can be drawn by the Tribunal from these techniques of interpretation employed by the ECJ? Criticism can of course be leveled at the creative role of the ECJ in advancing the objectives of the EU. In the SADC context an argument which might be

[1303] See Brown and Woods op cit 322 where Sir Patrick Neill, Warden of all Souls is quoted as having criticised the methods of interpretation used by the Court "as having liberated the European Court from customarily accepted discipline of endeavouring by textual analysis to ascertain the meaning of the language of the relevant provision."
[1304] Fairhurst op cit 161-162.
[1305] Case C-213/89 para 21.

advanced based on traditional doctrine is that it not the function of the court to make law or policy decisions; that role is best left to the relevant SADC policy-making institutions such as the SADC Summit or Council. But then the balance of opinion both at national and international level appears to have shifted in favour of the contextual and teleological approaches. On the international plane one has to simply look at the Vienna Convention 1969 itself and other tribunals such as the ICJ and the ECJ that have applied it. National courts which are required to interpret and apply national constitutional provisions especially on fundamental human rights and freedoms have often employed what is referred to as "purposive" interpretation whose aim is to try and ascertain the purpose behind the relevant constitutional provision[1306].

After having considered the organizational aspects and the methods of interpretation used by the ECJ, I can consider the position of the ECJ in relation to the selected areas of study. The next sections discuss the parties with standing before the ECJ, the jurisdiction of the Court, sources of EU law and finally the question of enforcement of EU law.

4.6 Parties (Access to the ECJ)

We have seen that under the SADC Treaty and the Protocol various actors are granted access to the Tribunal and these are member states, institutions of SADC as well as private persons who are subject to or derive rights from SADC law[1307]. These entities and persons can enforce SADC law or can be subject to obligations under SADC law through direct or indirect enforcement in the Tribunal or through the national courts with the possibility of a reference to the Tribunal under Article 16 of the Protocol. A similar situation exists in the EU, the main actors being member states, EU institutions and private persons. In this section I consider the respective capacities of these players as well as the limitations on those capacities and the role of the ECJ in ensuring the effectiveness of EU law.

[1306] See Botha C op cit 31 for discussion of the purposive (contextual) approach in countries following the Roman-Dutch legal traditions.
[1307] See Chap 2.

4.6.1 States

Member states of the EU enjoy unlimited capacity before the ECJ either as claimants or defendants[1308]. These unlimited rights derive mainly from the fact that the EU Treaties being international agreements give rights to member states who are primarily the subjects of international law. Secondly, the treaties themselves give specific rights to member states to either enforce or defend their rights against EU institutions or in some cases private persons directly before the ECJ.

Under Article 4.3 of the TEU (former 10 EC Treaty)[1309], member states have a general duty to take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of the Treaties or resulting from action taken by institutions of the EU. In addition to this positive duty there is a corollary negative obligation in the third limb of Article 4.3 of the TEU on member states "to refrain from any measure which would jeaopardise the attainment of the Union's objectives." We have noted that SADC states are under a similar positive duty and the corollary negative obligation to abstain from taking measures that could jeorpadise SADC objectives[1310].

Member states which fail to fulfill their obligations under the Treaties can find themselves before the ECJ in direct actions under Articles 258 and 259 of the TFEU (former 226 and 227 EC Treaty). The Commission is empowered by Article 258 of the TFEU to bring a case before the ECJ against a member state it considers has failed to fulfill its obligations under the Treaties. Secondly, the member states themselves are empowered under Article 259 of the TFEU to bring a case before the ECJ against other member states they consider to have failed to fulfill their obligations under the Treaties. A member state can also find itself before the ECJ either as a claimant or a co-defendant in annulment actions brought against EU institutions under Article 263 of the TFEU (former 230 EC Treaty). Under this article member states, institutions of the EU and private persons can bring actions for review of acts of institutions of the EU by the ECJ.

[1308] Articles 259 and 263 TFEU (former 227 and 230 EC Treaty).
[1309] This provision was repealed by the Lisbon Treaty.
[1310] Article 6.1 Treaty and discussion in Chap 2.

The member states can also find themselves before the ECJ through cases brought under the preliminary rulings procedure under Article 267 of the TFEU (former 234 EC Treaty). If a case involving a member state before a national court is referred to the ECJ for a preliminary ruling, that state automatically becomes a party to the subsequent proceedings before the ECJ. In addition, member states can be subject to actions for damages in national courts under the doctrine of state liability for breach of EU law. If the matter is subsequently referred to the ECJ under Article 267 of the TFEU the member state can find itself before the ECJ. In addition, under Article 40 of the Protocol on the ECJ Statute, member states of the EU as well as EU institutions have the right to intervene in any case before the ECJ without having to show any interest in the case. Private persons are given the same right of intervention provided they can show an interest in the case and the case is not between member states, between institutions of the EU or between member states and institutions of the EU.

The detailed circumstances under which member states appear before the ECJ in whatever capacity are discussed in the next section on jurisdiction of the ECJ.

4.6.2 EU Institutions[1311]

Institutions of the EU have capacity to enforce or defend actions before the ECJ in several situations. It would also appear that the institutions of the EU can actually be party to proceedings before national courts as the ECJ does not appear to have exclusive jurisdiction over disputes involving the EU, as in the case in SADC[1312]. In addition, Article 274 (former 240 EC Treaty) of the TFEU provides that disputes to which the EU is party shall not on that ground alone be excluded from the jurisdiction of the courts or tribunals of member states. This provision implies that institutions of the EU can be sued before national courts of the member states if necessary. The type and nature of

[1311] Note that in Articles 15.3, 228.1, 265, 266 and 267 TFEU (former 255.3, 195(1), 232, 233 and 234 EC Treaty) institutions of the EU include bodies, offices or agencies.
[1312] Articles See Chap 2.

proceedings depends on the institution in question thus it is necessary to discuss the capacity of each of the institutions in turn.

4.6.2.1 The European Council

Prior to the Lisbon Treaty, the European Council was not a formal institution of the communities, hence it was not subject to the jurisdiction of the ECJ. Now that the European Council is an institution of the EU[1313], the ECJ can now exercise jurisdiction over certain of its acts. The position of the European Council *vis a vis* the ECJ appears to be similar to that of the EP. Under Article 263 of the TFEU (former 230 EC Treaty), acts of the European Council, as well as those of the EP, which are intended to produce legal effects *vis a vis* third parties are now subject to the review jurisdiction of the ECJ. It would appear that the position of the European Council as a defendant in such proceedings is similar to that of the EP[1314]. It also follows that in cases of indirect challenges of acts through Articles 267 (former 234 EC Treaty) and 277(former 241 EC Treaty) of the TFEU, the European Council is in the same position as the EP: the European Council can be party to any proceedings where the legality of its acts are challenged under those provisions[1315]. The European Council, like the EP, can also find itself before the ECJ if an action for non-contractual damages is brought against it under Article 340 (former 288 EC Treaty) of the TFEU read together with Articles 266 and 268(former 233 and 235 EC Treaty) of the TFEU.

4.6.2.2 Council

Before the entry into force of the Lisbon Treaty, the Council was one of the principal institutions of the EU which had competences within all the three pillars of the EU. This was understandable since Council represents the interest of the governments of the member states in the EU. The position remains the same to date. It is inevitable that

[1313] Articles 13.1 and 15 TEU.
[1314] See section on European Parliament *infra.*
[1315] Ibid.

bearing in mind the many powers at the disposal of Council there were bound to be some checks and balances on its powers.

The Council can be party to proceedings before the ECJ under Article 263 (former 230 EC Treaty) of the TFEU either as a claimant or as defendant. The article provides for review of the legality of acts of certain institutions of the EU including the Council, by the ECJ. Annulment proceedings may be brought against the Council by a member state of the EU, the Commission, the EP, the European Council, the Court of Auditors, and the European Central Bank. Conversely under the same provision, the Council itself can bring annulment proceedings against the other institutions of the EU. Private persons can also bring annulment proceedings against the Council under the same Article 263 of the TFEU.

The Council may also be party to proceedings under Article 264 (former 231 EC Treaty) of the TFEU for failure to act. The same parties who may bring annulment proceedings under Article 263 may also bring proceedings under Article 264.

We shall see in the next section on jurisdiction, and in subsequent sections, that many cases involving the Council in whatever capacity have surfaced before the ECJ. The Council may also be party to proceedings before the ECJ in the course of preliminary rulings proceedings under Article 267 (former 234 EC Treaty) of the TFEU if the matter involves the interpretation or the validity of an act of the Council. If the matter is referred to the ECJ for a preliminary ruling the Council may be joined as a party in the proceedings. The same may also occur under Article 277 (former 241 EC Treaty) of the TFEU during any proceedings before the ECJ where a regulation of the Council is challenged. In this case, the Council may intervene under Article 40 of the Protocol on the Statute of the ECJ or be joined as party to those proceedings.

The Council may also find itself before the ECJ if an action for non-contractual damages is brought against it under Article 340 (former 288 EC Treaty) of the TFEU read together with Articles 266 and 268 (former 233 and 235 EC Treaty) of the TFEU. Article 268 of

the TFEU actually provides that the ECJ has exclusive jurisdiction over disputes relating to compensation for damage resulting from non-contractual activities of the EU.

The circumstances under which acts of the Council have been the subject of ECJ proceedings are discussed more fully in the sections on jurisdiction.

4.6.2.3 Commission

The Commission has been described as the "guardian of the treaties" because of its role as the driving force behind the activities of the EU to attain its aims of political, economic and social union and its (Commission's) role of ensuring that member states honour their obligations under the Treaties and implementing measures[1316]. Thus the Commission is given powers under various provisions of the TEU and TFEU to take action which is legally binding thus subject to the jurisdiction of the ECJ.

As we have noted above, Article 258 (former 226 EC Treaty) of the TFEU provides that if the Commission considers that a member state has failed to fulfill its obligations under the Treaties, the Commission may institute proceedings against that member state in the ECJ. The legal action is preceded by administrative proceedings instituted by the Commission with a view to ensuring that the member state complies with its obligations under the Treaties. Detailed comments on the Article 258 of the TFEU procedures are discussed in the sections on jurisdiction. It must be pointed out that it is only the Commission which is empowered to bring actions against member states before the ECJ in this manner. Again under Article 259 (former 227 EC Treaty) of the TFEU, member states which wish to commence proceedings against other member states for breach of treaty obligations must first of all notify the Commission which must then institute the administrative procedure and thereafter commence action in the ECJ.

The Commission can also be party to proceedings before the ECJ either as a plaintiff or defendant under Article 263 (former 230 EC Treaty) of the TFEU. The proceedings could

[1316] See Fairhurst op cit 92 and Steiner and Woods op cit 31.

involve a challenge to the legality of an act of the Commission or the Commission itself challenging the legality of acts of the other institutions of the EU. The Commission can equally be party to proceedings before the ECJ under Article 265 (232 EC Treaty) of the TFEU either as a plaintiff or defendant in an action for failure to act. Where there is an indirect challenge to the legality of an act of the Commission through Article 267 (former 234 EC Treaty) of the TFEU proceedings in the national court the Commission can become party to such proceedings if the matter is referred to the ECJ for a preliminary ruling. The same would apply when a regulation of the Commission is challenged during any proceedings before the ECJ. Under Article 277 (former 241 EC Treaty) of the TFEU any party to those proceedings may plead the illegality of the regulation as a defence in such proceedings in which case the Commission becomes party to the proceedings if it wishes to defend the legality of its regulation. At the same time the Commission itself can also plead the illegality of a regulation of the other institutions of the EU in any proceedings before the ECJ thereby making it party to the proceedings.

The Commission has power under Article 260 (former 228 EC Treaty) of the TFEU to institute proceedings to and to enforce judgments of the ECJ made against member states if the member states fail to comply with those judgments. The Commission may also find itself before the ECJ if an action for non-contractual damages is brought against it under Article 340 (former 288 EC Treaty) read together with Articles 266 and 268 (former 233 and 235 EC Treaty) of the TFEU. Article 268 of the TFEU actually provides that the ECJ has exclusive jurisdiction over disputes relating to compensation for damage resulting from non-contractual activities of the EU.

In addition, the Commission is also empowered by Article 107 (former 87 EC Treaty) of the TFEU to bring direct actions in the ECJ against member states which have granted aid to undertakings in breach of that article. The same applies as well under Article 114 (former 95 EC Treaty) of the TFEU wherein the Commission can bring proceedings directly in the ECJ against member states which have used their powers under that article to derogate from a harmonizing directive on grounds of major needs or protection of the environment. Finally, the Commission can take action in the ECJ against undertakings

which breach the EU's competition laws under Article 101 (former 81 EC Treaty) of the TFEU.

4.6.2.4 European Parliament

The position of the European Parliament in the EU constitutional structure has attracted the attention of the ECJ. In the original treaties of the communities the EP was known as an Assembly which only had advisory and supervisory powers. It was not intended to be a legislative body with power to adopt legally binding measures. The original Article 263 (former 230 EC Treaty) of the TFEU did not give the EP standing to challenge acts of the Council or the Commission, but in *Roquette Freres SA v Council*[1317] the ECJ held that the EP could intervene in proceedings before the ECJ. However, at that time the EP had standing to bring an action against the other institutions for failure to act under Article 265 (former 232 EC Treaty) of the TFEU. The EP was not specifically mentioned in Article 263 of the TFEU as one of the institutions which could bring annulment proceedings. But in the cases *Parliament v Council*[1318] and *Parliament v Council*[1319], the ECJ went on to hold that, although it (the EP) does not have general powers to challenge such acts, it could however bring an action under Article 263 of the TFEU in order to protect its own prerogative powers. These cases involved situations where the TFEU required that the EP be consulted before a measure was taken but this was not done. The ECJ therefore felt that, by denying the EP standing before it, the Court would be facilitating distortion of the balance of powers among the institutions. The reasons underlying these decisions of the ECJ was to enhance the position of the EP in the structures of the EU, thus maintaining institutional balance of power among the institutions.

The significance of these decisions lies in the fact that the EP was previously in the same position as that of the SADC-PF. We have seen that the SADC-PF is an institution of SADC even though it is not directly provided for in the SADC Treaty. A question which

[1317] Case C-138/79 para 21.
[1318] Case C-302/87.
[1319] Case C-70/88 paras 25-27.

could then arise is whether that institution has standing before the Tribunal, and under what circumstances the SADC-PF can bring actions against member states or other institutions of SADC or private persons? If the Tribunal were to adapt the generous interpretation applied by the ECJ in relation the EP, then the question of the standing of SADC-PF should not become an issue.

The principle enunciated in the above cases is now incorporated into Article 263 (former 230 EC Treaty) of the TFEU which provides that the ECJ can review the legality of acts of the EP which are intended to produce legal effects *vis a vis* third parties. However, the position of the EP as a defendant before the ECJ under Article 263 of the TFEU has never been an issue hence its acts have been subject to annulment proceedings by member states, other EU institutions and private persons. The question of indirect challenge of acts of the EP under Articles 267 and 277 (former 234 and 241 EC Treaty) of the TFEU is the same as that applying to the Council and the Commission; the EP can be party to any proceedings where the legality of its acts are challenged in that manner.

The EP may also find itself before the ECJ if an action for non-contractual damages is brought against it under Article 340 (former 288 EC Treaty) read together with Articles 266 and 268 (former 233 and 235 Treaty) of the TFEU. Article 268 actually provides that the ECJ has exclusive jurisdiction over disputes relating to compensation for damage resulting from non-contractual activities of the EU.

4.6.3 Private persons

In line with traditional international law doctrine that only states are the proper subjects of international law, the standing of private persons before the ECJ is somewhat restricted[1320]. We have noted in the SADC context, that the Tribunal appears to have unlimited jurisdiction over disputes between states and private persons, as well as between private persons and SADC institutions[1321]. The only restriction on private

[1320] Starke op cit 58, O'Brien op cit 137-139 and Brownlie op cit 59.
[1321] Article 15 Protocol see discussion in Chap 2.

persons who seek redress against member states of SADC in the Tribunal is that the private person must have exhausted all available domestic remedies before bringing the matter before the Tribunal.

However, in the EU system, private persons do not generally have a right of direct access to the ECJ except in review proceedings under Article 263 of the TFEU. Under Article 263 of the TFEU, a private person can bring proceedings to annul an act of an EU institution, provided that the person can satisfy the conditions set out in that article. A private person can only challenge the legality of a specified act if the decision is addressed to the applicant, the decision is addressed to another person and is of direct and individual concern to the applicant, or the decision is in the form of a regulation but is of direct and individual concern to the applicant.

The first category concerning decisions addressed to the private person is relatively straightforward. The other two categorises are not so straightforward and consequently have produced a litany of litigation in the ECJ producing a large body of case law. None of these cases is of much use to the Tribunal, since in the SADC context, private persons are not restricted in the manner that the TFEU restricts private litigants. The only limitation for private persons in the Tribunal is the requirement for exhaustion of domestic remedies, a requirement which is not applicable in the EU. It is not, therefore, necessary to discuss the case law of the ECJ in this regard. However, one issue which has recently arisen in the application of Article 263 of the TFEU is the issue of whether a person has a legal interest in the annulment of the contested measure.

Article 263 of the TFEU does not expressly require that an applicant must prove that he or she has a legal interest in bringing annulment proceedings before the ECJ. The principle of legal interest was in issue before the Court in *IBM v Commission*[1322]. The applicant, a US company, brought an action to annul a decision of the Commission concerning notification of the Commission's intention to institute proceedings against the

[1322] *IBM v Commission* Case 60/81.

applicant for alleged infringement of EU completion laws[1323]. The applicant challenged the Commission's notice on the basis that it was vitiated by a number of defects, in particular that it was in breach the principle of international law on the comity of nations which precluded such action since the conduct complained of had occurred mainly in the USA where it was the subject of other legal proceedings[1324]. The Court then explained the principle as follows:

> "In order to ascertain whether the measures in question are acts within the meaning of Article 263 (former 230 EC Treaty) of the TFEU it is necessary, therefore, to look to their substance. According to the consistent case-law of the court any measure the legal effects of which are binding on and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action under Article 263 for a declaration that it is void. However, the form in which such acts or decisions are cast is, in principle, immaterial as regards the question whether they are open to challenge under that article."[1325]

This principle was applied by the CFI in *Schmitz-Goth Fahzeugwerke v Commission*[1326], a case where the applicant challenged a Commission decision which required the German government to recover certain monies which had been granted as aid to several German companies. The applicant was a subsidiary of one of the affected companies. It alleged that it had a legal interest in the decision of the Commission because the effect of the decision was that the parent company was jointly and severally liable with its subsidiary companies to repay the aid which was allegedly granted in violation of EU law. The Court summarized the case-law of the Court on the subject as follows:

> "According to settled case-law, a natural or legal person may challenge, pursuant to the fourth paragraph of Article 263 (230 EC Treaty) of the TFEU, only

[1323] Ibid para 2.
[1324] Ibid para 4.
[1325] Ibid para 9.
[1326] Case T-167/01.

> measures the legal effects of which are binding on, and capable of affecting the interests of, that person by bringing about a distinct change in his legal position...
>
> Also, it is settled case-law that a claim for annulment brought by a natural or legal person is not admissible unless the applicant has an interest in seeing the contested measure annulled …That interest must be vested and present…. and is evaluated at the date on which the action is brought ..If the interest which an applicant claims concerns a future and legal situation, he must demonstrate that the prejudice to that situation is already certain. Therefore, he cannot rely upon future and uncertain situations to justify his interest in applying for annulment of the contested act."[1327]

In the case, the Court concluded that the contested decision was not an act adversely affecting the applicant and that the applicant therefore has no interest in seeking its annulment[1328]. Some of the reasons were that the aid had already been repaid by the parent company, and the joint and several liability of the subsidiary companies (which included the applicant) was a future interest which was not ascertainable at the time of the action[1329].

The issue of legal interest before bringing legal proceedings before national courts is not new. In the legal systems of the various member states of SADC, national courts have had to deal with this issue at one time or the other in particular in the context of class actions brought against authorities such as government departments and local authorities[1330]. The practice of states on the issue will inevitably differ, but one thing which deserves mention is the fact that a court will not entertain a case brought by a litigant who has no interest whatsoever in the matter or outcome of the matter. Although neither the Protocol nor the Rules of Procedure make specific reference to the

[1327] Ibid paras 46 and 47.
[1328] Ibid para 62.
[1329] Ibid paras 58-62.
[1330] See Burns and Beukes op cit 480 for the South African courts and common law approach to the issue of *locus standii* in administrative law. The applicant had to show that he had a sufficient legally protected interest to justify an application, the interest being a personal or direct one such as proprietary or pecuniary.

requirement for legal interest before proceedings are instituted, it is submitted that as a matter of general legal principle a person must certainly have some legal interest in a matter before bringing proceedings. This observation is reinforced by the Rules of Procedure of the Tribunal in cases of third party interventions. Rule 70 of the Rules entitles a member state, institution of SADC, or any person, to apply to intervene in any proceedings before the Tribunal. The rule goes further to state that an application to intervene must specify certain things including the interest, which must be of a legal nature, which the intervener considers may be affected by the decision in the case. If an intervener in proceedings before the Tribunal is required to a have a legal interest before joining the proceedings, then for a stronger reason the main parties must similarly have such interest. What amounts to a legal interest would then have to be decided by the Tribunal having regard to general principles of law applicable internationally and in the member states.

Private persons may also use the related Article 265 (former 232 EC Treaty) of the TFEU which can be used to challenge failure to carry out obligations imposed on EU institutions by the Treaties. Similar considerations which apply to standing under Article 263 (former 230 EC Treaty) of the TFEU also apply in this case and the jurisdiction of the ECJ under that article is similarly discussed in the next sections.

Despite the limitations on the rights to bring annulment proceedings under Articles 263 and 265 (former 230 and 232 EC Treaty) of the TFEU, private persons can be parties before the ECJ through the preliminary rulings procedure of Article 267 (former 234 EC Treaty) of the TFEU. In most cases this is the main avenue open to private persons to have their cases heard by the ECJ and is also likely to be another more convenient avenue for private persons who may wish to have their cases referred to the Tribunal for an authoritative final interpretation of SADC law. The preliminary rulings procedure in the EU is fully discussed in the section on jurisdiction of the ECJ. Private persons can also become litigants directly before the ECJ when they bring actions for damages for unlawful acts against EU institutions in terms of Article 340 (former 288 EC Treaty) of

the TFEU read together with Articles 266 and 268 (former 233 and 235 EC Treaty) of the TFEU. The jurisdiction of the ECJ in this regard is also discussed in the next sections.

4.7 Jurisdiction of the ECJ

The jurisdiction of the ECJ is shared between the Court of Justice and the General Court which was formerly known as the Court of First Instance (CFI)[1331]. The two Courts and the specialized courts now collectively constitute the Court of Justice of the EU[1332]. The overall court, however, is the Court of Justice which also acts as an appeal or review court from decisions of the General Court[1333]. Both courts are, however, collectively referred to in this study as the European Court of Justice (ECJ) unless the General Court is specifically mentioned. Apart from the general function of ensuring the observance of EU law, the two courts have specific tasks assigned to them by the EU Treaties in the form of heads of jurisdiction. Since they, like other institutions of the EU, can only act within limits of their powers, they only have jurisdiction if jurisdiction has been expressly conferred upon them. The Courts are in some cases specifically excluded from ruling on certain matters, such as measures or decisions relating to the maintenance of law and order and the safeguarding of internal security in member states.

The mains heads of jurisdiction of the ECJ can be summarized as follows:

(a) actions under Articles 258 and 259 (former 226 and 227 EC Treaty) of the TFEU by the Commission or member states against member states;

(b) review of the legality of acts or failure to act of EU institutions under Articles 263 and 265 (former 230 and 232 EC Treaty) of the TFEU;

[1331] The jurisdiction of the General Court is detailed in Article 256 TFEU. Basically it acts as a court of first instance in cases brought under Articles 263, 265, 267(in certain cases only), 268, 270 and 272 of the TFEU and as a court of appeal on decisions of the specialized courts.

[1332] Article 19.1 TEU.

[1333] Under Article 256 decisions of the General Court are subject to the right of appeal to the Court of Justice while in exceptional cases the decisions may be reviewed by the same court. The General Court may refer cases involving principles affecting consistency of EU law to the Court.

(c) claims for compensation for damages caused by institutions of the EU under Articles 268 and 340 (former 235 and 288 EC Treaty) of the TFEU;

(d) preliminary rulings under Article 267 (former 234 EC Treaty) of the TFEU;

(e) act as Court of Appeal for the General Court under Article 256 (former 225 EC Treaty) of the TFEU

(f) prescribe interim measures under Article 279 (former 243 EC Treaty) of the TFEU.

A cursory glance at this summary shows that the jurisdiction of the ECJ essentially covers matters which the Tribunal is expected to deal with. The jurisdiction of the ECJ can conveniently be discussed under two broad categories, being direct actions and indirect actions through the preliminary rulings procedure. I consider the subject under these two broad categories, but I will not discuss the heads of jurisdiction under paragraphs (e) and (f) above as they are not directly relevant to this study.

4.7.1 Direct actions

4.7.1.1 Actions against member states: Articles 258-260 (former 226-228 EC Treaty) of the TFEU

We have noted that under Article 4 of the TEU which is similarly worded to the former Article 10 of the EC Treaty, member states of the EU are under both a general positive obligation to take all appropriate measures to ensure fulfillment of their obligations under the Treaties, and a general negative duty to abstain from any measure which could jeopardise the attainment of the objectives of the Treaties. We also noted that member states of SADC are under a similar duty in terms of Article 6.1 of the Treaty wherein they undertake to adopt adequate measures to promote the achievement of the objectives of

SADC and to refrain from taking any measures likely to jeopardize the maintenance of its principles and the achievement of its objectives. These provisions are differently worded but, it is submitted, their effect is the same. This means that the case law which has been developed by the ECJ around the Article 4 (former 10 EC Treaty) of the TEU, may be useful to the Tribunal when determining whether a member state of SADC has failed to fulfill its Treaty obligations.

Through its case law, the ECJ has established that TFEU obligations bind not only states, but also organizations or bodies which are subject to the authority or control of the state or have special powers beyond those which result from the normal relations between individuals[1334], and these have been termed emanations of the state[1335]. These include government departments, state-funded and regulated agencies providing public services, state governments in federal systems, local authorities and the national courts[1336]. All these entities are potentially the subject of enforcement proceedings before the ECJ although the actual defendant in each case will be the state itself. There have been no actual cases of proceedings being taken against courts for refusal to follow or apply EU law, but some courts in member states have refused to follow decisions of the ECJ, such as the French *Conseil d'Etat* which has done so in several cases[1337]. The *Conseil d'Etat* refused to accept that a directive could be relied on to annul a national law in the *Compagnie Generale des Eaux* (CGE) case[1338]. The case concerned an appeal by the CGE against the decision of a French tribunal which invalidated a contract between CGE and a local municipality. The contract was alleged to be in breach of an EU directive. An initial application had been brought before the tribunal by another person who had been denied an opportunity to tender as a result of the municipality's alleged failure to follow the procedures laid down in the directive. CGE succeeded in its appeal before the *Conseil d' Etat* which, following its previous case law[1339], held that according to Article 288

[1334] *Foster v British Gas* Case C-188/89 para 18.
[1335] Fairhurst op cit 244-245.
[1336] *Costanzo v Commune di Milano* Case C-188/89 and *Foster v British Gas* op cit.
[1337] See Steiner and Woods op cit 78-79 for discussion on the French courts' response to the supremacy of EU law, including directives, in the member states.
[1338] [1994] 2 *CMLR* 373.
[1339] The Court followed the decision in *Minister of the Interior v Cohn-Bendit (Conseil d'Etat)* [1980] 1 *CMLR* 543 where the court refused to follow the ECJ decision in *Van Duyn v Home Office* to give direct

(former 249 EC Treaty) of the TFEU, national authorities alone were competent to decide on the form in which directives are to be implemented and to determine, under the supervision of the national courts, the means for giving effect to them in national law. It followed therefore, that private persons in the EU could not rely on the directive to challenge a national administrative act.

Under Article 258 of the TFEU, the Commission is the only institution empowered to take enforcement action against member states before the ECJ while the only remedy available to private persons is by way of action in the national courts which could result in a reference for a preliminary ruling being made to the ECJ under Article 267 of the TFEU. However, a reference under Article 267 of the TFEU does not prevent the Commission from taking parallel enforcement action under Article 258 of the TFEU.

Article 258 of the TFEU provides that if the Commission considers that a member state has failed to fulfill an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the state concerned an opportunity to submit its observations. If the state does not comply with the opinion within the period specified by the Commission, the Commission may bring the matter before the ECJ. In the SADC context, we have seen that the Tribunal has exclusive jurisdiction over disputes between SADC and a member state over matters specified in Article 14 of the Protocol, and that the dispute may be referred to the Tribunal by the state concerned or by the competent institution or organ of SADC[1340]. In addition, under Article 18 of the Protocol private persons may also bring actions against member states before the Tribunal provided they fulfill the condition of exhaustion of domestic remedies. Unlike in the EU, in SADC no person or institution has the exclusive right to bring enforcement action against member states before the Tribunal.

Although the Protocol does not define which entity constitutes a "competent institution or organ of SADC" for purposes of bringing an action before the Tribunal, it can safely be

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effect to an EU directive concerning the grounds for refusal of entry and residence of an EU citizen in the territory of another EU state.

[1340] Article 17 Protocol.

assumed that in most cases that organ will be the SADC Secretariat. This is so because the Secretariat is the principal executive institution of SADC which is also the only organ which is beyond the control or influence of member states[1341]. Thus, the experience of the Commission in the implementation of Article 258 of the TFEU should be of use to the Secretariat, or to any other institution of SADC which, or person who, may contemplate proceedings against a member state before the Tribunal. Since the Protocol does not set out the detailed procedures for bringing an action under Article 17 or Article 18 of the Protocol, it is not necessary for us to discuss the procedure under Article 258 of the TFEU and the case law developed by the ECJ in that connection.

I shall, however, discuss two aspects of the Article 258 proceedings which may be of relevance to the work of the Tribunal when exercising its jurisdiction under this head. The aspects are types of infringement by member states which have been the subject of litigation and the possible defences which member states have attempted to raise to proceedings and how the ECJ has dealt with such defences.

4.7.1.2 Types of infringement

Most infringements by EU member states involve failure to implement EU secondary legislation in the form of directives, or failure to implement them correctly or to observe their terms when implemented[1342]. In some cases infringement may involve direct breaches of EU Treaty provisions. The question of whether or not an infringement has occurred depends on whether or not the state has taken measures to implement EU law or, if it has, the nature of the measures which have been put in place by the member state to give effect to EU law. A similar situation is likely to arise in SADC where, as we have seen, the Treaty is cast in very broad terms leaving it up to protocols and subsidiary instruments to be developed to define detailed areas where action by member states is required. The Treaty and most of the protocols are directed at member states which are required to implement the objectives set out in the protocols through the necessary

[1341] Article 17 Treaty.
[1342] See Fairhurst op cit 192.

legislative or administrative measures. It is in this area of implementation that disputes between member states themselves, or between member states and institutions of SADC or private persons are likely to arise. It is worthwhile to look at some examples of infringements which have occurred in the EU context, and see how the ECJ has resolved them.

In *Commission v UK*[1343] the Commission brought proceedings against the UK for failing to legislate to implement an EU directive[1344] to ensure that water used for food production met the maximum nitrate levels specified in the directive. The UK's argument that as most food production was carried out with water from the domestic supply, legislation was not necessary was rejected by the ECJ which held that, in the absence of a specific derogation in the directive, all water used for food production should be made to comply with the directive[1345].

In *Commission v UK* the ECJ held that where an EU directive does not specifically provide any penalty for an infringement, Article 4 (former 10 EC Treaty) of the TEU requires the members states to guarantee the application and effectiveness of EU law[1346]. The choice of penalties remains with the members states which must ensure that infringements of EU law are penalized in the same manner that infringements of national law of a similar nature are penalized nationally and the penalty must also be effective, proportionate and dissuasive[1347].

A member state may also infringe its obligations under EU law by failing to control the actions of individuals under its jurisdiction. In *Commission v France*[1348] the Commission brought Article 258 (226 EC Treaty) of the TFEU proceedings against France arguing that France had breached its TFEU obligations by failing to take effective action to prevent French farmers from preventing imports of fruit and vegetables originating in

[1343] Case C-337/89.
[1344] Directive 80/778.
[1345] *Commission v UK* op cit paras 23-25.
[1346] Case C-382/92 para 55.
[1347] Ibid para 55.
[1348] Case C-265/95.

other member states from being disrupted by acts of violence committed by French farmers. The Court found that the TFEU required the member states to take all necessary and appropriate measures to ensure that the fundamental principle of the free movement of goods is respected in their territory[1349]. By failing to take the necessary measures to prevent acts of vandalism by the farmers, France was in breach of its TFEU obligations[1350].

4.7.1.3 Defences by member states[1351]

Once proceedings have commenced before the ECJ, EU member states have raised various defences, some of which might hold under international law, but have been swiftly rejected by the ECJ. One major defence used in relation to non-implementation of directives is that there has been a shortage of parliamentary time to enact the necessary legislation. In international law, this amounts to pleading internal situation[1352] and this defence has not been successful before the ECJ. In *Commission v Belgium*[1353] Belgium had imposed a discriminatory tax on wood which violated Article 110 (former 90 EC Treaty) of the TFEU. A draft law to amend the tax scheme had been laid before the Belgian Parliament but had fallen through when the parliament was dissolved. The Belgian government argued that these matters were out of its control and it had been prevented from legislating by *force majeure.* The ECJ dismissed this argument stating that:

> "The obligations arising from Article 90 (now 110) of the Treaty devolve upon states as such and the liability of a member state under Article 226 arises

[1349] Ibid paras 63-65.
[1350] Ibid.
[1351] See Steiner and Woods op cit 584 and Wyatt and Dashwoods op cit 429-432 for a discussion of the various defence which have been raised by EU states.
[1352] Shaw op cit 124 The position is reinforced by Article 27 of the Vienna Convention on Treaties which provides that a party may not invoke its internal law as justification not to carry out an international agreement. See also the *Alabama Claims* arbitration case of 1872 where the United States successfully claimed damages from Britain arising from failure by the latter state to prevent Confederate ships from leaving Britain to attack American ships. The absence of legislation to prevent the departure of the ships from the British ports was held to be no defence to the claim.
[1353] Case 77/69.

> whatever the agency of the State whose action or inaction is the cause of the failure to fulfill its obligations, even in the case of a constitutionally independent institution."[1354]

The defence of internal situation is also unacceptable under general international law and, in the case of treaty obligations, Article 27 of the Vienna Convention specifically precludes parties to treaties from invoking the provisions of internal law as justification for breach of obligations. However, the prohibition is subject to Article 46 which allows a state to invalidate a treaty on the basis that consent to be bound by the treaty was obtained in violation of its internal law, and the violation was manifest and concerned a rule of its internal law of fundamental importance. This exception, however, does not cover cases of breaches of treaty obligations where there is no allegation that the treaty is invalid. It follows that the Tribunal cannot be expected to entertain such a defence of raised in proceedings before it.

The defence of impossibility or difficulty has also been raised in the EU context. In *Commission v UK*[1355] the UK raised the defence as justification for its failure to take all necessary measures to ensure that bathing beaches in Blackpool and Southport met environmental and health standards set by EC Directive 76/160 by arguing that implementation was made much more difficult by local conditions. The ECJ, however, held that even assuming that absolute physical impossibility to carry out the obligations imposed by the directive might justify failure to fulfill them, in the case the UK had failed to establish such impossibility[1356]. This case presupposes that absolute physical impossibility, if the facts are proved, may be a defence to breach of EU law[1357]. But the ECJ has shown its reluctance to allow such defences by rejecting the special local economic, social or political justifications. In *Commission v Greece*[1358], the Greek Government attempted to justify its failure to implement a directive on the safe disposal

[1354] Ibid paras 15 and 16.
[1355] Case C-56/90.
[1356] Ibid para 46.
[1357] Under general international law *force majeure* can be a defence although the defence was rejected by the ICJ on the facts in the *Serbian Loans* case PCIJ, Series A, No. 29 1929. See Shaw op cit 710.
[1358] Case C-45/91.

of toxic waste because of "opposition of the local population."[1359] The ECJ reiterated its position that a member state cannot rely on its internal situation to justify disregard of its obligations[1360].

One defence which has been raised on several cases is the assertion by states that even if there is no national law in place to implement EU law or that even if the existing national law conflicts with EU law, administrative practices in place in the state, ensure that EU law is in fact applied or observed. The defence was raised in *Commission v France (RE French Merchant Seaman)*[1361] an action involving the French Code Maritime. The code was discriminatory in that it required ship-owners to employ three Frenchmen for very foreigner in certain jobs which was in violation of EU law. The French government's argument that in practice, the code was not implemented, was rejected by the Court. Enforcement by administrative practices was not enough and the existence of national laws which conflict with EU is sufficient to found a breach[1362]. The Court has, however, held in *Commission v Netherlands*[1363] that member states may use existing legally binding provisions of national law if they provide an effective means of implementing EU directives. In such cases individuals must be able to rely on a text of the national law that accurately reflects their rights and on which they can rely in case of legal challenge[1364]. In the same vein, the ECJ has also refused to allow member states to rely on the fact that the provisions of EU law which have been breached are directly effective, and may therefore be relied on by individuals in national courts which must give them precedence over inconsistent provisions of national law. In this regard, the Court said "..the primacy and direct effect of the provisions of EU law do not release member states from their obligation to remove from their domestic legal order any provisions incompatible with Community law."[1365]

[1359] Ibid para 20.
[1360] Ibid para 21.
[1361] C-167/73.
[1362] Ibid para 41 the Court noted the maintenance in force of such legislation "gives rise to an ambiguous state of affairs by maintaining, as regards those subject to the law who are concerned, a state of uncertainty as to the possibilities available to them of relying on Community law." See also *Commission v Italy* Case 166/82 and *Commission v UK (Re Tachographs*) Case 128/78.
[1363] Case C-190/90.
[1364] Ibid para 17.
[1365] *Commission v Italy* Case 104/86 para 12.

The failure of EU institutions to comply with their own obligations under the EU Treaty (sometimes referred to as 'reciprocity') has also been raised by unsuccessfully by member states as a defence to Article 258 of the TFEU proceedings. In *Commission v Luxembourg and Belgium*[1366] the Court stated that the basic concept of the TFEU requires that the member states shall not take the law into their own hands. The fact the Council failed to carry out its obligations cannot relieve the defendant member states from carrying out theirs, and the appropriate remedy for an aggrieved state is a direct action against the institution[1367]. Similarly, a member state cannot justify its breach of EU law on the ground that its object was to correct the effects of such a breach by another member state. In *Commission v France*[1368] the Court stated that a member state cannot under any circumstances unilaterally adopt, on its own authority, corrective measures to protect trade designed to prevent any failure on the part of another member state to comply with TFEU obligations. In such cases the aggrieved member state's remedy will be to invite the Commission to take Article 258 of the TFEU proceedings or for the member state itself to take action under Article 259 of the TFEU[1369].

4.7.2 Judicial review of acts of the EU

Unlike in national legal systems where there are constitutional structures, there are no such structures in the EU. The TFEU and the TEU confer specific powers and duties on each of the institutions of the EU and establish what has been referred to by the ECJ a "new legal order"[1370]. Each institution of the EU must carry out its functions within the

[1366] Cases 90 and 91/63 [1964] ECR 625 631.
[1367] Ibid 631.
[1368] Case 232/78 para 9.
[1369] Ibid.
[1370] See ECJ Opinion 1/91 *Draft Agreement Relating to the Creation of the European Economic Area* [1991] ECR I-6079 where the Court said: "In contrast, the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law'; moreover, `the Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals."

confines of the Treaties[1371] and in accordance with the general principles of EU law. The ECJ plays a vital role in ensuring that the EU institutions do not exceed their powers, and one of the means it uses is judicial review of acts of the institutions. We have seen, in the SADC context, that the Tribunal is empowered to determine disputes on the interpretation and application of the Treaty and the interpretation, application or validity of subsidiary instruments of SADC and *acts of the institutions of the Community* (my emphasis)[1372]. In this part I consider the jurisdiction of the ECJ in relation to acts of the institutions of the EU in so far as they may be relevant to the similar jurisdiction of the Tribunal. I therefore discuss actions for annulment under Article 263 (former 230 EC Treaty) of the TFEU, and the action for failure to act by EU institutions under Article 265 (former 232 EC Treaty) of the TFEU. The two forms of action may be considered as being similar to "acts of SADC institutions" under the Protocol and I consider that the experience of the ECJ in dealing with matters falling under the two articles might prove useful to the work of the Tribunal.

4.7.2.1 Actions for annulment under Article 263 (230 EC Treaty) of the TFEU

Article 263 of the TFEU provides that the ECJ "shall review the legality of legislative acts[1373], acts of Council and acts of the Commission and the European Central Bank, other than recommendations and opinions, and acts of the European Parliament and of the European Council[1374] intended to produce legal effects *vis a vis* third parties." We have seen that annulment action can be brought by institutions of the EU, member states, and private persons subject to certain conditions. The article also sets out the procedural aspects of action brought under its provisions, and the ECJ has developed a large body of case law on both the substantive and procedural aspects of Article 263 of the TFEU. The

[1371] Article 13.2 TEU.
[1372] Article 14 Protocol.
[1373] Article 230 EC Treaty referred to "acts adopted jointly by the EP and the Council" and the term "legislative" was introduced by the Lisbon Treaty but it is submitted that despite the different in terminology, the effect of the provision remains the same under the TFEU. Article 289.3 TFEU further provides that "Legal acts adopted by the legislative procedure shall constitute legislative acts."
[1374] Acts of the European Council were originally not covered by this provision but were inserted by the Lisbon Treaty.

case law of the ECJ has revolved around five aspects of the Article 263 of the TFEU proceedings namely, time limits for bringing actions, who may challenge the unlawful acts, which acts may be reviewed, the grounds for review and the consequences of annulment of an act.

For the purposes of this study, the question of time limits is not pertinent at this stage since neither the SADC Treaty nor the Protocol currently sets any time limits within which proceedings must be brought against either SADC institutions or member states. The question of time limits within which proceedings must be brought to annul acts of institutions, such as administrative bodies, in any legal system is important. It would be disastrous to the functioning of any legal system if actions for annulment could be instituted even after long periods of time after an act has been performed. It is presumed that SADC will enact further laws to cater for this situation which, if left open as at present, creates legal uncertainty which is undesirable.

The issue of who may bring annulment actions which the ECJ has dealt with is also of not much relevance in the SADC context because there are no restrictions as to who may bring actions before the Tribunal, a situation which differs from the EU where the TFEU places some restrictions on the rights of private persons to bring annulment proceedings before the ECJ. The remaining aspects of the Article 263 of the TFEU proceedings namely, reviewable acts, grounds for review, and consequences of annulment are considered in this section since the experience of the ECJ in dealing with those aspects could prove useful to the future work of the Tribunal.

4.7.2.2 Which acts may be reviewed

Article 288 (former 249 EC Treaty) of the TFEU lists what are generally considered to be acts of the EU and these are regulations, directives, decisions which are reviewable because they are intended to have legally binding force, and recommendations and opinions which are not reviewable because they have no legally binding force[1375]. The

[1375] See Fairhurst op cit 208.

nature and effect of these acts are considered in the next section dealing with sources of law. It must also be noted here that the Protocol does not specify which acts of SADC institutions can form the subject matter of a dispute before the Tribunal, and this was presumably left to interpretation by the Tribunal as to which acts are reviewable. In this section I thus consider the principles which have been developed by the ECJ on reviewable acts which principles may provide guidelines to the Tribunal in its future assessment of what constitutes reviewable acts of SADC institutions.

A literal reading of Article 263 of the TFEU *prima facie* indicates that it is only those acts listed in Article 288 of the TFEU which are reviewable by the ECJ. However, the ECJ has gone further to hold that it is not only the acts listed in Article 288 of the TFEU which are reviewable, but also other acts not specified in Article 288. In *Commission v Council*[1376], the Court held that a resolution passed by the Council to participate in a European Transport Agreement was reviewable under Article 263 (former 230 EC Treaty) of the TFEU. The Court refused to interpret Article 263 of the TFEU restrictively and declared that an action for annulment lies in case of all measures, whatever their nature and form, which are intended to have legal effects. In subsequent cases the ECJ has expanded on the principle by stating as follows in *IBM v Commission*:[1377]

> "In order to ascertain whether the measures in question are acts within the meaning of Article 230 (previously Article 173) it is necessary, therefore, to look to their substance. According to the consistent case law of the Court any measure the *legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action under Article 230 for a declaration that it is void.* However, the form in which such acts or decisions are cast is, in principle, immaterial as regards the question whether they are open to challenge under the article."[1378](my emphasis)

[1376] Case 22/70 paras 39-42.
[1377] Case 60/81.
[1378] Ibid para 9.

The distinction between form and substance has not always been easy draw in practice because an act may fail to have legal consequences precisely because it has not been adopted in the required form. In *Air France v Commission*[1379] the Commissioner responsible for competition policy had issued a press statement about the merger between Dan Air and British Airways, declaring that that it would result in sufficient concentration of air transport to have an EU dimension. Air France's challenge to the statement failed because the statement had not been adopted by the whole Commission and did not have the form of a legal act and thus could not have any legal consequences.

The cases pertaining to the position of the EP could also help to illustrate the application of the principle of legal effect by the ECJ. The original Article 263 (former 230 EC Treaty) of the TFEU did not mention measures adopted by the EP as being subject to review. Despite this omission, the ECJ held in *Parti Ecologiste ("Les Verts") v European Parliament*[1380] that measures adopted by the EP intended to have legal effects *vis a vis* third parties were subject to annulment under Article 263 of the TFEU. In that case, the EP had allocated funds from its own budget to the political parties for an "information campaign" leading up to the direct elections to the EP to be held in 1984. The new French environmentalist or "green" party complained that by reserving only a limited proportion of funds to parties putting up candidates for the first time in 1984, the EP was discriminating in favour of parties already represented in the EP. In a judgment of great constitutional significance to the EU legal order, the Court held that proceedings could be brought against the EP despite the fact that the original Article 263 of the TFEU did not refer to acts of the EP. It emphasized that "the European Economic Community (now EU) is a Community based on the rule of law, inasmuch as neither its member states nor its institutions can avoid a review of the question whether measures adopted by them are in conformity with the basic constitutional charter, the Treaty."[1381] The Court reasoned that although the article in question did not expressly mention the EP, the "general scheme" of the treaty was to make a direct action available against "all measures adopted

[1379] Case T-3/93.
[1380] Case 294/83.
[1381] Ibid para 23.

by the institutions….which are intended to have legal effect."[1382] An interpretation of Article 263 of the TFEU which excluded measures adopted by the EP from those which could be contested would lead to result contrary both to the spirit of the TFEU as expressed in Article 19.1 (former 220 EC Treaty) of the TEU[1383] and its system. The Court continued:

> "Measures adopted by the EP in the context of the EC Treaty could encroach on the powers of the member states or of other institutions, or exceed the limits which have been set to the EP's powers, without it being possible to refer them for review by the Court. It must therefore be concluded that an action for annulment may lie against measures adopted by the EP intended to have legal effects *vis a vis* third parties."[1384]

The Court found on the facts that the measures challenged by the Green party did have such effects and declared them void. It will be interesting to see whether the Tribunal could adapt a similar approach when faced with challenges to acts of the SADC-PF which as we have seen is an "institution" of SADC though not expressly mentioned in the Treaty[1385].

In two other cases the ECJ has also held that a declaration made by the President of the EP at the conclusion of the debate by the EP on the EU's budget has the character of a legal act and is subject to annulment[1386].

These cases must be contrasted with the *Len Pen v Parliament*[1387] case the facts of which were as follows. The applicant was a French member of the EP who had been convicted of a criminal offence under French law. In the light of that conviction and pursuant to

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[1382] Ibid para 24.
[1383] This article which sets out the function of the ECJ has been broadly interpreted by the ECJ and simply states that the Court "..shall ensure that in the interpretation and application of Treaties (this Treaty) the law is observed."
[1384] *Les Verts* case op cit para 25.
[1385] See the *Kethusegile-Juru* case op cit referred to in Chap 2 section on the SADC-PF.
[1386] *Council v Parliament* Case 34/86 and *Council v European Parliament* Case C-284/90.
[1387] T-353/00.

French law, the French Prime Minister declared, by decree dated 31 March 2000, that "[the applicant's] ineligibility brought to an end his term of office as a representative in the European Parliament."[1388] This disqualification was notified to the EP by the French government. The President of the EP then made a declaration in accordance with the law relating to election of members to the EP that "Pursuant to Article 12(2) of the [1976 Act], the European Parliament takes note of the notification from the French government confirming Mr. Jean-Marie Le Pen's removal from office."[1389] The CFI held that this declaration was not open to challenge stating that the intervention of the EP, under the its law relating to elections to the EP, was restricted to taking note of the declaration, already made by the French authorities that the applicant's seat was vacant[1390]. It accordingly held that the declaration of the President of the EP was not intended to produce legal effects of its own, but was a mere confirmation of the decision of the French authorities stating the applicant's disqualification as a representative in the EP[1391]. On appeal, the ECJ confirmed the findings made by the CFI, and accordingly dismissed the appeal[1392].

Acts of the Council have been held to be reviewable under Article 265 of the TFEU only if the representatives of the member states are acting as Council but not otherwise. In *Parliament v Council*[1393] the EP attempted to challenge a decision made at a Council meeting granting special aid to Bangladesh. The ECJ held that acts adopted by representatives of member states acting, not as members of the Council, but as representatives of their governments amounted to a collective exercise of the

[1388] Ibid para 17.
[1389] Ibid para 28.
[1390] Ibid paras 88-91.
[1391] Ibid paras 97-98.
[1392] C-208/03 paras 58 and 59 The Court said: "Thus, as regards first of all the appellant's argument based on the very wording of Article 12(2) of the 1976 Act which refers to an obligation for the Parliament to 'take note' that a seat has fallen vacant pursuant to national provisions in force in a Member State, that provision, far from supporting the appellant's argument, clearly highlights the complete lack of discretion on the part of the Parliament in the matter. In that particular case, the role of the Parliament is not to declare that the seat is vacant but, as the Court of First Instance rightly held in paragraph 88 of the judgment under appeal, merely to take note that the seat is vacant as already established by the national authorities, whereas in the other cases concerning, inter alia, the resignation or death of one of its members, that institution has a more active role to play since Parliament itself establishes that there is a vacancy and informs the Member State in question thereof." para 50.
[1393] Cases C-181/91 & C-248/91.

competencies of the member states and were not subject to review.[1394] A problem which may arise in this regard is to distinguish whether representatives are acting as Council or representatives of their governments, unless a specific declaration is made to that effect. The problem might be compounded where the subject matter of the decision is within the competence of both the member states and the EU institutions.

Some acts of the institutions of the EU are specifically excluded from review by the ECJ. For instance Article 276 (former 35 TEU) of the TFEU, provides that the ECJ shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law enforcement services of a member state. Despite those restrictions, the ECJ has not been deterred from exercising its supervisory functions in respect of some aspects of the excluded matters. It has held that it has jurisdiction to determine the scope of those exclusions. The CFI similarly ruled in *Svenska Jounalistforbundet v Council of European Union*[1395] that although it could not rule on the substance of decisions contained in Council documents, it did have jurisdiction to review the refusal to journalists of access to those documents[1396]. A Council decision refusing access to certain documents concerning the European Police Office was thus annulled[1397].

The CFI has also held in *Phillips Morris International and others v Commission*[1398] that a decision by the Commission to commence legal proceedings against certain American cigarette manufacturers before a federal court of the USA was not subject to annulment by the Court[1399]. The CFI reasoned that a decision to bring court proceedings does not in itself alter the legal position in question but has the effect merely of opening a procedure whose purpose is to achieve a change in that position through a judgment[1400]. This is so because the commencement of legal proceedings does not in itself determine definitely the obligations of the parties to the case and that determination results only from a judgment. The principle applies to proceedings before the EU courts, courts of member

[1394] Ibid para 25.
[1395] Case T-174/95.
[1396] Ibid paras 85-86.
[1397] Ibid para 127.
[1398] Joined cases T-379/00, T-380/00, T-260/01 and T-272/01.
[1399] Ibid para 118.
[1400] Ibid para 79.

states and courts of third states[1401]. The findings of the CFI were however confirmed by the ECJ on appeal[1402]. The propriety of this decision can however be questioned since for all intents, a decision to commence or not commence legal proceedings certainly alters a person's legal position. In particular a refusal to commence such proceedings may result in a person failing to get a remedy while a decision to commence criminal proceedings may prejudice the person who may ultimately be convicted.

Most decisions in this area of reviewable or non-reviewable acts revolve around competition law cases[1403]. These decisions are mainly about the Commission's refusal to act after receiving a complaint by undertakings and decisions of hearing officers in competition proceedings. These decisions are not discussed in this section since they pertain to a particular area of EU law which is outside the scope of this study. It is hoped the cases discussed above are sufficient to shed light on acts of EU institutions which may the subject of review proceedings before the ECJ.

4.7.2.3 Grounds for review

Fortunately for the ECJ, the TFEU, unlike the SADC Treaty or the Protocol, sets out the grounds upon which acts of EU institutions may be reviewed by the ECJ. The Protocol does not set out these grounds, presumably again leaving it up to the Tribunal to develop its own jurisprudence having regard to Article 21 of the Protocol. I again by way of illustration consider the experience of the ECJ in this area. Article 263 of the TFEU sets out the grounds for review which basically are derived from French administrative law, and it might be added, are not entirely alien to some of the national legal systems of SADC member states, especially those based on the common law tradition, hence the

[1401] Ibid para 93.
[1402] Joined Cases C-131/03 and C-146/03 The ECJ stated: "…it must be stated that the Court of First Instance rightly found, by reference to paragraph 47 of the judgment in *Commission* v *Germany*, that although the commencement of proceedings constitutes an indispensable step for the purpose of obtaining a binding judgment it does not *per se* determine definitively the obligations of the parties to the case, so that, *a fortiori*, the decision to bring legal proceedings does not in itself alter the legal position in question." para 58.
[1403] Fairhurst op cit 212-214.

case law developed by the ECJ around them is useful[1404]. The grounds are lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or any rule relating to its application, and misuse of powers. These grounds which are not mutually exclusive are discussed in turn.

4.7.2.3.1 Lack of competence

Lack of competence corresponds to what is known as substantive *ultra vires* in common law legal parlance and this simply means that a body may only do what it is authorised to do by law. If it does that which it is not authorized to do, it acts beyond its powers. Many challenges to acts of EU institutions have been mounted on the ground that the institution, in particular the Commission, used the wrong legal bases for a legislative proposal or a decision. Apart from challenges to the legal bases for a measure, challenges have been made as to the competence of the institution to perform the act. In *France v Commission*[1405] the Commission had concluded an agreement with the USA to promote cooperation and coordination and to lessen the possibility of conflict between the parties in the application of their competition laws. The French Government challenged the competence of the Commission to conclude the agreement. The ECJ held that under Article 218 (former 300 and 228 EC Treaty) of the TFEU the Commission had the power to negotiate agreements with states outside the EU or with international organizations, but it was not competent to conclude such agreements[1406]. The power to conclude agreements lay with the Council and the Commission therefore had acted outside its powers.

4.7.2.3.2 Infringement of an essential procedural requirement

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[1404] See Hoexter op cit 111-114 for discussion on the common law grounds for review as applied in South Africa. The grounds are mentioned in the old South African case *Johannesburg Consolidated Investments Co. v Johannesburg Town Council* 1903 TS 111 where the judge described the grounds as follows: "Whenever a public body has a duty imposed on it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of this duty, this Court may be asked to review the proceedings complained of and set aside or correct them..". See also Burns and Beukes op cit 280.

[1405] Case C-327/91.

[1406] Ibid para 28 and 43.

This ground for annulment is widely invoked before the ECJ and it corresponds to the common law concept of procedural *ultra vires*[1407]. The infringement involves breaches of the formal procedural requirements laid down in the Treaties and secondary legislation, as well as the more informal rules of fairness required by general principles of EU law (discussed in the section on sources of law). The most significant procedural requirement of the TFEU is contained in Article 288 (former 253 EC Treaty) of the TFEU which requires that legal acts[1408] must state the reasons on which they are based. The purpose of the requirement to state reasons for legal acts is to enable the EU judiciary to review the legality of the act and to provide the person concerned with sufficient information to make it possible to ascertain whether the act is well founded or whether it is vitiated by a defect which may permit its legality to be contested. In *Commission v European Parliament and Council*[1409] the contested act contained a brief statement of reasons on the point in issue. The statement had been developed by the Council in a declaration which was published in the Official Journal. Firstly, the ECJ explained the requirement to give reasons under Article 288 by stating that:

> "absence of reasons or inadequacy of the reasons stated goes to an issue of infringement of essential procedural requirements within the meaning of Article 263 (former 230 EC Treaty) TFEU, and constitutes a plea distinct from a plea relating to the substantive legality of the contested measure, which goes to infringement of a rule of law relating to the application of the Treaty within the meaning of that article…."[1410]

The Court then went on to explain the procedure to be followed when giving reasons for an act:

[1407] See Burns and Beukes op cit 204 for a discussion on the principle of *ultra vires.*
[1408] Article 253 of the EC Treaty referred to regulations, directives and decisions adopted jointly by the EP and Council requiring reasons. The concept of legal acts introduced by the Lisbon Treaty encompasses legislative acts and non-legislative acts which presumably covers decisions.
[1409] Case C-378/00.
[1410] Ibid para 34.

> "First, the statement of reasons for a Community measure must appear in that measure and,..second, it must be adopted by the author of the measure,..so that, in the present case, a declaration adopted by the Council alone cannot in any event serve as a statement of reasons for a regulation adopted jointly by the Parliament and the Council.."[1411]

One other common example of breach of a TFEU requirement is failure by an institution to consult the EP when the TFEU requires such consultation[1412]. Another example of breach of an essential requirement is failure to hear the views of interested parties before a decision which directly affects them is made. In *Lisrestal v Commission*[1413] the CFI said of this duty:

> "it is settled law that respect for the rights of the defence in all proceedings which are initiated against a person and are liable to culminate in a measure adversely affecting that person is a fundamental principle of Community law which must be guaranteed, even in the absence of any specific rules concerning the proceedings in question…. That principle requires that any person who may be adversely affected by the adoption of a decision should be placed in a position in which he may effectively make known his views on the evidence against him which the Commission has taken as the basis for the decision at issue."[1414]

This principle is not alien to the laws of the member states. As we shall see when discussing general principles of law, the right to be heard in administrative proceedings is one of the general principles falling under the rules of natural justice.

4.7.2.3.3 Infringement of the Treaties or any rule relating to their application

[1411] Ibid para 66.
[1412] *Roquette Freres v Council* Case 138/79 paras 33-34.
[1413] Case T-450/93.
[1414] Ibid para 42.

This ground is very wide and is capable of subsuming the other three grounds and has been invoked by litigants before the ECJ[1415]. It can cover the substantive legality of the contested measure such as breach of EU Treaty provisions and also covers breach of general principles of law recognized by the ECJ which are discussed in the section on general principles of law. These principles include the rights set out in the European Convention on Human Rights of 1950 and the principles of non-discrimination, proportionality, legitimate expectation, respect for property rights, and equal treatment.

4.7.2.3.4 Misuse of powers

This ground involves the use of power for an improper or illegitimate purpose. It is difficult to prove as it requires the applicant to establish that the intentions of the defendant institution were different from those stated in the contested measure. In *R v Secretary of State, ex parte British American Tobacco*[1416] the applicants challenged a directive on the manufacture, presentation and sale of tobacco products. The directive purported to be intended to improve the functioning of the internal market by ironing out differences between the laws of the member states, but the applicants argued that in fact, it was designed to protect public health, a field where the EU's competence was more limited. The ECJ firstly explained the circumstances under which an act can be invalidated by misuse of powers stating:

> "..a measure is vitiated by misuse of powers only if it appears on the basis of objective, relevant and consistent evidence to have been taken with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case."[1417]

The ECJ rejected the applicant's argument and took the view that:

[1415] See cases *Commission v European Parliament* Case C-378/00 and *Netherlands v European Parliament and Council* Case C- 377/98.
[1416] Case C-491/01.
[1417] Ibid para 189.

> "..the conditions for recourse to Article 95 EC Treaty were satisfied in the case of the Directive, and it has not in any way been established that it was adopted with the exclusive, or at least decisive, purpose of achieving an end other than that of improving the conditions for the functioning of the internal market in the tobacco products sector."[1418]

The Court then concluded that in the case that the Directive in question was not invalid by reason of misuse of power[1419].

4.7.2.4 Consequences of an annulment

Under Article 264 (former 231 EC Treaty) of the TFEU, if the ECJ finds an action under Article 263 of the TFEU well founded, it shall declare the act concerned to be void. The second paragraph of that article provides that in the case of a regulation, the ECJ shall, if it considers this necessary, state which effects of the regulation which is declared void shall be considered definitive. Article 265 of the TFEU provides that the institution or institutions whose act has been declared void or whose failure to act has been declared contrary to the Treaties, shall be required to take the necessary measures to comply with the judgment of the ECJ. The ECJ has no power to order the institution concerned to take any particular corrective steps. Article 266 of the TFEU further provides that the obligation to comply with the judgment of the ECJ does not affect any obligation which may arise for the institution to compensate for damage under Article 340 of the TFEU.

In the SADC context, neither the Treaty nor the Protocol specifically directs the Tribunal to declare acts of SADC institutions or of member states acting in compliance with SADC law, to be void. However, the Protocol in general, obliges member states and institutions of SADC to "..take forthwith all measures necessary to ensure execution of

[1418] Ibid para 191.
[1419] Ibid paras 192-193.

decisions of the Tribunal."[1420] Difficulties which may arise with the SADC approach is the effect which a declaration of invalidity may have on existing relationships which were created in reliance on the impugned act. A situation which may arise is that if the declaration of invalidity renders such relationships void, the question is as from when? If the invalidity begins from the date when the act was adopted by the institution then this might cause a lot of problems for persons who have in good faith entered into relationships long before the act is declared invalid. This creates legal uncertainty. One possibility is to render invalid only those relationships which were created after the declaration of invalidity hence saving existing transactions from becoming invalid. An objection to this approach is that an act which was void *ab initio* was never valid hence no one should be allowed to rely on it. A situation may arise where, for example, the Committee of Ministers responsible for trade matters under the Trade Protocol adopts measures for the elimination of import duties by prohibiting the collection by member states of fees or charges which are meant to cater for across-the board-internal charges or the costs of services rendered by a member state. These measures could be contrary to Articles 4.5 and 4.6 of the Trade Protocol which allow member states to collect such fees or charges which are not regarded as import duties. Suppose that some member states relying on the measures, refrain from levying those fees while others continue to levy them. Importers in the different states would be affected differently by the application of the measure by the member states, with some importers benefiting from its application while others are prejudiced in that they pay for services rendered to them while others pay nothing even for services rendered to them. This situation creates inequality in the cost of the imported product in that those who paid the duty would have to increase their prices to cater for the additional fees, which increase may be absorbed by the importer or passed onto the consumer by the importer. Should the measure subsequently be declared invalid the states which did not collect the levy may seek to recover the loss from either the SADC institution which wrongly adopted the measure, or from the importers who did not pay for services rendered to them. If the breach of the provisions of the Trade Protocol had continued for a long period of time, then it might be unfair for the importer to be required to compensate for the loss sustained by the states concerned. This is the

[1420] Article 32.2 Protocol.

situation where the Tribunal must draw a line as to what ought to be recoverable and from whom and for which periods.

Conscious of the problems which may be caused by declarations that an act was non-existent *ab initio,* the ECJ has been reluctant to make such declarations because of the disruption which this may cause to transactions or actions which may have been based on the assumption that the act was valid[1421]. But, in most cases, the Court merely declares the act to be void as from the date of judgment thus- limiting its application to situations arising at that time or after the declaration. In case of regulations, the ECJ draws assistance from the second paragraph of Article 264 of the TFEU which gives it a discretion as to which acts should or should not be affected by the declaration of invalidity. It is submitted that in the case of SADC, even in the absence of a similar discretionary provision, the Tribunal itself should use its discretion in determining the effect of measures or provisions of national law of member states which have been declared invalid. The adoption of such an approach cannot be considered inconsistent with the judicial function of the Tribunal which is aimed at ensuring that justice is achieved.

4.7.2.5 Action for failure to act Article 265 (former 232 EC Treaty) of the TFEU

The action for annulment under Article 263 of the TFEU is complemented by the action for failure to act under Article 265 of the TFEU. Under this provision where an institution of the EU fails to act in infringement of the Treaties, other institutions of the EU, EU states and private persons are empowered to bring an action before the ECJ to establish the infringement. The action under Article 265 of the TFEU is closely related to that under Article 263 of the TFEU, and the limitations applicable to private litigants under that article also apply. In addition, before taking action the applicant must first of all call upon the institution concerned to take the action within two months, failing which action can then be taken by the applicant

[1421] *Commission v BASF* Case C-137/92P.

Not many actions have been successful under this provision because many duties which are conferred on EU institutions involve both a duty to act coupled with a discretion on how to exercise that duty[1422]. The ECJ appears to have accepted that proceedings under Article 265 of the TFEU are not always confined to failure to adopt an act having legal effects which could be challenged in annulment proceedings. It has held in some cases that failure to adopt preparatory acts which though not open to review under Article 263 of the TFEU, constitutes an essential step in the process leading to another act which produces legal effects. In *Parliament v Council*[1423] the Court pointed out that the EP could bring proceedings against the Council under Article 265 of the TFEU if the Council failed to present a draft budget within the deadline laid down in Article 313 (former 272 EC Treaty) of the TFEU. The draft budget, being a preparatory measure, could not be challenged under Article 263 (former 230 EC Treaty) of the TFEU. If the EP were not allowed to challenge the failure to adopt a draft budget which could not be challenged under Article 263 (former 230 EC Treaty) of the TFEU as it does not produce legal effects, then the EP would not be able to exercise its powers under the TFEU to adopt the final budget[1424].

In cases where there is clear duty to act, such as the duty imposed on the Commission by Article 105 (former 85 EC Treaty) of the TFEU to act in cases of breaches of Articles 101 and 102 (former 81 and 82 EC Treaty) of the TFEU by undertakings, a statement by the Commission that it is not going to respond to a complaint might be ground for action under Article 265 of the TFEU. In *Ladbroke Racing (Deutschland) GmbH v Commission*[1425], Ladbroke had complained to the Commission about a denial of access for the televising of horse racing alleging a breach of Articles 101 and 102 of the TFEU by German and French companies in the horse racing and communications business. After deciding to investigate the complaint in 1990, the Commission had still not defined its position on the alleged breach by 1992 when it was requested to do so. The CFI held that there was a breach of Article 265 of the TFEU by the Commission as it had failed to

[1422] Fairhurst op cit 228.
[1423] Case 302/87.
[1424] Ibid para 17.
[1425] Case T-74/92.

define its position by 1992, which it could have done by initiating procedures for establishing the alleged breach of Article 102 of the TFEU, dismissing the complaint by formal letter to the complainant or making a reasoned decision not to pursue the complaint for lack of EU interest[1426].

The difficulties which the ECJ has experienced under this head of jurisdiction are further illustrated by the *Transport Policy Case*[1427] concerning alleged of failure to act under Article 90 and 91 (former 70 and 71 EC Treaty) of the TFEU that require the Council to adopt a common transport policy for the EU. More than 20 years after the EC Treaty had come into force, the Council had failed to adopt such policy and the EP brought proceedings against it for failure to act. This was after a number of requests for action had been made by the EP to the Council. The ECJ agreed that several requests had been made to the Council for action as required by Article 265 of the TFEU, but no action had been taken. However, the ECJ held that the obligations in Articles 90 and 91 were not sufficiently precise as to amount to an enforceable obligation thus the Article 265 action failed[1428].

The Protocol does not make specific reference to action being taken for failure to take action in breach of SADC law by either SADC institutions or member states. This situation is once again one of those omissions in SADC law which if not addressed through subsidiary legal instruments, could result in the existence of an incomplete legal system. Presumably this gap could be filled by the Tribunal giving a very wide interpretation to the concept of "acts of SADC institutions" to include omissions. As can be discerned from the experience of the EU, it is not far-fetched to imagine that failure to act by institutions could result in prejudice either to member states of SADC, other institutions of SADC, or even private persons.

[1426] Ibid paras 56-63.
[1427] *European Parliament v Council* Case 13/83.
[1428] The Court said para 36:"In view of that relationship it must be concluded that in both cases the measures which are the subject of the action must be sufficiently defined to allow the Court to determine whether their adoption, or the failure to adopt them, is lawful."

4.7.3 Claims for compensation for damages for unlawful acts by EU institutions under Articles 268 and 340 (former 235 and 288 EC Treaty) of the TFEU

4.7.3.1 Basis and conditions for liability

It has noted that neither the SADC Treaty nor the Protocol specifically provides for an action for damages against SADC institutions and that if such a remedy were to be available in the SADC legal order, then it would have to be invented by the Tribunal through creative interpretation of the law. Alternatively, SADC itself could, through a subsidiary legal instrument such as a protocol, make provision for payment of compensation by SADC institutions or member states to persons who have sustained injury, damage or loss resulting breaches of SADC law. Even if such an action were to be created through legislation, there would still be need to determine questions of circumstances under which liability may be incurred (e.g. whether liability arises in respect of all acts such as legislative, administrative and judicial) and matters of reparation.

However, it is submitted that a claim for compensation resulting from damages caused by the unlawful acts of SADC institutions is a remedy which can be implied from general principles of national and international law. Where a person or institution causes or does an unlawful act which results in injury to another person, the wronged party is entitled to compensation for such injury[1429]. I therefore discuss the of liability for unlawful acts of EU institutions as expounded by principles developed by the ECJ derived from principles common to member states of the EU.

In the EU legal order, liability for non-contractual matters is governed by Article 340 (former 288 EC Treaty) of the TFEU. Article 266 (former 233 EC Treaty) of the TFEU makes it clear that a declaration under Article 263 of the TFEU (that an act is void), or under Article 265 of the TFEU (that an institution has failed to act) does not affect any

[1429] See Chap 2 for discussion on possible action for compensation for damages arising from unlawful acts in SADC.

obligation which may arise to compensate for damages under Article 340 of the TFEU. It does not follow that once a declaration of annulment is made the applicant is automatically entitled to succeed in an action for compensation for damage. The applicant, if he or she wishes to claim compensation, must make a separate claim under Article 340 of the TFEU. Article 268 (former 235 EC Treaty) of the TFEU gives the ECJ exclusive jurisdiction over claims for compensation for damages against EU institutions. In this respect this provision is similar to Articles 17, 18 and 19 of the Protocol which give the Tribunal exclusive jurisdiction over disputes involving SADC and other entities, be it member states, private persons, or staff of SADC.

Article 340 of the TFEU then provides that the EU shall, in accordance with the "general principles common to the laws of member states", make good any damage caused by its institutions or servants. The principles governing liability are thus left to be developed by the ECJ through case law and it has done so and I now consider those principles bearing in mind that the Tribunal can also gain some inspiration from them.

The ECJ has interpreted the term "institutions" in a broad sense to include, not only the institutions listed in Article 13 (former 7EC Treaty) TEU of the, but any EU body "established by the Treaty and authorized to act in its name and on its behalf"[1430]. It has been held, for example, in *European Ombudsman v Lamberts*[1431], that acts of the European Parliament Ombudsman may in principle provide the basis for an action for damages under Article 340 (288 EC Treaty) of the TFEU. The ECJ has also established that the liability under the Treaties extends to the EU as a whole, although for the purposes of proceedings the relevant institution is cited alone or jointly[1432].

In the EU legal order, it has also been established that the reference in Article 340 of the TFEU to "general principles common to the law of member states" does not mean that the Court must search for cases decided in member states to find a majority. This simply

[1430] *SGEEM and Etroy V EIB* Case C-370/89 [1992] ECR I-6211 where the ECJ held that the terms institutions covered the European Investment Bank. Institutions of the EU now include bodies, offices or agencies of the EU. See section on EU Institutions *supra.*
[1431] Case C-234/02P.
[1432] *Werhahn v Council* Joined Cases 63-69/72.

means that the Court must gain inspiration from national systems in devising the principles for liability under EU law[1433]. Previously, the Court's approach to liability was very strict resulting in very few actions for damages succeeding before the ECJ. At the same time, the criteria used to determine liability was different from that applied in national courts in cases of liability for damages under the *Francovich* principle discussed in the next section. However, this divergence in approach was dispelled by the ECJ in *Brasserie du Pecheur and Factortame*[1434] where the Court stated that:

> "the conditions under which the State may incur liability for damage caused to individuals by a breach of Community [EU] law cannot, in the absence of particular justification, differ from those governing the liability of the Community [EU] in like circumstances. The protection of the rights which individuals derive from Community [EU] law cannot vary depending on whether a national authority or a Community [EU] authority is responsible for the damage."[1435]

Thus, the principles of liability under EU law must be the same, regardless of whether the defendant body is a member state before a national court or an EU institution before the ECJ. The basic rules for EU liability were laid down in the case *Lutticke v Commission*[1436] and these are that there must be actual damage to the claimant, there must be an unlawful act on the part of the EU institution and a direct casual link must exist between the act of the institution and the alleged damage[1437].

Fault, which is an element for liability in some national systems, is not an essential element under this head. The only fault which is required is the unlawful act on the part of the institution. If there is a positive duty to do something, there must be an omission on the part of the institution and, if there is a discretion, then for liability to be incurred the discretion must have been exercised in an unlawful way. Liability under EU law is also wider than can be found in national systems in that EU institutions can be liable for

[1433] See opinion of Advocate-General Gand in Case 9/69 *Sayag v Leduc* [1969] ECR 329 339-340.
[1434] Cases C-46/93 and C-48/93.
[1435] Ibid para 42.
[1436] Case 4/69.
[1437] Ibid para 10.

wrongful legislative acts. Traditionally, the ECJ has attempted to draw a distinction between liability for legislative acts and liability for administrative acts[1438]. In the latter case, the basis for liability is encapsulated in the basics rules noted above and the case of *Adams v Commission*[1439] can be used to illustrate the circumstances under which an institution may become liable.

Adams was employed by Hoffmann La Roche, one of the largest pharmaceutical companies in Europe[1440]. Although the company was based in Switzerland, its products were widely sold throughout the EU. It came to Adam's attention that the company which dominated parts of the pharmaceutical market, appeared to be engaged in a number of abuses. He passed various documents to the Commission with a request that it did not identify him and the documents subsequently enabled the Commission to establish the existence of the abuses and to fine the company. During the course of exchanges with the company, the Commission sent copies of various documents supplied by Adams to the company. In addition, the company's lawyers informed the Commission that the company intended to institute criminal proceedings against the informant if ever he entered Switzerland. This information was not brought to Adam's attention. Some of the documents contained marks and other indications which identified Adams as the informant. As a consequence he was arrested and charged under Swiss law for the criminal offence of breach of employee confidentiality and economic espionage. He was prevented from communicating with his wife during detention and she committed suicide. His conviction led to the collapse of a business he had established in Italy. Adams later brought proceedings against the Commission for breach of its duty of confidentiality under Article 339 (former 287 EC Treaty) of the TFEU and EC Regulation 17/62. The ECJ found that the Commission had breached the duty of confidentiality by handing over the documents to the company and had compounded the damage to Adams by failing to warn him of the company's intention to prosecute him

[1438] See Hoexter op cit 49 for discussion on the approach of some common law jurisdictions to the distinction between legislative, administrative and judicial acts.
[1439] Case 145/83.
[1440] The facts of the case are set out in paras 4-19.

under Swiss law[1441]. The ECJ therefore found the Commission liable for damages under Article 340 of the TFEU[1442], but the damages payable to Adams were reduced by half because he had failed to inform the Commission of the possibility that he might be identified from the documents and had returned to Switzerland without enquiring from the Commission whether he might be at risk if he did so[1443].

Liability for legislative acts is, however, limited by the so-called *Schoppenstedt* formula propounded in *Zuckerfabrik Schoppenstedt v Council*[1444], The Court explained the formula by stating that "Where legislative action involving measures of economic policy is concerned, the Community does not incur non-contractual liability for damage suffered by individuals as a consequence of that action…unless a sufficiently flagrant violation of a superior rule of law for the protection of the individual has occurred."[1445] The application of the formula has involved defining what exactly constitutes "legislative action." The case law of the ECJ gives some guidelines. The Court has held that the term does not cover instruments of primary EU law, such as treaties concerning accession of new member states[1446], or the amending treaties such as the Single European Act[1447]. These are agreements concluded between states and not "acts of the institutions". The CFI held in *Schroder v Commission*[1448] that the concept of legislative measure within the meaning of the case law applies to all measures referred to in Article 288 (former 249 EC Treaty) of the TFEU and not regulations alone. The test here, as with action for annulment, is not what the disputed act is called, but whether it was of general application meaning that directives and decisions depending on their nature qualify as legislative measures. In the *Schroder* case, the CFI concluded that the contested measures even though they took the form of decisions produced "with regard to the applicants effects which are those of a measure of general application in the same way as a

[1441] Ibid paras 35 and 39.
[1442] Ibid para 44.
[1443] Ibid paras 53-55.
[1444] Case 5/71.
[1445] Ibid para 11.
[1446] *Laisa v Council* Joined Cases 31 and 35/86.
[1447] *Dubois et Fils v Council and Commission* Case T-113/96.
[1448] Case T-390/94.

regulation."[1449]. The formula can thus be applied to loss allegedly caused by a directive. Conversely, the formula does not apply where the contested act, though labeled a regulation, is not in fact a legislative measure of general application.

The *Schoppenstedt* formula also calls for a definition of what constitutes "superior rule of law for the protection of the individual." The case law has established that this could include a provision of the TFEU[1450] or of a regulation. An applicant need only show that the rule in question was for the protection of individuals in general, and not meant for the protection of a particular class of which he was a member[1451]. Thus the category would include general principles of law, such as proportionality, equal treatment and protection of legitimate expectations, including misuse of power by an institution. However, a rule which fails to respect the institutional balance laid down in the treaties was held insufficient to render the EU liable in damages since the division of powers among the institutions is not intended to protect individuals[1452].

The *Schoppenstedt* formula also required proof that the superior rule of law in question had been breached in a manner that was sufficiently serious to fix the EU with liability. In *HNL v Council and Commission*[1453], the Court stated that in a legislative field which involved the exercise of a wide discretion, such as the common agricultural policy, the EU would not incur non-contractual liability "…unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of it powers."[1454]. Where this was not established it was not possible to establish a sufficiently serious breach of a superior rule of law. The Court went further to hold in *Amylum v Council and*

[1449] Ibid para 54. The Court stated that "concept of legislative measure within the meaning of the case-law may apply to all the measures referred to by Article 189 [now 288] and not only to regulations. According to settled case-law, the nature of a measure is not to be sought in its external form, but rather in whether or not the measure at issue is of general application."
[1450] For example, Article 40 (former 34.2 EC Treaty) of the TFEU which prohibits discrimination between producers and consumers in the EU in the common organization of agricultural markets, or a provision contained in a regulation.
[1451] *Kampffmeyer v Commission* Joined Cases 5, 7 and 13/66.
[1452] *Vreugdenhil v Commission* Case C-282/90 paras 20-22.
[1453] Joined cases 83 and 94/76 and 4, 15 and 40/77.
[1454] Ibid para 6.

Commission[1455] that a legal situation resulting from legislative measures involving choices of economic policy would only be sufficient to fix EU liability if the conduct of the institutions concerned "was verging on the arbitrary."[1456]. As a result of this extremely strict test, actions involving legislative measures conferring discretionary measures have been rarely successful. The Court justified the strict approach on two grounds. The first is that if liability were too easy to establish, the institutions would be hampered by actions for compensation in the performance of their tasks under the TFEU[1457]. Secondly, the Court felt that an individual who considered himself or herself injured by an EU act which had been implemented by national authorities, could challenge the act's validity before the national courts which could then make a reference under Article 267 of the TFEU[1458].

The Court's strict approach has been heavily crticised because of its restrictiveness, and also on the basis of its distinction between legislative and administrative measures[1459]. This distinction could result in unfairness since, with regard to administrative acts, the EU could incur liability on the basis of illegality alone without proof of fault or culpability even where the acts might equally involve the exercise of wide discretionary powers. In light of these criticisms the Court had to revise its approach and an opportunity arose in the *Bergadem* case[1460]. The case concerned a directive adopted by the Commission amending a list of substances which, if contained in cosmetic products, would require member states to prohibit the marketing of those in accordance with the directive. The claimant company argued that since it was the only undertaking affected by the Commission's directive, the directive should be considered an administrative act and its illegality alone should entail liability on the part of the EU. The CFI disagreed holding that the act was legislative in nature and applied the *Schoppenstedt* formula. The undertaking appealed to the ECJ which observed that as regards the liability of member

[1455] Joined cases 116 and 124/77.
[1456] Ibid para 19.
[1457] *HNL* case op cit para 5.
[1458] *Amylum* case op cit para 14.
[1459] See Wyatt and Dashwood op cit 490.
[1460] *Laboratoires Pharmaceutiques Bergadem SA v Commission* Case C-352/98P.

states to make reparations for damage caused for breach of EU law, the requirements were as follows:

(a) the rule of law infringed must be intended to confer rights on individuals;
(b) the breach must be sufficiently serious;
(c) there must be causal link between the breach and the damage sustained[1461].

As regards (b), liability depends on the member state or institution of the EU manifestly and gravely disregarding the limits of its discretion, and where the member state or institution had little or no discretion, the mere infringement of EU law may be sufficient to establish the existence of a serious breach[1462]. The Court concluded that the general or individual nature of a measure adopted was not decisive in identifying the limits of the discretion, and thus that the strict categorization of a measure as legislative or administrative was not proper[1463]. The Court did not expressly overrule the *Schoppenstedt* formula, but subsequent case law of the Court confirmed the new approach: liability of EU institutions was to be the same as that applicable to member states under the *Francovich* case law.

But is there a difference between the conditions laid down in the *Bergadem* case and those which previously applied under the *Schoppenstedt* formula? Is the idea of a "superior rule of law for the protection of the individual" any different from the concept of "rule intended to confer rights on individuals" stated in a) above? There appears to be no distinction in practice between the two formulations as a rule intended to protect individuals would of necessity also confer rights on the individual, or else how would it protect the individual without conferring rights. Requirement (b), however, appears to abolish the previous distinction between legislative and administrative acts meaning that now the sole criteria will be whether the breach is sufficiently serious, irrespective of the nature of the measure contested. The result is that for claimants it is even now more difficult to establish EU liability because the test is now the same for both legislative and

[1461] Ibid para 42.
[1462] Ibid paras 43-44.
[1463] Ibid paras 46-47.

administrative acts whereas previously, in cases of administrative acts it was sufficient to establish liability by merely proving the illegality of the act.

4.7.3.2 Damage

In proceedings under Article 340 of the TFEU an applicant may recover actual financial loss and loss of profits[1464] provided that he or she is able to quantify the loss or produce some evidence on the basis of which the loss can be assessed[1465]. The claimant may also recover damages for non-material injury such as the effect on the applicant's integrity and reputation of defamatory remarks made by the defendant[1466]. Where the damage is imminent and foreseeable with certainty, the EU may be declared liable although in such situations, the applicant must take steps to mitigate any loss as he will not be entitled to recover compensation where he could have passed the loss to his customers[1467]. If an action is successful, the Court does not normally make a specific award of damages, but usually it will establish the acts or omissions giving rise to liability and order the parties to attempt to reach a settlement on the amount of compensation, failing which the Court will determine the amount[1468].

4.7.3.3 Causation

As regards causation the Court has said that Article 340 of the TFEU does not require the EU "to make good every harmful consequence, even a remote one, of the unlawful legislation"[1469]. The applicant must prove that the damage is a "sufficiently direct consequence of the unlawful conduct of the Council to make the Community liable to make good the damage."[1470] And the Court has held in some cases that there was no causal link between the damage allegedly suffered by the applicant and the EU's act[1471].

[1464] See for example *Kampffmeyer v Commission* Joined Cases 5, 7 and 13/66.
[1465] See *Ismeri Europa Srl v Court of Auditors* Case T-277/97.
[1466] Ibid.
[1467] *See Ireks-Arkady v Council and Commission* Case 238/78.
[1468] *Adams* case op cit para 55.
[1469] *Dumortier Freres v Council* Joined Cases 64 and 113/76, 167 and 239/78, 27, 28 and 45/79 para 21.
[1470] Ibid.
[1471] *Compagnia Italiana Alcool v Commission* Case C-358/90.

Where the chain of causation is broken, say by the actions of national authorities or the applicant himself or herself, the EU will not be liable. Traders are thus expected to behave in a prudent manner and to acquaint themselves with the markets in which they operate[1472].

4.7.3.4 Concurrent liability

Where the damage is caused by the actions of member states relying on an unlawful act of an EU institution, it may not be clear who is liable. The ECJ has, however, held that in such situations the claimant is expected to claim in the national courts[1473]. Where however, there is no remedy in the national courts claims may be brought against the institution in the ECJ[1474].

4.7.3.5 Conclusion

A question which may be asked at this stage is: What is the significance of these authorities emanating from the ECJ for the Tribunal? A close look at the cases reveals that most of the principles propounded by the ECJ are based on principles derived from the law common to the member states of the EU. This implies that the Tribunal itself would largely have to rely on the principles of law common to the member states in developing its own jurisprudence on the possible liability of SADC institutions for damage caused. Thus, in cases of damage caused by servants of SADC, the national principles of vicarious liability could be applied. The Tribunal, however, should avoid attempts to distinguish between legislative and administrative acts of SADC as this could give rise to numerous problems as the experience of the EU shows. The standard of liability must be the same regardless of the capacity in which the institution is acting. In the context of national law, such classification is said to have led to "a rigid and insensitive application of the law."[1475]

[1472] *Compagnie Continentale v Council* Case 169/73 paras 22-32.
[1473] *Vreugdenhil v Commission* Case C-282/90 para 12.
[1474] *Krohn v Commission* Case 175/84 paras 18 and 23.
[1475] See Hoexter op cit 49.

4.7.4 Preliminary rulings jurisdiction under Article 267 (former 234 EC Treaty) of the TFEU

4.7.4.1 Introduction

We have noted that one way in which EU law is enforced is through the national courts of the EU member states. The ECJ is not a Court of Appeal for decisions of the national courts on matters pertaining to EU law. This is a consequence of the nature of the EU itself which, as we have noted, is not a federation of states in the sense of say, the USA. The member states chose to create the EU with limited capacity in agreed areas which, as we have seen, were originally purely economic but now encompass other wider fields such as social and political as well as environmental matters. As the original communities expanded, the competencies of the communities were also expanded to reflect the changes. But one thing which was clear from the beginning was that member states did not intend to surrender all their sovereign powers to the communities. This principle is apparent when one looks at the current structure of the EU. We have seen that it consisted of three pillars, the first one of which comprised the communities which are for all intents the most advanced in terms of supranational structures. The other two pillars which constituted limited intergovernmental areas of cooperation with very limited powers being exercised by the EU institutions have now been integrated into the EU by the Lisbon Treaty. It was inevitable that in this type of set up the courts of the member states would play an important role both in the development and in the implementation of EU law. This role they play through the preliminary rulings procedure. A similar situation exists in SADC. The SADC Treaty and Protocol envisage that SADC national courts will play a role similar to that of the EU national courts through a similar preliminary rulings procedure[1476].

[1476] Article 16 Protocol.

In *Simmenthal*[1477] the ECJ explained the cooperative relationship between the ECJ and the national courts and the duty of national courts as follows:

> "A national court which is called upon, within the limits of jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provisions of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means."[1478]

Given the different national legal traditions prevailing in the EU member states, there is a danger that if this duty of national courts is taken literally without some form of control, EU law would develop differently in the different states. On way to ensure uniform development of EU law in the member states would have been to have the ECJ as the final court of appeal from national courts of member states on questions of EU law. However, as we noted, this was not accepted by the founders of the EU. They opted instead for the preliminary rulings procedures under Article 267 (former 234 EC Treaty) of the TFEU which empowers national courts of member states confronted with a question of EU law to refer that question to the ECJ for an authoritative interpretation. During the course of the application of the Article 267 procedures problems arose. Many references were made by the national courts to the ECJ and this resulted in an accumulation of cases and thus a large backlog in the ECJ[1479]. These problems resulted in amendments being made to the EC Treaty by the Treaty of Nice (2000) aimed at the sharing of the Article 267 jurisdiction between the Court of Justice and the General Court[1480]. The General Court now has jurisdiction under that article in certain specified

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[1477] Case 106/77.
[1478] Ibid para 27.
[1479] See Brown and Jacobs op cit Chap 5 for the background to and the reasons which led to the establishment of the Court of First Instance.
[1480] Article 225 EC Treaty provided for the establishment of the CFI as an attachment to the ECJ and sets out the procedure by which the Council shall use to determine the jurisdiction of the CFI as well as provision for the Rules of Procedure of the CFI. These provisions are now contained in Article 19 TEU and Article 256 of the TFEU.

areas as determined in the Statute of the Court[1481]. However, there are some limitations to the jurisdiction of the General Court. If the General Court considers that a matter referred to it requires a decision of principle likely to affect the unity or consistency of EU law, it may refer the case to the Court of Justice for a ruling[1482]. In addition, decisions of the General Court may in exceptional circumstances, be subject to review by the Court of Justice where there is a serious risk of the unity or consistency of EU law being affected[1483]. Subject to these observations, the discussion in this section focuses on the combined jurisdiction of both the Court of Justice and the General Court as that of the ECJ unless otherwise stated.

4.7.4.2 Preliminary rulings jurisdiction under Article 267 of the TFEU

The essence of Article 267 of the TFEU is that jurisdiction over matters involving EU law is shared between the ECJ and the national courts of the member states, with the ECJ being responsible for interpreting the law, and the national courts applying it. The function of the ECJ differs from that of an appellate court which may substitute its decision for that of the lower court if the appeal is successful. In a reference, it is the lower court which takes the decision to refer the case. The ECJ rules on the issues raised and returns the matter to the lower court which then applies the ruling to the facts of the case. The aim here is to retain the independence of the national court while at the same time preventing " a body of national case law not in accord with the rules of EU law from coming into existence in any member state."[1484] However, in many cases national courts are able to give and have given judgments on matters involving EU law without making a reference, thus the procedure itself is not fool proof that divergence in interpretation of EU law will not occur in national courts. Article 267 of the TFEU gives the ECJ jurisdiction to give preliminary rulings concerning the interpretation of the Treaties, the

[1481] Article 256.3.
[1482] Article 256.3 second para.
[1483] Article 256.3 third para.
[1484] *Hofmann La Roche v Centrafarm* Case 107/76 para 5.

validity and interpretation of acts of the institutions, bodies, offices or agencies of the EU.

Where the question is raised in a court or tribunal of a member state the court or tribunal may refer the question to the ECJ, if it considers that a decision by the ECJ on the question "is necessary to enable it to give judgment"[1485]. In the second situation where the question is raised before a court or tribunal of a member state against whose decision there is no judicial remedy under national law, that court or tribunal shall refer the matter to the ECJ[1486]. The Lisbon Treaty introduced an expedited procedure where a person is in custody. The fourth paragraph of Article 267 now reads: "If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay."

We have noted that the preliminary rulings jurisdiction of the ECJ is similar to that of the Tribunal. Under Article 16 of Protocol the Tribunal has jurisdiction to give preliminary rulings in proceedings of any kind and between any parties before the courts or tribunals of member states of SADC. The article further provides that the Tribunal has no original jurisdiction on the matter, but may rule on the interpretation, application or validity of the provisions in issue if the question is referred to it by the court or tribunal of the member states for a ruling. Unlike the ECJ under Article 267 of the TFEU, the matters on which a reference may be made are not prescribed in Article 16 of the Protocol but are specified in the article on the general jurisdiction of the Tribunal which is Article 14 of the Protocol. Under that article we have seen that the Tribunal has general jurisdiction over all disputes relating to the interpretation and application of the Treaty, the interpretation, application or validity of the protocols, all subsidiary instruments adopted within the framework of SADC, and acts of institutions of SADC and all matters specifically provided for in any agreement that states may conclude among themselves or within SADC and which confer jurisdiction on the Tribunal.

[1485] Second paragraph of Article 267 TFEU.
[1486] Third paragraph Article 267 TFEU.

The circumstances under which a reference may be made are not set out in the Protocol but are found in the Rules of Procedure of the Tribunal. Article 75 of the Rules provides that "where a question is raised before a court or tribunal of a member state concerning the application or interpretation of the Treaty or its protocols, directives and decisions of SADC or its institutions, such court or tribunal shall, if it considers that a ruling on the question is necessary to enable it to give judgment, request the Tribunal to give a preliminary ruling". Secondly, the same article provides that if a similar question is raised before a court or tribunal of a member state against whose decision there are no judicial remedies under national law, that court or tribunal shall refer the case pending before it to the Tribunal.

Before moving on to the case law and experience of the ECJ in the application of Article 267 of the TFEU, I must briefly discuss the similarities and differences between the provisions of Article 267 and those of the Protocol and the Rules of Procedure. A reference under Article 267 can be made in relation to the interpretation of the Treaties, while under the Protocol a reference can be made in relation to both the interpretation and application of the SADC Treaty. Secondly, under Article 16 of the Protocol a reference can be made in relation to the interpretation, application or validity of the protocols, all subsidiary instruments adopted within the framework of SADC, as well as the interpretation, application or validity of acts of institutions of the SADC. In this respect the SADC provisions are wider than the EU Treaty provisions in that, while the ECJ is limited to giving rulings on the interpretation and validity of acts of the institutions of the EU, the Tribunal enjoys jurisdiction in respect of the interpretation, application and validity of both the protocols which, as we have seen, are entered into by the member states themselves, and apart from the Protocol, do not form an integral part of the SADC Treaty, and other subsidiary legal instruments which are also made by the member states themselves.

The Tribunal also enjoys jurisdiction similar to that of the ECJ over acts of SADC institutions, except that the Tribunal's jurisdiction in this respect also extends to the

application of those acts of the institutions. However, Rule 75 of the Tribunal's Rules of Procedure appears to be differently worded to Article 14 of the Protocol in that the rule refers to a "question concerning the application or interpretation of the Treaty or its Protocols, directives and decisions of the Community or its institutions." Article 14 of the Protocol does not specifically mention "directives and decisions of the Community or its institutions" but refers to protocols and "all subsidiary legal instruments" and "acts of the Community". It is not clear why there is this divergence in wording. In addition, the Tribunal has specific jurisdiction under this head to rule on all matters specifically provided for in any agreement that states may conclude among themselves or within SADC and which confers jurisdiction on the Tribunal, a jurisdiction which is not found in Article 267 of the TFEU.

The courts or tribunals of the EU member states which may refer a matter to the ECJ have a discretion under Article 267 of the TFEU which uses the word "may", while the SADC national courts or tribunals appear to have no such discretion because Rule 65 uses the word "shall" in the same context. In the case of courts or tribunals against whose decisions there is no judicial remedy, both EU Treaty and Protocol provisions use the word "shall" which implies a mandatory duty.

Apart from these differences, it is submitted that the two courts enjoy more less similar jurisdiction under the preliminary rulings head and the case law and experience of the ECJ could be useful a guide to the Tribunal when it ultimately exercises its preliminary rulings jurisdiction. In the next subsections I therefore discuss some aspects of the Article 267 jurisdiction which have attracted the attention of the ECJ. I will consider the matters under the following headings:

(a) matters which may be referred
(b) the courts or tribunals which are able to refer
(c) admissibility of a reference
(d) the discretion to refer
(e) the duty to refer

(f) circumstances when not necessary to refer

(g) interpretation or application

4.7.4.3 Matters which may be referred

Interpretation of the treaty covers the EU Treaties, the amending treaties, and the Treaties of Accession by new member states which are normally made expressly subject to Article 267 of the TFEU. Provisions of the Treaties relating to the common foreign and security policy are specifically excluded from the jurisdiction of the ECJ except that the ECJ has jurisdiction to review the legality of decisions providing for restrictive measures against natural or legal persons adopted under Chapter 2 of Title V of the TEU and to monitor compliance with Article 40 of the TEU[1487]. Again, in terms of Article 276 of the TFEU, in exercising its powers under the TFEU, in matters relating to freedom, security and justice, the ECJ shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a member state or the exercise of the responsibilities incumbent upon member states with regard to the maintenance of law and order and the safeguarding of internal security.

EU acts include not only legally binding acts such as regulations, directives and decisions, but extend to opinions and recommendations where these are relevant to the interpretation of EU law by the courts of member states[1488]. In *Deutsche Shell AG v Hauptzollant Hamburg*[1489], the ECJ held that "arrangements" made by a joint committee responsible for implementing a convention on a common transit policy between the EEC and the European Free Trade Area formed part of the EU legal order[1490]. The fact that an EU legal measure lacked compulsory effect did not prevent the ECJ from giving a ruling on it because national courts were obliged to take it into account when interpreting the convention[1491].

[1487] Article 24 TEU read with Article 275 TFEU.
[1488] *Frecassetti* Case 113/75.
[1489] Case C-188/91.
[1490] Ibid paras 16-18.
[1491] Ibid para 18.

This approach can be contrasted to acts which are subject to review under Article 263 of the TFEU which are required to produce legal effects for them to be reviewable. In the *Deutsche Shell* case the ECJ held that it did not have jurisdiction to give a ruling on the compatibility of national measures with EU law[1492]. But in practice, when interpreting the EU measure, the Court will describe the national measure in hypothetical terms and then state that if there was such a measure, it would be incompatible with EU law. In subsequent cases where member states had chosen to align their domestic legislation with EU law the Court explained its position as follows:

> "..where in regulating internal situations, domestic legislation adopts the same solutions as those adopted in Community [EU] law so as to provide for one single procedure in comparable situations, it is clearly in the Community interest that, in order to forestall future differences of interpretation, provisions or concepts taken from Community law should be interpreted uniformly, irrespective of the circumstances in which they apply[1493]."

The principle is meant to ensure that national legislation which is based on EU law, though not taken verbatim from it, must receive uniform interpretation in the national courts of the EU member states. This is achieved through the ECJ giving preliminary rulings on questions referred to it by national courts which must then be applied by the referring courts and followed by national courts of other states facing similar situations. It would be advisable for the Tribunal to adopt a similar approach in order to avoid divergent application and interpretation of SADC law in the national courts of member states.

The ECJ has power to give preliminary rulings on the "validity" of acts of the EU institutions but not on the validity of the EU Treaties. An act of an EU institution may be declared invalid, i.e. void (of no effect) on any of the grounds referred to in Article 263 of the TFEU, such as lack of competence, infringement of an essential procedural

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[1492] Ibid para 27.
[1493] *Leur-Bloem v Inspecteur der Belastingdienst/Ondermemingen Amsterdam 2* Case C-28/95 para 32.

requirement, infringement of the Treaties or any rule relating to their application and misuse of powers. If the Court finds that an act on which a national measure is based is invalid it will make its ruling and return the case to the national court which will then apply the ruling to the matter before it by either setting aside the national measure or declining to give effect to the national provision which is based on an invalid EU act.

4.7.4.4 The courts or tribunals which are able to refer

The duty or discretion to refer a case depends on the status of the court or tribunal, some may and some must refer questions on interpretation or validity to the ECJ. The ECJ has developed the principles which must be applied for the purpose of determining whether an entity of a member state qualifies as a court or tribunal for the purposes of Article 267 (former (234 EC Treaty) of the TFEU. The first important principle in this regard is that the issue of whether a court or tribunal qualifies is a matter of EU law and not national law[1494]. In determining whether an entity qualifies as a court or tribunal for purposes of Article 267 of the TFEU, the Court takes into account a number of factors such as whether the entity is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law, and whether it is independent[1495]. For an entity to qualify it must have powers to make legally binding decisions, be independent from the parties appearing before it, and its decision making function must be recognized by the state.

An arbitrator who, by contract, is empowered to make legally binding decisions and is independent of the parties but who lacks official state recognition to make his decisions judicial in nature, cannot make a reference under Article 267 of the TFEU[1496]. But an arbitration board or disciplinary body which is recognized by the state as having a function in making legally binding decisions in relation to an industry or a profession may qualify as a court or tribunal. In *Broekmeulen v Huisarts Regstratie Commissie*[1497]

[1494] *Dorsch Consult Ingenieurgesellschaft v Bundebaugesellschaft Berlin* C-54/96 para 23.
[1495] Ibid.
[1496] *Nordsee v Reederei Mond* Case 102/81 para 10.
[1497] Case 246/80.

the question involved a Dutch body called the Appeals Committee for General Medicine. The body heard appeals from the Dutch body responsible for registration of persons seeking to practice medicine in the Netherlands. Both of the bodies were established by the Royal Netherlands Society for the Promotion of Medicine, a private association but recognized indirectly in some Dutch legal provisions. The Appeals Committee was not a court or tribunal under Dutch law but it followed an adversarial procedure and allowed legal representation. The applicant was a Dutch national who had studied medicine in Belgium and had applied for registration which was refused. He appealed to the Appeals Committee which then referred the question of whether it was a "court or tribunal of a member state" to the ECJ. The ECJ started by emphasizing the duty incumbent upon member states to take the necessary steps to ensure that within their territories the provisions adopted by the EU institutions are implemented in their entirety and then went on to state:

> "If, under the legal system of a Member State, the task of implementing such provisions is assigned to a professional body acting under a degree of governmental supervision, and if that body, in conjunction with the public authorities concerned, creates appeal procedures which may affect the rights granted by Community law, it is imperative, in order to ensure the proper functioning of Community law, that the Court should have an opportunity of ruling on issues of interpretation and validity arising out of such proceedings."[1498]

The ECJ went on to hold that in the absence of a right of appeal to the ordinary courts, the Appeals Committee was a court or tribunal for purposes of Article 267 of the TFEU since it satisfied the criteria[1499]. The committee operated with the consent of the public authorities and with their cooperation, and it delivered, after an adversarial procedure, decisions which are final and binding in matters involving EU law[1500]. It therefore qualified as a court or tribunal of a member state.

[1498] Ibid para 16.
[1499] Ibid para 17.
[1500] Ibid.

In a related case, *De Coster v College des Bourgmestres et Echevins de Watermael-Boitsfort*[1501], a similar question of admissibility arose. The case concerned a dispute between De Coster and the College. The College had levied a municipal charge on De Coster in respect of his satellite dish. He argued that this tax breached Article 56 (former 49 EC Treaty) of the TFEU because it was a restriction on the free movement of services (freedom to receive television programmes coming from other member states). The College referred the case to the ECJ for a preliminary ruling on whether it was a court or tribunal of a member state. The ECJ reiterated the principles which are applicable in deciding the question stating that the question is one governed EU law alone[1502]. The factors to be considered are whether the body is established by law, whether its permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent[1503]. All these factors were satisfied in the case, and the College qualified as a court or tribunal of a member state.

A national court determining an appeal against an arbitration award not on the basis of law, but of what is "fair and reasonable" has been held to be a court or tribunal of a member state[1504]. Similarly a national court delivering an advisory "opinion" has been held to be a "court or tribunal" for purposes of Article 267 of the TFEU. In *Garofalo and Others v Ministero del Sanita and Others*[1505] an opinion delivered by the Italian *Consiglio del Stato* to the Italian President, although not binding on him, was held to be a proper subject for reference under Article 267 of the TFEU.

4.7.4.5 Admissibility of a reference

The Court has established through its case law that the decision to refer a case to the ECJ is that of the national courts alone having regard to the particular features of each case, both the need to refer the question and the relevance of such question to the case before

[1501] Case C-17/00.
[1502] Ibid para 10.
[1503] Ibid.
[1504] *Municipality of Almelo and Others v Eneriebedvijf NV* Case C-393/92 para 24.
[1505] Joined Cases 69-79/96 para 27.

it[1506]. It is only in very exceptional cases where it is obvious that the interpretation of EU law sought bears no relation to the facts or purpose of the main action, that the ECJ refrains from giving a ruling[1507].

A reference can be made at any stage of the proceedings even before the full hearing, during the interim stage, or where the case is being dealt with in the absence of one of the parties[1508]. The ECJ has held that it is desirable that an *inter partes* hearing take place before the reference[1509]. Even though the ECJ does not hear arguments that a court or tribunal should not have, under national law, referred the matter, it does expect the case to have reached a stage at which the relevant facts have been established and the issues identified on which the assistance of the ECJ is sought[1510]. In particular, it is desirable that questions of purely national law be settled before a reference is made[1511].

In *Telemarsicabruzzo SpA*[1512] the Court refused to give a ruling stating that the need to give a practical interpretation of EU law requires that the factual and legal framework in which the question arises, or at least the factual assumptions on which the questions are based[1513]. Although neither had been done in the case but in *Venntveld*[1514], the Court held the case admissible as there was sufficient information in the case file. In the *Bacardi-*

[1506] *Guimont* Case C-448/98 para 22 and *Reisch* Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 para 25.

[1507] *Konle* Case C-302/97 para 33 where the Court stated: "However, as the Court has consistently held, it can refrain from giving a preliminary ruling on a question submitted by a national court only where it is quite obvious that the interpretation or assessment of validity of Community law sought by that court bears no relation to the actual facts of the main action or its purpose, or where the problem is hypothetical and the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it." See also Anonese Case C-261/98.

[1508] *Simmenthal v Amministrazione delle Finanze dello Stato* Case 70/77 paras 10-11 and *Balocchi v Ministero Finanze dello Stato* Case C-10/92 paras 13-14 where the Court stated: "According to the case-law of the Court, it may be in the interest of the proper administration of justice that a question be referred to the Court for a preliminary ruling only after both sides have been heard. ..Nevertheless, it should be held that the existence of a prior discussion in which both sides have been heard is not among the conditions laid down for the implementation of the procedure provided for in Article 267 (former 234) of the Treaty and it is for the national court alone to assess the need for hearing the defendant before making an order for reference."

[1509] *Eurico Italia Srl v Ente Nazionale Risi* Case C-332/92.

[1510] *Reina v Landeskeditbank Baden-Wurttemberg* Case 65/81.

[1511] *Irish Creamery Milk Suppliers Association v Ireland* Case 36/80.

[1512] Joined Cases C-320-322/90.

[1513] Ibid paras 5-9.

[1514] Case C-316/93.

Martine and Cellier des Dauphins case[1515], the Court held inadmissible a question referred to it to enable the referring court to decide whether the legislation of another member state was in accordance with EU law. The Court stated that in such cases the Court must display special vigilance and must be informed in some detail of the referring court's reasons for considering that an answer to the question is necessary to enable it to give judgment[1516].

4.7.4.6 The discretion to refer

The second paragraph of Article 267 of the TFEU provides that if a court or tribunal considers that a decision on a question before it is necessary to enable it to give judgment, the court or tribunal may request the ECJ to give a ruling on the matter. We have noted that in the SADC context, if the same situation arises the national court *shall* request for a ruling from the Tribunal. Article 267 appears to give a discretion to the national court or tribunal to make a reference, while Article 16 of the Protocol appears to make it mandatory to make a reference once the need for reference is noted. It is submitted that despite the variation in wording, the effect of the two provisions is the same - the national court or tribunal must decide whether a decision on the question is necessary in order to enable it to give judgment on the case. Once the court or tribunal decides that a decision is necessary it is difficult to see how the national court may then fail or refuse to make a reference whether it has a discretion to do so or not.

The decision to refer is that of the national courts or tribunals alone, and in this respect the ECJ said in *Dzodzi v Belgium*[1517]

> "In context of the division of judicial functions between national courts and the Court of Justice, provided for by Article 234, the Court of Justice gives preliminary rulings without, in principle, needing to enquire as to the circumstances which led to the national court submitting questions to it…The

[1515] C-318/00.
[1516] Ibid paras 46 and 53-54.
[1517] Joined Cases C-297/88 and C-197/89.

> only exception to that principle would be cases in which it appeared that the procedure provided in Article 234 had been abused and where the question submitted sought, in reality, to lead the Court of Justice to make a ruling on the basis of an artificial dispute, or where it is obvious that the provision of Community law submitted to the Court of Justice could not be applied."[1518]

In the case the reference was based on a provision of national law which was outside the competence of EU law but which had been based on EU law. The ECJ held the reference admissible.

While under Article 267 the national court has a discretion whether to refer a matter or not, the national court must however explain the basis on which it has come to the conclusion that a reference is necessary to enable the ECJ to determine whether it has jurisdiction. Once the ECJ is satisfied that the reference is properly before it, it must in principle give a ruling[1519]. The ECJ cannot refuse to give a ruling on the basis that if the ruling were to annul an EU or national provision then this would create a legal vacuum in the member state[1520]. It is for the national court to interpret the ruling in such a way that there is no such vacuum.

If one of the parties to the national proceedings withdraws from them the ECJ cannot continue to give judgment on the reference because such a judgment would no longer be necessary for the outcome of the case[1521]. But the principle in this decision is questionable because when the ECJ gives its judgment that judgment will not only be applied to the case at hand, but to other similar cases arising before the national courts of that member state or of other member states. (See the discussion of precedent in the next subsection.) The need to have a judgment in such a case becomes more apparent where the validity of an EU act is in issue. A failure by the ECJ to give its ruling on the reference would mean that an EU measure which is otherwise invalid, will continue to be

[1518] Ibid para 178.
[1519] *Helmig and others* Case C-399/99 para 9.
[1520] Ibid para 11-14.
[1521] *Teres Zabal Erasun and Others v Instituto Naciaonal de Empleo* Joined Cases C-422-424/93 para 30.

applied until another challenge is brought either under the article under discussion or under Article 263 of the TFEU.

Where there is a ruling of a superior court of the member state on the same issue, the national court or tribunal is not precluded from making a reference to the ECJ. The national court, however, has a discretion to refer where its decisions are subject to appeal but that discretion is not available to the court where the issue raised concerns the validity of an EU act. The court must refer the matter since it has no power to rule on the validity of EU acts[1522].

4.7.4.7 The duty to refer

The third paragraph of Article 267 provides that where a question is raised in a case pending before a court or tribunal against whose decisions there is no judicial remedy in the national law, that court or tribunal shall refer the matter to the ECJ for a ruling. This provision, as we have seen, is similarly worded to Article 75 of the Rules of Procedure of the Tribunal hence the principles which have been developed by the ECJ can be helpful.

The concept of no judicial remedy connotes a situation where there is no appeal from that court or tribunal to the highest court of appeal in a member state such as the supreme court. The situation may also arise in specific cases where an appeal is not possible from a lower court because of the nature of the case or the amount involved is too small, e.g. small claims courts which can be found in some jurisdictions. In the landmark case of *Costa v ENEL*[1523] the amount claimed was less than two sterling pounds but there was no appeal from the decision of the magistrate because of the small amount involved thus the court was obliged to refer the matter to the ECJ.

[1522] *Foto-Frost* Case 314/85. In this case the Court following the Advocate-General's recommendation para 3 held that it is only the ECJ which power to declare acts of the EU and that national courts have no such powers, they must refer cases where invalidity is alleged to the ECJ paras 17-20.
[1523] Case 6/64.

The ECJ has held that there is no duty to refer in cases where there is a right of appeal but which is subject to granting of leave to appeal by the appeal court itself, or by the court giving the decision appealed against. The issue arose in *Kenny Roland Lyckerskog*[1524] which directly involved the application of the third paragraph of Article 267 of the TFEU. A Swedish district court had referred the question whether it fell within the third paragraph of Article 267 of the TFEU or not, because an appeal from its decision to the Swedish Supreme Court would only be admissible if the supreme court declared the appeal admissible. The ECJ stated that decisions of national courts which can be challenged before a supreme court are not decisions of a "court or tribunal of a member state against whose decision there is no judicial remedy under national law" within the meaning of Article 267[1525]. The fact that the lodging of the appeal is subject to a declaration of admissibility by the supreme court (which may rule the appeal inadmissible) does not mean that there is no remedy in the national courts because that possibility of appeal exists[1526]. Again this is a decision which must be treated with caution as it may result in the deprivation of a remedy to private persons. The possibility that the supreme court might refuse leave for an appeal to be lodged with it is sufficient indicator of the dangers involved. In cases where leave of the deciding court itself is required, the same problem arises- that court may refuse leave to appeal to the supreme court as well refusing to make a reference. The person is then left without a remedy. There appears to be no harm in placing such courts under an obligation to refer cases just as the last courts of appeal are obliged to do.

In the UK system on which the administrative law of some of the member states of SADC is based[1527] the term "judicial remedy" has been held to be wide enough to include judicial review. Thus decisions of administrative tribunals where there is no avenue for appeal are not considered as final as they are subject to review by the High Court through its inherent powers of review. In such cases it would appear that there is no obligation to

[1524] Case C-99/00.
[1525] Ibid para 16.
[1526] Ibid.
[1527] Some of the countries whose legal system is based on common law are Botswana, Lesotho, Malawi, Namibia, South Africa, Swaziland, Zambia and Zimbabwe. See Chapter 2 section on sources of law for the Tribunal: General principles of the law states.

refer on the part of the court or tribunal since its decisions are subject to review by the High Court[1528]**.** Again this approach ought to be considered with caution. The purposes of appeal and review are different. In an appeal the appellant challenges the merits of the decision, while during review proceedings the applicant is limited to questioning the legality of the decision or procedural defects in arriving at the decision[1529]. It is submitted that in the SADC context, review proceedings should not be considered as a "judicial remedy" for purposes of Article 16 of the Protocol as the challenge in review proceedings is restricted to certain aspects of the matter only.

The third paragraph of Article 267 of the TFEU does not expressly mention the requirement that the "decision on the question is necessary to enable it to give judgment" which expression is expressly mentioned in the second paragraph of that article. The ECJ has held that the same principle is applicable to the third paragraph and said in *CILFIT*[1530]:

> "..it follows from the relationship between the second and third paragraphs of Article 234 that the courts or tribunals referred to in paragraph 3 have the same discretion as any other national court or tribunal to ascertain whether a decision on a question of Community [EU] law is necessary to enable them to give judgment."[1531]

The ECJ here supplied a *casus omissus* into Article 267 of the TFEU and this approach might be relevant to the Tribunal when considering the similarly worded Article 75 of the Rules. The second paragraph of Article 75, which deals with the same issue as Article 267, also does not mention the requirement that a "decision on the question is necessary to enable it to give judgment". The Tribunal might follow the ECJ approach by supplying a *casus omissus*.

[1528] .Fairhurst op cit 180-181. *R v Immigration Appeal Tribunal, ex parte Antonissen* C-292/89.
[1529] See Burns and Beukes op cit 278 and Hoexter op cit 63 for discussion on the differences between review and appeal proceedings in the South African context.
[1530] Case 283/81.
[1531] Ibid para 10.

4.7.4.8 Circumstances when a reference is not necessary

In the situations discussed above some courts have a discretion to refer a matter while others are obliged to do so, but in both cases the reference can only be made if the court "considers a decision on the question to be necessary to enable it to give judgment." There may be a number of reasons why a court or tribunal may not consider it necessary to have the question referred to the ECJ. Two of the reasons which emerge from the case law of the ECJ are the development of precedent, and the doctrine of *acte clair* which are discussed in turn.

4.7.4.8.1 Precedent

The doctrine of precedent in terms of which decisions of superior courts are binding and must be followed in inferior courts is not applicable in the ECJ, but the Court generally follows its own previous decisions for the sake of legal certainty. The same principle should also apply to the Tribunal which, as we have noted, is not bound by its previous decisions but will follow them for the same reasons as other international courts[1532]. The ECJ acknowledged the significance of precedence in the application of Article 267 of the TFEU when it said in *CILFIT*[1533]:

> "the authority of an interpretation under Article 234 already given by the Court may deprive the obligation of its purpose and thus empty it of its substance. Such is the case when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case."[1534]

The Court held in this case that it may not be necessary to make a reference in cases where the question has already been answered in a previous decision of the Court. Despite the existence of a precedent, a national court or tribunal may still make a reference in cases where the case before the national court or tribunal raises new factual

[1532] See discussion on the ICJ's approach to the doctrine of precedence in Chapter 3.
[1533] *CILFIT v Ministry of Health* Case 283/81.
[1534] Ibid para 13.

or legal issues. In such cases the ECJ may simply refer the national court to its previous decision such as in *Da Costa*[1535] where it stated:

> "The questions of interpretation posed in this case are identical with those settled as above [in the *Van Gend en Loss*] and no new factor has been presented to the Court. In these circumstances the Tariefcommissiie must be referred to the previous judgment."

Judging from the above cases, the Court appears to have indirectly sanctioned the use of previous decisions by the national courts or tribunals and in the process has created a system of precedent by default. In another case, *International Chemical Corporation*[1536], the Court had previously ruled EU Regulation 563/76 to be invalid. In the case, the national court referred the matter to the ECJ asking whether the previous decision that the regulation was invalid applied only to the particular case or whether it was applicable to subsequent litigation. The Court held that the purpose of Article 267 was to ensure that EU law was applied uniformly by national courts. Uniform application did not only apply to interpretation of EU law, but also applied to the validity of an EU act. Although the previous ruling was addressed to the national court making the reference, once the act was declared invalid any other national court could likewise treat the act as invalid for the purposes of a similar case before it[1537]. However, on the question of the validity of EU acts, it is only the ECJ which can declare them invalid: it is not open to national courts to do so unless there is a previous declaration by the ECJ. To do so would put the objective of uniform application of EU law at risk[1538].

*4.7.4.8.2 Doctrine of **acte clair***

[1535] Cases 28-30/62 [1963] ECR 31 38-39.
[1536] Case 66/80.
[1537] Ibid para 13.
[1538] .*Firma Foto-Frost* op cit para 4 of the Advocate-General and para 17 of the judgment.

The second situation which was mentioned by the ECJ in the *CILFIT*[1539] case is that a national court is not bound to refer a case where the answer to a question of interpretation of EU law is "so obvious as to leave no scope for any reasonable doubt"[1540]. This situation is referred to in EU law as *acte clair*. But the application of this principle is not as clear as that of precedent discussed above. The ECJ laid down some factors which must be taken into account before declining to refer a case on this basis. The factors found by the Court are:

(a) the question of interpretation of the provision is so obvious as to leave no scope for any reasonable doubt;
(b) the matter must be equally obvious to the Courts of other member states and the ECJ;
(c) the characteristic features of EU law and the particular difficulties to which its interpretation gives rise;
(d) different language versions which are authentic which may have to be compared when interpreting EU law;
(e) terminology which is peculiar to EU law, in particular the fact that legal concepts do not necessarily have the same meaning in EU law and in national law of member states[1541].

The principles enunciated by the ECJ are problematic and have in practice caused difficulties. The ECJ gives the national courts permission to apply the doctrine of *acte clair,* but this clearly places those courts in a difficult position. While a national court may find less difficulty in determining obviousness, how is it to decide whether what is obvious to it is also obvious to the national courts of other member states or the ECJ itself? The language and terminology difficulties cited by the ECJ make it even more difficult for the national court to be in a position to apply the doctrine of *acte clair* thus opting for a reference would be the better option for a national court faced with a

[1539] Case 283/81.
[1540] Ibid para 16.
[1541] Ibid paras 16-19.

question of EU law. The advantages enjoyed by the ECJ were summarized by an English judge as follows:

> "..It has a panoramic view of the Community and its institutions, a detailed knowledge of the treaties and much of subordinate legislation made under them, and an intimate familiarity with the functioning of the Community market which no national judge denied the collective experience of the Court of Justice could hope to achieve."[1542]

Although in some instances courts of member states have declined to make references where a reference is clearly needed, in most cases references have been made[1543]. In some cases references have been declined perhaps because of the time factor as references take long to be resolved[1544].

4.7.4.9 Interpretation or application

We have seen that the ECJ has no mandate to *apply* its ruling under the preliminary proceedings where- it is confined to considering the interpretation and validity of acts. We have also noted that the Tribunal is not so restricted as it has jurisdiction to rule on, among other things, the "application" of the Treaty, subsidiary legal instruments and acts of SADC institutions. However, a strict distinction between the role of the ECJ and national courts of member states under Article 267 is not entirely possible. According to the theory, the national court makes a reference to the ECJ requesting for a ruling on the interpretation or validity of EU law. The ECJ then answers the question referred and sends the matter back to the national court to apply the ruling to the facts.

It is not always easy to maintain that division as the *Cristini* case[1545] shows. The case concerned the meaning of Article 7.2 of EU Regulation 1612/68 which provides that an

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[1542] Bingham J in *Customs and Excise Commissioners v Samex* [1983] 3 CMLR 194.
[1543] Fairhurst op cit-see discussion and cases cited at 184.
[1544] Ibid.
[1545] *Fiorinin (nee Cristini) v Societe Nationale des Chemins de Fer Franchais* Case 32/75.

EU worker who is working in another member state should be entitled to the same "social advantages" as workers of that member state. Large French families were allowed reduced fares on railways. The question put before the ECJ by the French court was whether this was a "social advantage" within the meaning of the regulation and thus should be available to large families of all member state nationals working in France. While claiming that it had no power to decide the actual case, the Court went on to hold that the concept of "social advantage" included this type of fare reduction offered by the French railways[1546]. In reality the ECJ supplied the answer as to how the ruling was to be applied by the national court. The Tribunal will not be confronted with such situations since it has specific powers to rule on the "application" of the Treaty, it would then direct the national court as to how to apply its ruling to particular cases. Does this not amount to an affront on the judicial independence of national courts?

4.8 Sources of EU law

Unlike the Statute of the ICJ or the Protocol which specifically direct the ICJ or Tribunal to apply particular sources of law when resolving disputes, there is no specific provision in the EU legal order which directs the ECJ to apply any particular source of law. The sources of EU law are left to be deduced or inferred from a perusal of the EU Treaties and secondary legislation as well as decisions of the ECJ. However, some principal sources of laws have been identified through the literature and by inference[1547]. These are the Treaties establishing the European Communities and the European Union, secondary legislation made under the treaties, soft law, related treaties made between member states, international treaties concluded by the EU under the Treaties, decisions of the European Court of Justice and the General Court, and general principles of law and fundamental rights upon which the constitutional law of the member states is based. These will be discussed in turn in the ensuing subsections.

4.8.1 The Treaties establishing the European Union

[1546] Ibid para 30.
[1547] Fairhurst J op. cit. Chapter 2, Wyatt and Dashwood op cit Chapter 5, Weatherrill S. op cit Chapter 2.

The three founding treaties which are the EC Treaty, ECSC Treaty and Euratom Treaty as amended by the Single European Act (SEA) 1986, Merger Treaty 1965, Treaty on European Union (TEU) 1992, Treaty of Amsterdam (ToA) 1997 and the Treaty of Nice (ToN) 2000 together with the Lisbon Treaty which amended the TEU and amended and renamed the EC Treaty, the Treaty on the Functioning of the European Union (TFEU), form the constitutional framework of the EU, and are thus important sources of EU law. The ECSC expired in 2002 and the TFEU is the most comprehensive of the original three treaties. Although the TFEU was not intended to be the constitution of a federal state, it has that effect and has been interpreted in that way by the ECJ. In Opinion 1/91 *on the Draft Agreement between the EEC (now EC) and the European Free Trade Association*[1548] the Court said:

> "The EC Treaty [TFEU], albeit concluded in the form of an international agreement, nonetheless constitutes the constitutional charter of a Community based on the rule of law. As the Court of Justice has consistently held, the Community Treaties established a new legal order for the benefit of which the States had limited their sovereign rights, in ever wider fields, and the subjects of which comprised not only the Member States but also their nationals. The essential characteristics of the Community's legal order which had thus been established were, in particular, its primacy over the law of Member States and the direct effect of a whole series of provisions which were applicable to their nationals and to the Member States themselves."

Despite this wide interpretation of the nature of the TFEU, it nevertheless remains short of the constitution of a federal state since, in the EU, much of policy areas which are ordinarily exercised by a state in a federation are left in the hands of the member states. Thus the areas of police, defence, justice and foreign policy remain with the member states. However, through various amendments brought about by the TEU, ToA and ToN,

[1548] [1991] ECR I-6079.

member states have agreed to coordinate action in the above areas, as well as areas of drugs enforcement, illegal immigration and justice and home affairs.

The EU Treaties define the competences of the EU itself as well as that of its institutions and to some extent the rights of citizens[1549]. The Treaties did not contain a bill of rights as may be the case in national constitutions. However, the Charter of Fundamental Rights of the EU of 7 December 2000 has now been given the same legal status as the Treaties by the Lisbon Treaty[1550]. The ECJ has developed the doctrine of direct effectiveness which empowers the citizens to enforce EU law in the national courts against their governments or other individuals. Many TFEU provisions have been held to be directly effective among them, the right not to be discriminated against on grounds of nationality, the right to equal pay for work of equal value- regardless of gender, the right to seek work and remain as a worker in another member state, the right to receive and provide services, and the right not to be subjected to import taxes[1551]. Through subsequent amendments, the EU Treaties now cover a wide range of policy areas to include not only economic, but also social and political policies. The EU Treaties are followed by a number of protocols, declarations and agreements. Protocols have legal effect in the EU legal order by virtue of Article 51 of the TEU which provides that the protocols annexed to the Treaties shall form an integral part thereof. Declarations and agreements have legal effect if they are adopted by the Council of Ministers, but not when Council members are acting as representatives of the member states[1552].

Unlike the SADC Treaty which sets out the policy areas of SADC in broad terms to be filled in by subsidiary legal instruments such as protocols, the EU Treaties set out the broad objectives of the EU amplified in more detail by substantive provisions. For example, Article 2 of the TEU and Articles 7 to 17 of the TFEU set out the broad policy

[1549] See Titles I-III of the TEU and Parts One and Two of the TFEU which contain general provisions relating to the competences of the EU and its institutions and the rights of EU citizens.
[1550] Article 6.1 TEU.
[1551] See section on the direct effect if EU Treaty provisions *infra*.
[1552] For example an agreement reached at the Edinburgh Summit in December 1992 after Denmark's rejection of the TEU in referendum in May 1992 was not legally binding. The decision and declaration on Denmark was not taken by the Council but by the Heads of State or Governments meeting within the European Council thus it was an international agreement falling outside the scope of the communities.

objectives of the EU, as well as the activities which the EU shall carry out in the various policy areas such as the creation of an internal market. Then follow substantive provisions of the TFEU in the relevant policy area which spell out the rights of individuals or action to be taken by EU institutions. For example, Articles 45 to 48 (former 39 to 42 EC Treaty) of the TFEU, which deal with free movement of workers, then details the freedom of workers such as the right to move around freely in the EU, abolition of discrimination based on nationality, and other detailed conditions to reinforce the freedoms[1553]. These are followed by a provision which empowers the Council or the relevant EU institution to make secondary legislation in the form of regulations or directives, setting out the measures required either on the part of EU institutions or member states to bring about the free movement of workers in the EU[1554]. In the SADC set up, the detailed provisions in the policy areas of cooperation are to be found in separate protocols adopted by member states pursuant to the Treaty, e.g. the Trade Protocol sets out the details on free movement of goods in SADC.

4.8.2 Secondary legislation made under the Treaties

Article 288 (former 249 EC Treaty) of the TFEU spells out the different types of EU legislation and these are regulations, directives, decisions and recommendations, and opinions. All of these acts can be made, issued, taken or delivered by the European Parliament acting jointly with the Council, using the ordinary legislative procedure[1555], or either the EP or the Council using the special legislative procedure[1556], or by the Commission[1557]. In addition, legal acts are required by Article 296 (former 253 EC Treaty) of the TFEU to give reasons on which they are based and generally they must be published in the *Official Journal of the European Union*, and in the case of some directives and decisions they must be notified to whom they are addressed[1558]. The SADC

[1553] Article 45 paras 2 and 3 TFEU.
[1554] Ibid Article 46.
[1555] Ibid Article 289.1.
[1556] Ibid Article 289.2.
[1557] Ibid Article 290.
[1558] Ibid Article 297. Legislative acts must be published in the Journal while regulations and directives addressed to all member states and decisions which do not specify to whom they are addressed must also be published.

Treaty does not give details of the various types of subordinate legal instruments of SADC other than protocols. In case of protocols, the Treaty specifies their binding effect on member states, but is less clear on their effect on private persons. The effect of other legal instruments can be inferred from Article 10.9 of the Treaty which provides that unless otherwise provided in the Treaty, decisions of the Summit shall be taken by consensus and shall be binding. It is not clear from this provision on whom the decisions are binding - whether on member states as well as on private persons. This lack of clarity on such an important matter in the Treaty is rather unfortunate as it creates room for legal uncertainty. We have noted that in the African Union, the Treaty establishing the African Economic Community attempts to address this situation by specifying the various types of acts of the institutions of the AU and their legal effect[1559]. The approach of both the EU and the AU is commendable as it brings legal certainty, and SADC would do well to draw lessons from these approaches for future purposes.

Despite these concerns, in the next sections, I consider the nature of each of the types of legislative act of the EU contained in Article 288 of the TFEU. The legal effect of both the Treaties and secondary legislation made under the Treaties are considered in the section on development of the law by the ECJ.

4.8.2.1 Regulations

Regulations are of general application, binding in their entirety and directly applicable in all the member states[1560]. They are binding in the sense that they are legally enforceable in the courts. Regulations are directly applicable in the sense that there is no need for them to be transposed into national law before they can be enforced. In traditional international law if states enter into an agreement with other states, the agreement is binding in international law but it can only become effective in the legal systems of the states if implemented in accordance with the constitutional requirements of each state. In the case of regulations of the EU this is not necessary as it could prove burdensome

[1559] Articles 10 AEC Treaty deals with decisions of the Assembly of the AU and Article 11 AEC Treaty deals with regulations made by the Council of the AU. See discussion of these provisions in Chap 2.
[1560] Article 288 TFEU.

bearing in mind the large volume of regulations which emanate from the EU each year[1561].

4.8.2.2 Directives

A directive is described in Article 288 (former 249 EC Treaty) of the TFEU as "binding as to the result to be achieved on the member states to whom it is addressed but shall leave it to the national authorities the choice of form and methods". If a directive is adopted following the ordinary legislative procedure, then it must be published in the *Official Journal of the EU*. Directives are normally directed to all the twenty-seven member states and they often provide the member states with a range of options to choose from when implementing the measure. Directives are not directly applicable, they require member states to incorporate them into their legal systems to make them effective.

4.8.2.3 Decisions

A decision is binding in its entirety on those to whom it is addressed. A decision must be notified to the person or member state to whom it is addressed and becomes effective on notification. If a decision is adopted following the ordinary legislative procedure, then it must be published in the *Official Journal of the EU*.

4.8.3 Soft Law

Soft law comprises non-legally binding instruments which may be used as aids to interpretation or application of EU law by the ECJ. Two particular forms of soft law have been used by the Court and these are recommendations and opinions envisaged in Article 288 and the Charter of Fundamental rights of the European Union which are discussed below.

[1561] Fairhurst op cit 57.

4.8.3.1 Recommendations and opinions

Article 288 of the TFEU provides that recommendations and opinions shall not have binding force. They may, however, be used to clarify issues in a formal way. For example, Article 211 of the EC Treaty empowered the Commission to formulate recommendations or deliver opinions on matters dealt with in the EC Treaty not only when specifically required to do so, but also when the Commission considered it necessary. Although this provision was repealed by the Lisbon Treaty, it appears that the Commission still has power to adopt acts which take the form of non-binding soft law. Article 290 of the TFEU provides that a legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act. Although recommendations and opinions have no legal force they may be of persuasive authority if they are subsequently referred to or taken notice of in a decision of the ECJ. National courts are bound to take recommendations and opinions into account when interpreting national provisions based on EU law[1562].

4.8.3.2 The Charter of Fundamental Rights of the European Union

This Charter, which was originally signed by fifteen states in December 2000, is now legally binding by virtue of Article 6 of the TEU. The Charter is given the same status of law as the Treaties but with some limitations. The second paragraph of Article 6 of the TEU provides that the provisions of the Charter shall not extend in any way the competences of the EU as defined in the Treaties. It is submitted that this provision might be interpreted to mean that the Charter applies only to matters governed by the Treaties, i.e. by EU law. The Charter does not apply to matters which are outside the scope of EU law. We shall see that the application of general principles of law in EU law is subject to the same limitation. The other limitation is that three states namely, the UK, Poland and

[1562] *Grimaldi v Fonds des Maladies Professionelles* Case C-322/88 para 19 where the Court said: "However, national courts are bound to take those recommendations into consideration in order to decide disputes submitted to them, in particular where they are capable of casting light on the interpretation of other provisions of national or Community law."

the Czech Republic, by way of separate protocols, opted to exclude the application of the Charter from their national systems unless the rights protected by the Charter are recognized in their national law[1563]. It is highly probable that, despite these exclusions, the Charter could still be used by the ECJ when interpreting and applying EU law in all the member states[1564]. The Charter contains most of the basic civil, political, economic, social and societal rights which are found in international, European and national sources. Some aspects of matters contained in the Charter are discussed in the section on general principles of law.

4.8.4 Related treaties made between member states

These include all the treaties amending the original treaties and the treaties of accession entered into with new member states. The amending treaties include the Merger Treaty 1965, the SEA 1986, the TEU 1992, the ToA 1997, ToN 2000, and the Lisbon Treaty of 2007. The treaties of accession include those with Denmark, Ireland and the UK of 1972, Greece of 1981, Spain and Portugal of 1986, Austria, Finland of 1994, ten member states namely, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia in 2003, and Bulgaria and Romania in 2007. The treaties of accession with new member states have been held by the ECJ to confer directly enforceable rights on individuals[1565].

4.8.5 International treaties concluded by the EU under the treaties

These include multilateral treaties to which the EU is party, such as the General Agreement on Tariffs and Trade (GATT) and Association Agreements concluded between the EU and individual states. The ECJ held in *International Fruit*[1566] that the

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[1563] Protocol No. 7 to the Reform Treaty (Lisbon Treaty).
[1564] See Fairhurst op cit 61 on the possible effect of the Charter in the EU legal order.
[1565] *Rush Portuguesa v Office National d'Immigration* Case C-113/89 para 19 the Court gave direct effect to Articles 215 and 216 of the Act of Accession of the Kingdom of Spain and the Portuguese Republic as read with the TFEU to the extent that Portuguese undertakings were entitled to bring in workers from Portugal to work on their projects in France, free from the requirements of work permits, etc.
[1566] Case 21-24/72.

GATT agreement was binding on the EU[1567] and in the *Fediol* case that undertakings which complain to the Commission of illicit commercial practices which breach the EU's commercial policy instrument, may rely upon the GATT as forming part of the rules of international law to which the instrument applies[1568]. Again in *Kupferberg*[1569] the ECJ held that Article 21 of the EEC –Portugal Association Agreement was directly enforceable in the national courts.

4.8.6 Decisions of the European Court of Justice and the General Court

The jurisprudence of the Court of Justice and the General is a major source of EU law. These include the formal decisions of the ECJ which are binding on the parties, as well as the principles enunciated in the judgments and opinions of the ECJ. The treaties and secondary legislation of the EU set out the broad principles of law which are then supplemented by the creative interpretation of the ECJ. The ECJ through its creative jurisprudence and willingness to interpret measures in such a way as to make them effective, to achieve the *effet utile*, has done much to assist in the attainment of the objectives of the treaties.

4.8.7 General principles of law and fundamental rights upon which the constitutional law of the member states is based

The original EU Treaties did not make specific provision for the application of general principles of law as a source of law for the ECJ. This source of law has been left to development by the ECJ on a case by case basis without any specific legal bases. It is sometimes stated that the legal bases for use of general principles of law by the ECJ are Article 19.1(former 220 EC Treaty) of the TEU which requires the ECJ to ensure that in the interpretation and application of the treaty "the law is observed", Article 263 (former 230 EC Treaty) of the TFEU which refers to the grounds of invalidity of EU as including infringement of "any rule of law" relating to the EU Treaties application, and Article 340

[1567] Ibid para 18.
[1568] *Fediol v Commission* Case 70/87 para 19.
[1569] Case 104/81 paras 22 and 27.

(former 288 EC Treaty) of the TFEU which provides that the non-contractual liability of the EU shall be determined "in accordance with the general principles common to the laws of the member states"[1570]. We have seen that in the cases of the ICJ, the CJ of the AU and the Tribunal their constitutive documents specifically empower them to apply general principles of law, be they international or national as sources of law.

For the purposes of this study this source of law is important in that the creative activity of the ECJ in modeling its own principles should be an inspiration to the Tribunal when required to perform a similar task. Now Article 2[1571] of the TEU expressly states that:

> "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

Some aspects of this provision, as we have noted, are mirrored in Article 4 of the Treaty which sets out the principles on which SADC and its member states shall act although that article refers to "human rights, democracy and the rule of law." However, the ECJ has developed its own general principles of law based on the fundamental laws of the constitutions of member states, principles of international law, and some directly derived from the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 1950.

Although under Article 19.1 (former 220 EC Treaty) of the TEU, the ECJ's jurisdiction is limited to the interpretation of the Treaties and secondary legislation made under them in such a way that "the law is observed", the provision has been widely interpreted to mean not only the law established by the treaties but "any rule of law relating to the Treaty's

[1570] See Wyatt and Dashwood op cit 235-237, and Steiner and Woods op cit 154.
[1571] Former Article 6.1 of the TEU provided that "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States."

application."[1572]. The principles of the ECHR are applied insofar as they relate to matters which fall within the EU's competence. The EU is obliged to respect fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to members states as general principles of EU law[1573]. In addition, since the entry into force of the Lisbon Treaty, the EU is now under an obligation to accede to the ECHR[1574]. In the *Campbell* case, the Tribunal made reference to several regional and international legal instruments such as the African Charter on Human and Peoples Rights[1575], the European Convention on Human Rights, the American Convention on Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights in its judgment[1576]. This approach by the Tribunal appears to be a clear indicator that the Tribunal takes a serious view of regional and international legal instruments and jurisprudence on human rights. In this subsection I consider the development and application of general principles of law by the ECJ. The main principles identified and discussed are human rights which comprises a bundle of individual rights and freedoms, proportionality, equality, legal certainty and non-retroactivity, legitimate expectation and natural justice. There are other general principles of law which have received the attention of the ECJ but which cannot be considered here due to the limited nature of this study.

4.8.8 Human rights

Article 2 of the TEU sets out the principles on which the EU is founded namely respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights including rights of minorities. Article 6 of the TEU goes further to declare that "fundamental rights" as guaranteed by the ECHR of 1950, "shall constitute general principles of the Union's law." The effect of these provisions is simply to formalize principles of fundamental human rights and freedoms which had been part of the

[1572] Fairhurst op cit 64 and Wyatt and Dashwood op cit 236. Both writers cite Pescatore "Fundamental Rights and Freedoms in the System of the European Communities" [1970] *AJIL* 343 348.
[1573] Article 6.3 TEU which replaced Article 6.2 TEU.
[1574] Article 6.2 TEU.
[1575] The Charter was adopted on 27 June 1981.
[1576] *Campbell* case op cit 19, 20, 29 and 46.

jurisprudence of the ECJ since its early days. In *Stauder*[1577] the applicant claimed entitlement to cheap butter made available by the EC to persons receiving welfare benefits. German law required a potential recipient to disclose his name and address on the coupon which he had to present to get the butter. He challenged the law claiming that it violated his fundamental human rights namely - equality of treatment - and the matter was referred to the ECJ by the German court. The Court declared that "the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community [EU] law and protected by the Court."[1578] In the *ERT* case[1579] the ECJ remarked that "the Court draws inspiration from the constitutional traditions common to member states and from guidelines supplied by international treaties for the protection of human rights on which member states have collaborated or of which they are signatories."[1580] These remarks were reiterated in *A v Commission*[1581] where the CFI took note of the EU's commitment in Article 6 of the TEU to respect for the fundamental rights guaranteed by the ECHR[1582].

The effect of these decisions is that when there is a conflict between national law which is intended to implement EU law, and a right protected in the ECHR or recognized by the Court, the Court will rule that the national law is contrary to EU law. In *Johnson v Chief Constable of the Royal Ulster Constabulary*[1583] national measures intended to prohibit sexual discrimination in Northern Ireland and to provide a remedy for those alleging discriminatory behaviour, were at issue. The ECJ held that the national measures were contrary to EU law because they did not afford the complainants an effective remedy as required by Article 13 of the ECHR. The Court can only rule on the compatibility

[1577] *Stauder v City of Ulm* Case 29/69.
[1578] Ibid para 7.
[1579] *Elliniki Radiophonia Tiléorassi AE (ERT) and others v Dimotiki Etairia Pliroforissis (DEP) and others* Case C-260/89.
[1580] Ibid para 41. See also *Nold v Commission* Case 4/73 where the Court stated "As the Court has already stated, fundamental rights form an integral part of the general principles of law, the observance of which it ensures."
[1581] Case T-10/93.
[1582] Ibid para 49.
[1583] Case 222/ 84 para 21. At para 17 the Court said: "It follows from that provision that the member states must take measures which are sufficiently effective to achieve the aim of the directive and that they must ensure that the rights thus conferred may be effectively relied upon before the national courts by the persons concerned."

between ECHR rights and EU law in those areas of national law affected by EU law. It cannot rule, for example, on the compatibility of a criminal trial in a member state with ECHR rights to fair trial if the trial is unrelated to any matter of EU law, even if the individual involved is an EU citizen[1584].

The development of the ECJ's jurisprudence on fundamental rights has not been systematic but has largely depended on the nature of cases brought before that Court. It has drawn inspiration from the ECHR and the constitutions of the member states and has shown a marked commitment to issues of human rights dating back to the *Stauder* case. We have noted that until the TEU, there were no specific provisions in the treaties for protection of human rights but the ECJ has succeeded in reading such rights into the treaties. Its motives for doing so have been the subject of conjecture with some citing protection of the supremacy of its jurisdiction. One writer has stated:

> "Reading an unwritten bill of rights into Community law is indeed the most striking contribution the Court made to the development of a new constitution for Europe. This statement should be qualified in two respects. First, that contribution was forced on the Court from outside, by the German and, later, the Italian Constitutional Courts. Second, the Court's effort to safeguard the fundamental rights of the Community citizens stopped at the threshold of national legislations." (Mancini (former Advocate-General of the ECJ) 1989)[1585]

Because of the importance of this topic to this study and the future role of the Tribunal in relation to matters of human rights, I must consider some of the human rights which have received the attention of the ECJ. These rights include, but are not limited to, the traditional human rights such as the right to property, freedom to trade, right to effective judicial remedies before the national courts, protection of family life, home and family

[1584] *Kremzov v Austria* Case C-299/95 para 19 where the Court concluded "..where national legislation is concerned with a situation which, as in the case at issue in the main proceedings, does not fall within the field of application of Community law, the Court cannot, in a reference for a preliminary ruling, give the interpretative guidance necessary for the national court to determine whether that national legislation is in conformity with the fundamental rights whose observance the Court ensures, such as those deriving in particular from the Convention."

[1585] See Fairhurst op cit 66.

correspondence, prohibition on sex discrimination, freedom of expression and religion, and freedom of trade union activity. In the next section I discuss some of the more important rights and freedoms which have received the attention of the ECJ.

It must be mentioned here that the Tribunal has already determined in the *Campbell* case that the respondent state was in breach of its obligations under the Treaty in that it discriminated against the applicants in the matter on the basis of their race[1586]. This decision is clear indicator that the Tribunal would in its future work take into account issues of human rights seriously. This is demonstrated by the manner in which it referred to various international and regional human instruments as well as decisions of several human rights tribunals[1587]. It is hoped that the Tribunal will in future have to deal with human rights which are not specifically mentioned in the Treaty but which have received international recognition. It is therefore necessary to look at some of the rights which have received the attention of the ECJ.

4.8.8.1 The right to property and the freedom to choose a trade or profession

The right to property is contained in the ECHR[1588] and the ECJ has declared that it is guaranteed in the EU legal order[1589]. In *Wachauf* [1590]a German tenant farmer was deprived of his right to compensation under EU Regulation 857/84 for loss of a milk quota as a result of the way in which the German government had interpreted the regulation. He argued that this amounted to expropriation without compensation and the case was referred to the ECJ which stated:

> "It must be observed that Community rules which, upon the expiry of the lease, had the effect of depriving the lessee, without compensation, of the fruits of his labour and his investments in the tenanted holding would be incompatible with

[1586] The implications of the judgment are discussed in Chap 2.
[1587] The Tribunal referred to decisions of the European Court of Human Rights, Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights as well as the conventions administered by these bodies.
[1588] Article 1 of the First Protocol ECHR.
[1589] *Hauer v Land Rheinland-Pfalz* Case 44/79.
[1590] *Wachauf v Germany* Case 5/88.

> the requirements of the protection of fundamental rights in the Community legal order. Since those requirements are also binding on member States when they implement Community rules, the Member States must, as far as possible, apply those rules in accordance with those requirements."[1591]

Even though the right to property and the freedom to pursue a trade or business form part of general principles of EU law, they are however not absolute principles. The Court stated as follows in *Germany v Council:*[1592]

> "Both the right to property and the freedom to pursue a trade or business form part of the general principles of Community law. However, those principles are not absolute, but must be viewed in relation to their social function. Consequently, the exercise of the right to property and the freedom to pursue a trade or profession could be restricted, particularly in the context of a common organization of a market, provided that those restrictions in fact corresponded to objectives of general interest pursued by the Community and did not constitute a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed."[1593]

In relation to employment, the ECJ declared that "free access to employment is a fundamental right which the Treaty confers individually on each worker of the Community."[1594].

4.8.8.2 The right to an effective judicial remedy before national courts (Articles 6 and 13 ECHR)

The right to an effective judicial remedy, which is otherwise known as the right to a fair trial, stems from Article 6 of the ECHR. The article provides that in the determination of

[1591] Ibid para 19.
[1592] *Germany v Council* Case C-280/93.
[1593] Ibid para 78.
[1594] .*UNECTEF v Heylens* Case 222/86 para 14.

his or her civil rights and obligations or of any criminal charge against him or her, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. This right has received recognition in the EU legal order in the form of Article 19 of the TEU which now obliges member states to "provide remedies sufficient to ensure effective legal protection in the fields covered by Union law." This principle which is found in the constitutions of many states, including SADC states[1595], has become one of the most developed fundamental principles in the jurisprudence of the ECJ. In *Johnston v Chief Constable of the RUC*[1596], the RUC maintained a general policy of refraining from issuing firearms to female members of the force. The policy was defended on the ground that the relevant national provision the Sex Discrimination (Northern Ireland) Order[1597] permitted sex discrimination for the purpose of 'safeguarding national security or protecting public safety or public order'. A certificate issued by the Secretary of State was to be 'conclusive evidence' that the action was necessary on security grounds. The complainant argued that the rule effectively barred her promotion and that EU Directive 76/207 should take priority over national law. Article 6 of the directive provided that complainants should be able to 'pursue their claims by judicial process'. On a reference under Article 267 of the TFEU, the ECJ held that the national tribunal had to be given enough information to determine whether or not the policy of the Chief Constable was objectively justified and this was in the interest of effective judicial control. The Court went on to emphasize that the principle of effective judicial control was a general principle of law common to the constitutional traditions of the member states, enshrined in the ECHR, and recognized by joint declarations of the institutions of the EU[1598].

The principle of effective judicial control and effective remedies has been invoked in several decisions of the ECJ relating to cases involving individuals who seek to establish themselves in businesses and professions in other member states. These decisions require

[1595] See for example Article 12 of the Namibian Constitution and Article 18(9) of the Constitution of Zimbabwe.
[1596] Case 222/84.
[1597] SI 1976/1042 (NI 15).
[1598] *Johnson* case op cit para 18.

that reasons must be given for official decisions to enable them to be challenged in court if need be. In *UNECTEF v Heylens*[1599] the Court stated:

> "But where, as in this case, it is more particularly a question of securing effective protection of a fundamental right conferred by the Treaty on Community workers, the latter must be able to defend that right under the best possible conditions and have the possibility of deciding, with full knowledge of the relevant facts, whether there is any point in their applying in the courts."[1600]

4.8.9 Proportionality

Proportionality is a general principle imported from German law and is often invoked to determine whether a piece of subordinate legislation or an action purported to be taken under the treaties goes beyond what is necessary to achieve the declared, lawful objects[1601]. The principle requires that an individual should not have his freedoms of action limited beyond the degree necessary for the public interest. The principle is applied in relation to action by the EU in the area of legislation, for example whether a regulation has gone beyond what was necessary to achieve the aim contained in the enabling treaty provision, or whether the EU institution has exceeded the necessary action to be taken in relation to an infringement of EU law. It is also applied to action taken by member states in relation to a permitted derogation from EU law. For example, while restrictions on imports from other member states are prohibited by Article 34 (former 28 EC Treaty) of the TFEU, Article 36 (former 30 of EC Treaty) of the TFEU allows member states to restrict imports on, among other grounds, public health. A total ban on imports of a product would be disproportionate while some sampling and testing proportional to the perceived degree of risk may be legitimate. Excessive action may constitute a disguised restriction on trade[1602]. The same applies in the relation to restrictions on the free movement of workers. Rules relating to the registration of

[1599] Case 222/86.
[1600] Ibid para 15.
[1601] See Fairhurst op cit 72.
[1602] *Commission v Germany (Re Crayfish Imports)* Case C-131/93.

foreigners are permissible, but the imposition of a deportation penalty for breach of those rules might be disproportionate as it would render the exercise of the right of free movement ineffective[1603].

4.8.10 The principle of equality

The EU Treaties contain various provisions on prohibition against discrimination and these include Article 18 (former 12 EC Treaty) of the TFEU which prohibits discrimination based on grounds of nationality, and Article 157 (former 141 EC Treaty) of the TFEU which entitles both men and women to equal pay for work of equal value. These provisions are supplemented by secondary legislation in the form of directives which detail the various types of discriminatory acts. The ECJ has recognized the principle of equality as one of general application and which requires that comparable situations should not be treated differently and that different situations should be treated in the same way unless such differentiation is objectively justified[1604]. Apart from the treaty provisions, the ECJ has also held that the fixing and collection of financial charges which make up the EU own resources are governed by the general principle of equality[1605].

4.8.11 Legal certainty and non-retroactivity

Legal certainty and non-retrospectively is a general principle of law applied in most legal systems of the EU member states and in SADC states[1606]. The principle of legal certainty requires that administrative and legislative measures of the EU must be unequivocal, predictable and notified to the affected before they are brought into effect. In the *Racke* case the Court declared:

[1603] *R v Pieck* Case 157/79 paras 18-20.
[1604] *Graff v Hauptzollant Koln-Rheinau* Case C-351/92 para 15.
[1605] *Grosoli* Case 131/73 para 8.
[1606] In common law jurisdictions there is presumption of statutory interpretation that the legislature intends to regulate future matters only and several South African cases confirm this principle which can however be rebutted by the express language of a statute. See Botha op cit 72 for a discussion of the principle of retrospectively.

> A fundamental principle in the Community legal order requires that a measure adopted by public authorities shall not be applicable to those concerned before they have the opportunity to make themselves acquainted with it."[1607]

The principle of legal certainty means, for example, that the principle of indirect effect of directives does not apply to national provisions with criminal sanctions because the need for legal certainty requires that the effect of national criminal law should be absolutely clear to those subject to it[1608]. In *Kolpinghuuis Nijmegen*[1609] the ECJ said that the national court's obligation to interpret domestic law to comply with EU law was "limited by the general principles of law which form part of Community [EU] law, and in particular, the principles of legal certainty and non-retroactivity."[1610]

4.8.12 Legitimate expectation

The principle of legitimate expectation has its origins in English law and has been embraced by some countries following common legal traditions[1611]. In the common law systems the principle is an extension of the rules of natural justice and requires that the person who does not have a right but a legitimate expectation, has a right to procedural fairness before action adverse to him is taken[1612]. In the EU legal order legitimate expectation is based on the concept that trust in the EU's legal order must be respected[1613]. A person is said to have a legitimate expectation where a reasonable person would have such expectation as to matters likely to occur in the normal course of things. For example, where a person's licence to carry on a business has previously been renewed on several occasions, he has a legitimate expectation that it would be renewed again. If the authorities intend to act otherwise, then according to the principle he must be given an opportunity to make representations on the impending refusal of the licence.

[1607] Case 98/78 para 15.
[1608] Fairhurst op cit 75.
[1609] Case 80/86.
[1610] Ibid para 13.
[1611] The term is attributed to Lord Denning in *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149.
[1612] See Hoexter op cit 355 for discussion of the principle in the South African context.
[1613] See Steiner and Woods op cit 168 and Fairhurst op cit 75 for discussion of the principle in the EU.

Under this principle assurances relied on in good faith must be honoured[1614]. The principle of legitimate expectation is related to that of legal certainty and seeks to ensure a fair process although it cannot fetter the EU's freedom of action. A balance between the competing principles of legal certainty and legitimate expectation is not always easy to strike as illustrated in the English case *R v Ministry of Agriculture and Fisheries, ex parte Hamble Fisheries*[1615] where the judge said:

> "The principle of legal certainty and the protection of legitimate expectation are fundamental to European Community law. Yet these principles are merely maxims derived from the notion that Community law is based on the rule of law and can be applied to individual cases only if expressed in enforceable rules. Moreover, in most instances there are other principles which run counter to legal certainty and the protection of legitimate expectations; here the right balance will need to be struck. For instance, in the field of Community legislation the need for changes in the law can conflict with the expectation of those affected by such a change that the previous legal situation will remain in force…"

In the case the court found that the legitimate expectations of the holders of fishing licences had not been infringed when the Ministry introduced a more restrictive fishing licensing policy to protect the remaining fish stocks allocated to the UK under the EU's quota system. Similarly, the CFI has held that the operators in the EU's agricultural markets cannot have a legitimate expectation that an existing situation will prevail since the EU's intervention in these markets involves constant adjustments to meet changes in the economic situation[1616].

[1614] *Compagnie Continenatle v Council* Case 169/73 paras 20-21.
[1615] [1995] 2 ALL ER 714.
[1616] *O'Dwyer and Others v Council* Cases T-466, 469, 473 and 477/93 para 48 the Court noted: "However, operators may not have a legitimate expectation that a situation which may be modified at the discretion of the Community institutions will be maintained. That applies particularly in an area such as the common organization of the agricultural markets whose purpose involves constant adjustments to meet changes in the economic situation. In such a context, the scope of the principle of the protection of legitimate expectations cannot be extended to the point of generally preventing new rules from applying to the future effects of situations which arose under the earlier rules."

4.8.13 Natural justice

This is a concept familiar to common law jurisdictions derived from English administrative law but is closely linked to the American "due process". The principle also finds a place in many other jurisdictions, in particular those deriving from common law. In the common law tradition it implies two basic principles namely, the right to an unbiased hearing, and the right to be heard before the making of a potentially adverse decision affecting the person concerned[1617].The ECJ has used it to mean no more that "fairness" and not always distinguishable from "equity". The ECJ has described the principle in the *Kuhner* case as:

> "..a general principle of good administration to the effect that an administration which has to take decisions, even legally, which cause serious detriment to the person concerned must allow the latter to make known their point of view, unless there is serious reason for not doing so."[1618]

The principle is prominent in relation to decisions affecting an individual's free movement rights on the grounds of public policy, public security and public health[1619]. In these situations it involves the right to be given full reasons for the decision in order that it may be challenged. It is also closely linked to the right to effective remedy as demonstrated in *UNECTEF v Heylens*[1620].

4.9 Development of law by the European Court of Justice

Having considered the various aspects of the EU legal order, including the jurisdiction of the ECJ and the sources of EU law, I can now consider the extent to which EU law has

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[1617] See Burns and Beukes op cit 302 and 318 for a discussion of the effect of the two rules of natural justice as expressed in the Latin maxims '*audi alterem partem*" and " *nemo iudex in sua causa*" in South African law which derives from common law.
[1618] Case 33/79 para 25.
[1619] EU Directive 64/221 Articles 5-7.
[1620] Case 222/86 para 15.

been developed by the ECJ. As can be noted from earlier discussions and the cases reviewed, it is quite apparent that the ECJ has greatly contributed to the development of EU law in many areas. It is beyond the scope of this study to include all the areas covered by the ECJ's creative techniques. In this section I, however, discuss three areas where the ECJ has developed fundamental principles of EU law. These principles are supremacy of EC law over national law, direct and indirect effect of EU law, and the principle of state liability for damage caused by breach of EU law[1621].

4.9.1 Supremacy of EU law

One area in which the ECJ has been bold in its interpretative duty is in the area of the relationship between EU law and the national law of the member states. Under traditional international law, the relationship between international law and national is left to be determined by domestic law[1622]. Each state is left to determine its own system with some states giving primacy to international law while others do not. In the latter case, if there is conflict between a provision of international law and national law the courts must give priority to national law. This primacy of national law does not relieve the state from liability for breach of its international obligations. The EU Treaties are silent on this issue, and the same applies to the SADC Treaty. The SADC Treaty merely provides that member states shall take steps to ensure the uniform application of the Treaty, and take all necessary steps to accord the Treaty the force of national law[1623]. The absence in the EU Treaties of a provision on the relationship between EU law and the national laws of EU member states has not deterred the ECJ from declaring that supremacy of EU law over national laws is implied in the Treaties. In *Flaminio Costa v ENEL*[1624] the ECJ made the following oft-quoted statement:

> "By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the

[1621] Wyatt and Dashwood op cit Chap 5, Steiner and Woods op cit Chaps 4 and 5 and Fairhurst op cit Chap 9 for discussion of these principles.
[1622] See Chapter 2 for discussion on the relationship between SADC law and international law.
[1623] Article 6.4 and 5 Treaty.
[1624] Case 6/64 [1964] ECR 585.

> international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves."[1625]

It will be interesting to see whether such general statement of principle can be applied by the Tribunal in the SADC context. In the *Campbell* case the issue was not directly raised before the Tribunal but subsequent developments after the Tribunal's decision might necessitate a reconsideration of the position[1626]. The SADC Treaty, as we have noted, gives SADC legal personality as an international organisation and also legal personality in the domestic laws of the member states. But have SADC member states limited their sovereignty in any way by being party to the Treaty? This is not an easy question to answer in the absence of an express provision in the Treaty to this effect. But the answer will depend on how the provisions of the Treaty and other relevant legal instruments are interpreted by the Tribunal. One issue which may arise is whether SADC has created institutions which are independent of its member states. We have noted that apart from the Secretariat and to some extent the Tribunal, all other institutions of SADC are composed of representatives of the governments of each member state. But does this fact alone imply that these institutions cannot take decisions as independent entities functioning apart from the member states such as we have seen happens with the European Council of Ministers? We have seen that the effect of decisions taken by Council as an institution of the EU differ from those taken when members of Council act as representatives of their governments.

It can be argued that the same principle can be applied to SADC institutions such as the Council, Summit, etc. When they take decisions as institutions of SADC, they act

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[1625] Ibid 593.

[1626] Subsequent to the case the Zimbabwe government declared that it was not bound by the Tribunal's ruling. Several senior government officials were quoted in various media as having declared that the ruling of the Tribunal was not binding on Zimbabwe including the Zimbabwean President who was quoted as having called the ruling of the Tribunal "nonsensical" (Zimbabwe Times online edition of 9 April 2009) www.thezimbabwetimes.com. (visited 15/05/09).

independently of the member states hence those decisions are binding on the member states independently of the constitutional arrangements or the effect of SADC law in the legal systems of the member states. This proposition is envisaged by the Protocol which provides that in disputes between SADC and its member states or private persons, SADC may be represented by the "competent institution or organ of the Community."[1627] To this extent, SADC as represented by its institutions, is competent to take legally binding decisions which bind member states and presumably by extension private persons. Secondly, the Summit or the Council or any other institution of SADC under delegation are empowered to adopt legal instruments, including protocols, to implement the Treaty[1628]. This position can be compared to that of UN institutions such as the General Assembly or the Security Council which have no power to legislate for member states of the UN. Thus one might maintain that by giving the institutions powers to take legally binding measures, be they legislative or otherwise, SADC member states have limited their sovereign rights in some respects. Thirdly, the existence of a Tribunal with compulsory jurisdiction over disputes relating to the interpretation, application or validity of the Treaty, or acts of SADC institutions, is another clear indicator of the limitation of sovereign rights of member states of SADC. If SADC member states did not intend to be bound by decisions of SADC institutions, such as the Tribunal, they would certainly not have created a court with compulsory jurisdiction; they could simply have modeled the Tribunal along the lines of the ICJ which has no compulsory jurisdiction over disputes between UN member states.

Having regard to these factors, one can confidently assert that the position in SADC is no different from that in the EU and thus the principle of supremacy of EU law noted above can be applied to SADC. If SADC law is not accorded supremacy over national law, and it is left to each member state to give whatever status it chooses, the whole objective of having a community based on the rule of law as applied by the Tribunal will be defeated. To that extent it is submitted that if confronted with a question of supremacy, the

[1627] Articles 17 and 18 Protocol.
[1628] Article 10.2 Treaty.

Tribunal can without difficulty rule that SADC law takes precedence over the national laws of the member states.

4.9.2 Development of the principles of direct and indirect effect and state liability

We have seen that the enforcement of EU law lies in the hands of EU institutions, member states and private persons and that this can be through direct actions before the ECJ or through indirect actions before the national courts of the EU member states. Direct enforcement against member states is by way of Articles 258 and 259 (former 226 and 227 EC Treaty) of the TFEU by the Commission or other member states. Private persons cannot take direct actions against member states before the ECJ, meaning that a private person who wishes to take action against a member state will either have to persuade the Commission or another member state to take action on his or her behalf in the ECJ, or take the matter to a national court which has the discretion to refer or not to refer a matter to the ECJ under Article 267 of the TFEU. We have also seen that if a member state is found to have infringed its treaty obligations, the ECJ can make such declaration and may impose a penalty under Article 260 of the TFEU if the state fails to comply with an adverse judgment.

However, the ECJ has no power to make an order say, for compensation in favour of an aggrieved party against a member state under the Articles 258 and 259 of the TFEU procedure. This effectively means that a person who suffers injury resulting from a member state's breach of EU law, has no remedy in the EU courts. This situation had serious implications for the private person who would have to pursue a remedy in the national courts. But then in the national courts the state could plead that though it was in breach of its EU obligations, it could not be made accountable as EU law was not intended to confer rights which could be enforced in the national courts. Acknowledging these problems, the ECJ sought to develop principles which would ensure that persons whose rights were affected by breach of EU law had an effective remedy in the national courts. The ECJ achieved this objective by interpreting EU law in such a way that aggrieved persons could obtain remedies for breaches of the law by either states or other

persons, in the national courts. Thus the ECJ developed the principles of direct and indirect effect and state liability which are now part of the Court's jurisprudence. These principles are discussed in subsequent parts of this section.

4.9.3 Principle of direct effect

The principle of direct effect was developed way back in *Van Gend en Loos v Nederlandse Administratie der Belastingen*[1629]. The facts of the case were as follows:

Van Gend en Loos had imported ureaformaldehayde from Germany into the Netherlands. It had been charged customs duty. This breached the rules on the free movement of goods between members states, and in particular Article 30 (former 25 EC Treaty) of the TFEU. Van Gend en Loos instituted proceedings in a Dutch court, claiming reimbursement of the customs from the Dutch Government. The court referred to the ECJ the question of whether or not the claimant could rely on Article 30 of the TFEU in the national court. The ECJ addressed the question whether TFEU provisions could confer directly effective rights on individuals, and held as follows:

> "The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit in limited fields, and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member States, Community law therefore not only *imposes obligations* on individuals but is also intended to *confer on them rights* which become part of their heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon Member States and upon institutions of the Community."[1630](my emphasis)

[1629] Case 26/62 [1963]ECR 1.
[1630] Ibid 12 para II B.

We have noted above that the machinery for enforcing EU law against defaulting member states lay with the Commission and other member states under Articles 258 and 259 of the TFEU. We also noted that the machinery did not assist an aggrieved private person as the ECJ cannot order the defaulting state to make good any loss incurred as a result of its default. In the *Van Gend en Loos* case some of the member states who joined in the proceedings contented that TFEU provisions could not be used before the national courts because there already existed the Articles 258 and 259 of the TFEU machinery to deal with the situation. The contention was rejected by the ECJ which stated that:

> "In addition, the argument based on Articles 226 [now 258] and 227 [now 259] put forward by the three Governments is misconceived. The fact that these Articles of the Treaty enable the Commission and the Member States to bring before the Court a State which has not fulfilled its obligations does not mean that individuals cannot plead these obligations, should the occasion arise, before a national court…. The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted under Article 226 and 227 to the diligence of the Commission and Member States."[1631]

Thus was born the principle of direct effect as a supplementary means by which private persons could play their part in ensuring the effectiveness of EU law in the EU member states. The ECJ, however, did not open a Pandora's box for actions based on the direct effectiveness of TFEU provisions. It imposed two conditions namely, that the Treaty provision relied on must be sufficiently precise and unconditional for it to have direct effect[1632]. Whether a provision satisfies the conditions is a matter for the Court to determine based on the interpretation given to each particular provision on a case by case basis.

[1631] Ibid.

[1632] In this regard the Court stated "The wording of Article 12 (now 25) contains a *clear and unconditional* prohibition which is not a positive but negative obligation."

The issue of whether an EU directive was sufficiently precise arose in *Van Duyn v Home Office*[1633]. The ECJ held that a directive which provided that "measures taken on the grounds of public policy or of public security shall be based exclusively on the personal conduct of the individual concerned"[1634] was sufficiently precise to be capable of direct effect, despite the fact that the scope for 'public policy' and 'public security' would require determination by the Court[1635]. Similarly, in *Defrenne v SABENA*[1636] the ECJ held that Article 157 (former 141 EC Treaty) of the TFEU which set out the principle that men and women "should receive equal pay for equal work" was sufficiently precise to be capable of direct effect, despite the fact that the scope for 'equal pay' and 'equal work' would require determination by the Court[1637].

An EU Treaty provision is unconditional where it is not subject, in its implementation or effects, to any additional measure by either the EU institutions or member states. In *Van Gend en Loos* Article 30 (former 25 EC Treaty) of the TFEU which was in issue was held by the ECJ to be unconditional because it imposed a negative obligation on member states[1638] to "refrain from introducing between themselves any new customs duties on imports and exports…and from increasing those which they already apply in their trade with each other." Its application did not depend on member states taking measures to implement it.

However, in *Costa v ENEL*[1639] the ECJ held that Article 117 (former 97 EC Treaty) of the TFEU was not unconditional. That article provided that where a member state intended to adopt or amend its laws in such a way that there was a reason to fear this might cause distortion of the conditions of competition in the common market, there was an obligation of prior consultation between the member state and the Commission. The Court held that

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[1633] Case 41/74.
[1634] EU Directive on Residence and Public Policy and Security No. 64/221. OJ.
[1635] *Van Duyn* case op cit paras 12-14.
[1636] Case 43/75.
[1637] Ibid para 40.
[1638] *Van Gend en Loos* op cit IIB para 7 the Court said: "The implementation of Article 12 does not require any legislative intervention on the part of the states. The fact that under this article it is member states who are made the subject of the negative obligation does not imply that their nationals cannot benefit from this obligation."
[1639] Case 6/64.

this provision was not unconditional because it was subject to additional measures in the form of "prior consultation with the Commission"[1640]. I now move on to consider the principle of direct effect in relation to EU Treaty provisions and to each type of EU legislative acts which are regulations and directives and the case law developed by the ECJ in relation to each.

4.9.3.1 Treaty provisions

We have noted that under traditional international law, treaties are generally not capable of conferring rights on individuals in the courts of their states[1641]. In the case of the TFEU, we have seen from the *Van Gend en Loos* above, that individuals can do so under the principle of direct effect developed by the ECJ. This is possible provided the conditions of sufficiently precise and unconditionality have been satisfied. In the *Van Gend en Loos* case the ECJ held that the provision in question, Article 30 (former 25 EC Treaty) of the TFEU, was directly effective against the state and this was so because when the state signed the treaty it had committed itself to abide by the provisions of the treaty. This application of treaty provisions is referred to as "vertical effect"[1642]. Vertical application in this context means that the provisions are enforceable by private persons as against the state. The ECJ, however, did not address the effect of the TFEU provisions between private persons; could the provisions be enforced by private persons against other private persons?

The ECJ answered this question in the affirmative in the later case of *Defrenne v SABENA*[1643]. The case involved a claim by an air stewardess against her employer for equal pay to that received by male stewards. Article 157 (former 141 EC Treaty) of the TFEU provided that "Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work." Belgium had not enacted legislation to bring this

[1640] Ibid para 19.
[1641] Chap 2.
[1642] See Steiner and Woods op cit 91-92 and Wyatt and Dashwood op cit 147 for discussion of the concept of vertical effect.
[1643] Case 43/75.

about, so a claim was brought that the article was directly effective and it was referred under Article 267 of the TFEU. The Court dismissed the argument that the wording of the provision confined the obligation to the member state itself and stated:

> "Therefore, the reference to "Member States" in Article 141 cannot be interpreted as excluding the intervention of the courts in the direct application of the Treaty….Since Article 141 is mandatory in nature, the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals."[1644]

The effect of this decision is that Article 157 (former 141 EC Treaty) of the TFEU could be invoked before a national court by a private person against another private person. In this sense the provision is said to have "horizontal effect." Some provisions of the TFEU could apply vertically, i.e. directly enforceable by private persons against the state such as in *Van Gend en Loos,* while some have both vertical and horizontal effect, i.e. directly enforceable against both the state and other private persons. The effect of a provision depends upon its wording and the context and this is for the Court to decide. In subsequent cases the ECJ has held many other TFEU provisions to have both vertical and horizontal effect. For example in *Cowan v The French Treasury*[1645] the ECJ held that Article 18 (former 12 EC Treaty) of the TFEU which prohibits discrimination on grounds of nationality, to be both vertically and horizontally effective and this enabled a British tourist who had been attacked and injured in Paris to obtain equal treatment with French nationals in relation to payments of criminal injuries compensation from the French government[1646].

Other provisions of the TFEU which have been held to have both vertical and horizontal effect, include Articles 34 and 35 (prohibiting the imposition of restrictions on the import

[1644] Ibid para 35.
[1645] Case 186/87.
[1646] Ibid para 20.

and export of goods)[1647], Article 45 (free movement of workers)[1648], Articles 49 and 56(the right of establishment of business and professions to provide services)[1649], and Articles 101 and 102 (the prohibition of restrictive agreements and the abuse of a monopoly position)[1650]. Because of the large number of cases in relation to these provisions the ECJ has changed its terminology not only to regard them as directly effective at the suit of individuals, but to regard some of them, such as the freedom of movement, to be fundamental rights of EU citizens. That the principle of direct effect has changed the shape of the EU from its inception is beyond doubt. As one judge of the ECJ remarked: "without direct effect, we should have a very different Community today – a more obscure, more remote Community barely distinguishable from so many other international organizations whose existence passes unnoticed by ordinary citizens" (Mancini and Kelling 1994)[1651].

Whether SADC will follow a similar route depends on how the Tribunal approaches the issue of the effect of SADC Treaty provisions in the national legal systems. Applying the ECJ's approach to the SADC Treaty, we may find that there are some provisions of the Treaty read together with the related protocols, which are capable of direct effect. Examples of such protocols are given and discussed in the section on SADC protocols in Chapter 2.

4.9.3.2 Regulations

Article 288 of the TFEU provides that a regulation shall have general application and that it shall be binding in its entirety and directly applicable. The reference to "directly applicable" means that domestic legislation is not required in order to incorporate a regulation into national law[1652]. In this sense the concept of "directly applicable" could be equated to "self executing" which was considered in Chapter 2. The ECJ has held on

[1647] *Dansk Supermarked* Case 58/80.
[1648] *Dona v Mantero* Case 13/76.
[1649] *Thieffry v Paris Bar Association* Case 71/76.
[1650] *Brasseries de Haecht* Case 48/72.
[1651] See Fairhurst op cit 239.
[1652] Ibid.

several occasions that the duplication or transposition of EU regulations is impermissible, unless authorized in the particular case. In the *Leonesio* case the ECJ explained the rationale behind this principle as follows:

> "So as to apply with equal force with regard to nationals of all the member states, Community regulations become part of the legal system applicable within the national territory, which must permit the direct effect provided for in Article 189 [now 288 TFEU] to operate in such a way that reliance thereon by individuals may not be frustrated by domestic provisions or practices….Budgetary provisions of a member state cannot therefore hinder the direct applicability of a Community provision and consequently of the exercise of individual rights created by such a provision."[1653]

The Court reiterated this point in the *Fratelli Variola* case where it stated that:

> "More particularly, member states are under an obligation not to introduce any measure which might affect the jurisdiction of the Court to pronounce on any question involving the interpretation of Community law or the validity of an act of the institutions of the Community, which means that no procedure is permissible, whereby the Community nature of a legal rule is concealed from those subject to it." [1654]

Whether or not a regulation is "directly effective" i.e. capable of creating rights which are enforceable in the national courts depends on the terms of the regulation; it must be sufficiently precise and unconditional as discussed above. By their very nature many regulations are directly effective and are an important source of individual rights, e.g. regulations on employment rights of migrant workers and social security benefits. Regulations which meet the criteria for direct effect will also have both vertical and horizontal effect as with TFEU provisions.

[1653] *Orsolina Leonesio v Ministero dell'agricoltura e foreste* Case 93/71 paras 22-23.
[1654] *Fratelli Variola SpA v Amminitsrasione Italiana delle Finanze* Case 34/73 para 11.

4.9.3.3 Directives

Problems which have been experienced in the EU in the application of the principle of direct effect arose in the context of directives. Unlike regulations, directives are not directly applicable, thus they are always conditional upon the member states taking further action. We have noted that a directive shall be binding, as to the result to be achieved, upon each member state to which it is addressed but shall leave to the national authorities the choice of form and method of incorporation into domestic law[1655].

Directives differ from regulations in that they are not addressed to the world in general but to member states. In the case of TFEU provisions, some of which are addressed to member states we seen that the ECJ has held that they could also bind private persons. As indicated earlier, directives are always conditional; they depend upon member states taking further action. The problem which has arisen in relation to directives is non-implementation by the member states or incorrect or improper implementation. However, the ECJ has stated that implementation does not always entail direct transposition into national law. Where the laws of a member state have sufficient provisions for matters covered in the directive, it may not be necessary for the state to enact further legislation to implement the directive[1656]. It is not always necessary to implement legislation in relation to all directives, in particular those which do not confer rights on private persons[1657]. But in most cases directives are intended to confer rights on private persons and in such cases member states are obliged to enact the necessary laws, they cannot rely on circulars, letters or administrative practices because these can be easily altered resulting in lack of legal certainty and transparency[1658]. Failure to implement or incorrect implementation of a directive can result in serious prejudice to individuals who may be deprived of rights conferred by EU law, e.g. employment protection laws.

[1655] Article 288 third paragraph TFEU.
[1656] *Commission v Germany (Re Nursing Directives)* Case 29/84 para 23.
[1657] Ibid.
[1658] *Commission v Belgium* Case 102/79 para 11.

Since directives are always conditional upon action being taken by states, it was initially thought that they could not have direct effect in the same way as EU Treaty provisions and regulations. However, the Court expressed some sentiments in the *Grad*[1659], a case which concerned a regulation**,** that a directive may have that effect if not implemented by the due date[1660]. The Court was more specific in *Van Duyn v Home Office* [1661]when it recognized the direct effect of directives.

The claimant, Ms Van Duyn, was a Dutch national who was a member of the Church of Scientology. She wished to enter the UK to work at the headquarters of the organisation. The UK Government had decided some years previously that the Church of Scientology was an undesirable organization although no steps had been taken against it except to publicise the government's view. As a worker, Ms Van Duyn had a right of entry under Article 45 (former 39 EC Treaty) of the TFEU. That right is subject to the right of a host state to exclude and expel a person on grounds of public policy or security[1662]. The details on the limitation of the state's powers to derogate from Article 45 of the TFEU and other procedural matters were set out in EU Directive 64/221. Article 3 of the directive provides that a decision to exclude or expel should be based "exclusively on the personal conduct of the individual concerned". Ms Van Duyn argued that membership of an organisation could not be "personal conduct" under Article 3. The UK government argued that its power to refuse entry could not be limited in this way because the UK had not yet implemented the directive in question. On a reference the argument was rejected by the ECJ which held as follows:

> "The UK observes that, since Article 249 of the Treaty distinguishes between the effects ascribed to regulations, directives and decisions, it must therefore be presumed that the Council, in issuing a directive rather than making a regulation, must have intended that the directive should have an effect other than that of a

[1659] *Grad v Finanzamt Traunstein* Case 9/70 para 5 where the Court said: "However, although it is true that by virtue of Article 288 (former 249), regulations are directly applicable and therefore by virtue of their nature capable of producing direct effects, it does not follow from that this other categories of legal measures (directives and decisions) mentioned in that article can never produce similar effects."
[1660] Steiner and Woods op cit 93.
[1661] Case 41/74.
[1662] Third paragraph Article 45(former 39 EC Treaty) of the TFEU.

> regulation and accordingly that the former should not be directly applicable…However..it does not follow from this that other categories of acts mentioned in that article can never have similar effects. It would be incompatible with the binding effect attributed to a directive by Article 249 to exclude, in principle, the possibility that the obligation which it imposes may be revoked by those concerned. In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if the individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law`."[1663]

The ECJ here took a pragmatic approach to ensure the *effet utile* or useful effect of EU law in the legal systems of the member states. It appears also to have been influenced by a principle which is found in many legal systems that a party cannot benefit from his or her or its wrongdoing[1664]. Thus, in principle, it is not open to a member state to defend itself against a claim by an individual by raising its own failure to implement a directive as a defence. Once the deadline for implementing a directive has passed but not before, an individual could enforce the directive against the government of the state which failed to implement it, hence it was vertically effective[1665]. However, not all directives are directly effective and it is necessary to examine in each case whether the nature, general scheme and wording of the provision make it capable of having direct effect. The test of sufficiently precise and unconditional also applies in case of directives, and the ECJ in *Francovich v Republic of Italy*[1666] explained that in order to meet the test it is necessary to be able to identify the persons who are entitled to the right, ascertain the content of that right, and identify the person or body liable to provide that right[1667].

[1663] *Van Duyn* op cit paras 11-12.
[1664] See Fairhurst op cit 241-242. In the common law systems the principle is known as equitable estoppel and in the civil law systems it is the doctrine of the impermissibility of reliance on one's won turpitude.
[1665] *Ratti* Case 148/78.
[1666] Cases C-6 & 9/90.
[1667] Ibid para 12.

The *Francovich* case concerned EU Directive 80/987 which sought to protect employees on their employers' insolvency. The persons entitled to the rights under this directive were employees (Article 2(2) of the directive refers to national law for the definition of the terms 'employee' and 'employer). The ECJ held that the first requirement was satisfied as the directive was sufficiently precise to allow a national judge to ascertain whether the applicant had the status of an employee under national law[1668]. As to the second requirement, the member state was given a number of choices in implementing the directive which included a choice when the payment of wages would accrue and a discretion to set a liability ceiling so that payment of wages would not exceed a certain sum. Despite these conditions, the ECJ held that it was possible at least to calculate the minimum guarantee provided for by the directive which would impose the least burden on the body liable to provide the benefit[1669]. With regard to the discretion to set a ceiling, the Court held that this discretion would not be available unless the member state had actually implemented the directive and applied the derogation. As regards the last requirement of the identity of the person or body liable to provide the benefit, the member states had a choice whether the body should be public or private and the Court held that because of the wide discretionary powers on part of member states it was not sufficiently precise and unconditional[1670].

A question which still required an answer was whether directives had both vertical and horizontal application as the case with EU Treaty provisions and regulations. The Court subsequently held, in *Marshall v Southampton Area Health Authority*[1671], that a directive could only be enforced against a state and not against private persons. After considering the effect of the third paragraph of Article 288 (former 249 EC Treaty) of the TFEU the Court stated:

> " a Member State which has not adopted the implementing measures required by the directive within the prescribed period may not plead, as against its own

[1668] Ibid para 14.
[1669] Ibid para 22.
[1670] Ibid para 26.
[1671] Case 152/84.

> individuals, its own failure to perform the obligations which the directive entails..According to Article 249 ..the binding nature of a directive .exists only in relation to 'each Member State to which it is addressed'. It follows that a directive may not be relied upon as such against such a person."[1672]

The Court used Article 288 of the TFEU to justify its own view that a member state could not be allowed to defend itself against an action based on its own wrongdoing. Private persons could be allowed to use non-implementation of directive as a defence to an action by other individuals because there is no obligation on individuals to implement directives as with states. The decision of the ECJ can be criticized on the grounds that it is unfair that a private person is denied a remedy when a directive has not been properly implemented or has not been implemented by a state, simply because the defendant in the matter happens to be another private person and not a state. If the rationale for giving direct effect to EU legislation is to ensure that citizens of the EU enjoy benefits emanating from such legislation, then it should not matter who the actual defendant in the matter is: effect must be given to the legislation for the benefit of the citizen.

What constitutes the 'state' for the purposes of the principle has been another area of difficulty. Under Article 4[1673] (former 10 EC Treaty) of the TEU the obligation to implement directives falls on the member states and the Court has given the term "state" a broad interpretation. In *Marshall v Southampton Area Health Authority*[1674] the claimant was employed by the Health Authority. She wished to retire at 65, the same age as her male colleagues. The rules of the Authority required her to retire at 60. She was dismissed on the grounds of her age at 62, and she brought action against her employers based on sex discrimination. Discrimination on the basis of sex is prohibited by Directive 76/207. The UK Sex Discrimination Act 1975, which had been enacted to implement the directive contained an exception allowing different retirement ages for males and females. There was no such discrimination in the directive thus the UK law infringed the

[1672] Ibid paras 46 and 48.
[1673] Article 4.3 second paragraph.
[1674] Case 152/84.

directive. The question was whether the wrongly implemented directive could be enforced against the Authority. The ECJ held that it could stating that:

> " Where a person involved in legal proceedings is able to rely on a directive as against the State, he may do so regardless of the capacity in which the latter is acting, whether as an employer or public authority. In either case it is necessary to prevent the State from taking advantage of its own failure to comply with Community law."[1675]

The Court further held that it was for the national courts to determine the status of a body for the purposes of determining whether or not a directive could be enforced against it[1676]. The question of what constitutes a "state" was considered further by the ECJ in *Foster v British Gas*[1677].

In that case the UK court requested a preliminary ruling from the ECJ under Article 267 of the TFEU on the question whether the British Gas Corporation (BGC) was, at the material time, a body of such type that individuals could directly enforce a directive against it in the national courts and tribunals. The BGC which employed Foster at the time, was not a privatized body. Foster, like Marshall, was made to retire at 60 as opposed to 65, the retirement age for her male colleagues and this constituted sex discrimination which was prohibited by the same directive as in *Marshall.* What became an issue before the ECJ was whether the BGC was a "state authority" such that the directive could be enforced directly against it. The ECJ developed the test to be applied to ascertain whether a body, if not the state itself, against whom a directive is to be enforced was an emanation of the state. The ECJ said:

> "a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from

[1675] Ibid para 49.
[1676] Ibid para 50.
[1677] Case C-188/89.

> the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon."[1678]

A body thus qualifies as an emanation of the sate if it provides a public service, is under state control, and has special powers to provide the public service. The case was returned to the national court for the application of the criteria to the facts of the case[1679]. The national court found that the criteria had been met because the BGC was established by the law of the UK for purposes of providing gas to the public and that constituted a public service. The BGC was also under the control of the state as its members were appointed by the state and they were answerable to the responsible Secretary of State. In addition, the UK law gave the BGC a monopoly for the supply of gas and this constituted 'special powers' which were not enjoyed by other persons in normal relations between individuals. Thus all three criteria were met and the directive could be enforced against the BGC. Later national cases have been based on the above criteria although some national courts have even asserted that they are not conclusive but "..must always be the starting point and will usually be the finishing point."[1680]

The question of whether directives can have horizontal effect still remains unclear. In some few cases the ECJ appears to have acknowledged that a directive could be allowed to have horizontal effect if no particular obligation is placed on the defendant private person[1681].

4.9.4 Principle of indirect effect

The application of the principle of direct effect to directives is limited in that they are only enforceable against states or emanations of the states which meet the *Foster* criteria

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[1678] Ibid para 20.
[1679] *Foster v British Gas (No 2)* [1991] 2 AC 306.
[1680] See the UK case of *Doughty v Rolls-Royce plc* [1992] CMLR 1045 para 24 whose facts were similar to those in *Foster* case.
[1681] See ECJ cases *CIA Security International v Signalson and Securitel* Case C-194/94 and *Criminal Proceedings against Rafael Ruiz Bernaldez* Case C-129/94. In both cases the ECJ implicitly gave direct effect to directives affecting parties who were all private persons.

set out above. The ECJ has not attempted to interpret "emanation of the state" to include private commercial employers and this has created the anomalous situation that a person aggrieved by the non-implementation or improper implementation of a directive may or may not get a remedy depending on the identity of the defendant. The anomalies became apparent in applying EU Directive 76/207 differently between private and public employment relationships. Two similar cases, *Von Colson*[1682] and *Harz v Deutsche Tradax*[1683], were brought before the ECJ. Ms Von Colson was employed by the prison service and Mrs. Harz by a private company. Both cases were referred to the ECJ by the German national court. Germany had implemented Directive 76/207 but German law provided only nominal and not proper compensation for unlawful discrimination as required by the directive. From current case law Ms Von Colson could enforce the directive vertically against her employer a public body and get full compensation for discrimination suffered, while Ms Harz could not enforce it against her employer who was a private person.

The ECJ once again used its creative interpretative techniques to ensure that at least both claimants could recover full compensation. The ECJ started off with the member states' obligation under Article 4.3 (former 10 EC Treaty) of the TFEU to take all appropriate measures to give effect to EU law stating that it:

> "…is binding on all the authorities of member States including, for matters within their jurisdiction, the courts. It follows that, in applying the national law…..national courts are required to interpret their national law in the light of the wording and the purposes of the directive in order to achieve the result referred to in the third paragraph of Article 249."[1684]

The German court, which had referred the matter to the ECJ, was therefore required to interpret the national law on sexual discrimination in such a way that it was consistent with the objective of the directive which was to ensure that all employees regardless of

[1682] Case 14/83.
[1683] Case 79/83.
[1684] Ibid paras 6-8.

their sex were entitled to full compensation as opposed to the nominal compensation provided for in German law.

The *Von Colson* case involved the interpretation of national law put in place to implement a directive, but it was not clear whether the principle also applied to cases where the directive was not implemented at all. The Court had to deal with that issue in *Marleasing SA v La Commercial SA*[1685]. In that case a Spanish court had to deal with a national law on the constitution of companies which conflicted with Directive 68/71. Spain had not yet implemented the directive but the Court, on reference by the Spanish court held that:

> "It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 288(former 249EC Treaty) of the Treaty"[1686]

This directive from the ECJ requires national courts to 'interpret' national law which may have been enacted many years before the directive and for different reasons "in the light of the text and aims of the directive." This directive obviously creates problems for the national courts even though the ECJ has directed further that the national courts should act on the presumption that that relevant national law, whether passed before or after the relevant directive, was intended to implement it. However, whether this is possible, in light of the wording of the national provision, is a matter for interpretation by the national courts. The ECJ however, established one exception to the obligation on national courts to interpret national law consistently with an unimplemented or incorrectly implemented directive, and this is a case where the national measure to be interpreted this way imposes

[1685] Case C-106/89.
[1686] Ibid para 8.

criminal liability. The ECJ held in *Arcaro*[1687] that no obligation could be imposed on an individual by an unimplemented directive nor could a person be criminally liable for a contravention of such a directive.

In the SADC context it is possible to imagine a similar situation arising in the application of national law which is intended to give effect to SADC law in circumstances where the SADC law cannot be enforced directly against private persons or even member states. In such cases it would not make much sense if national courts were allowed to interpret national law inconsistently with SADC law in the form of legislative instruments emanating from SADC institutions, or case law emanating from the Tribunal. Such an approach would ultimately defeat the whole purpose of having SADC law in the first place. A better approach would be for the Tribunal to establish the principle that whenever the national law of a member state is meant to give effect to SADC law, then the national courts ought to interpret it consistently with SADC law to ensure that the objectives of SADC are achieved. This issue of indirect effect would not arise at all if the direct effect is given to SADC legal instruments regardless of the status of the defendant. This means that a person can enforce his rights against both states and private persons in cases where a state has failed to implement, or has incorrectly implemented a SADC legal instrument.

4.9.5 Principle of state liability

The first case to deal with state liability for failure to implement a directive is the ECJ case *Francovich and Bonifaci v Republic of Italy*[1688]. In that case an Italian company went into liquidation, leaving Francovich and other employees with unpaid arrears of salary. Directive 80/987 required member states to set up a compensation scheme for employees in these circumstances but Italy had failed to do so. Francovich claimed compensation from the Italian Government. The case was referred to the ECJ to determine whether the directive was capable of direct effect, whether a state was liable

[1687] Case C-168/95.
[1688] Cases C-6 &9/90.

for damage arising from its failure to implement a directive, and to what extent the state was liable for damages for violation of obligations under EU law. The Court held that the directive in question was not sufficiently precise so as to have direct effect[1689]. It reiterated the principle that the TFEU had created a new legal order which is binding upon member states and citizens. The *effet utile* (effectiveness) of EU law would be diminished if individuals were not able to obtain damages after suffering loss incurred because of a violation of EU law by a member state[1690]. There was an implied obligation under Article 4.3 (former 10 EC Treaty) of the TFEU to compensate individuals affected by a violation of EU law[1691]. The ECJ then laid the conditions under which a state may be liable to compensate as follows:

(a) the result aimed at by the directive involved rights conferred on individuals;
(b) the content of those rights could be identified from the provisions of the directive;
(c) there must be a causal link between the failure by the state to fulfill its obligations and the damage suffered by the person affected[1692].

The Court did not decide the quantum of the damage but left it to national law which must ensure the full protection of rights which the individual derives from EU law. Subsequent to this case the ECJ has developed the concept of state liability and entitlement to damages in subsequent cases. In some jurisdictions attempts are made to classify state liability in terms of the nature of the act in question with some acts not being subject to judicial scrutiny. For example, in the UK the courts have no power to declare an Act of parliament unconstitutional hence the question of state liability for legislative acts does not arise[1693]. However, the ECJ has held that state liability attaches to all domestic acts and omissions, be they legislative, executive or judicial, that are in breach of EU law[1694]. I consider the principle of state liability under the *Francovich*

[1689] Ibid para 26.
[1690] Ibid para 33.
[1691] Ibid para 36.
[1692] Ibid para 40.
[1693] Hood Phillips and Jackson op cit 29-35.
[1694] See *Factortame Ltd and others* discussed below para 34.

principle in respect of legislative acts, executive acts and judicial acts of the EU member states.

4.9.5.1 Legislative acts

The judgment concerning liability for legislative acts was passed in joined cases *Brasserie du Pecheur v Germany and R v Secretary of Sate for Transport, ex parte Factortame Ltd and others*[1695]. Both cases concerned directly effective TFEU articles which had been breached. The first case concerned a pre-existing German law which breached Article 34 (former 28 EC Treaty) of the TFEU and the second case a UK law which was enacted in breach of Article 49 (former 43 EC Treaty) of the TFEU. In both cases the claimants sought damages against the respective states for the legislature's breach of EU law. Both cases were referred to the ECJ under Article 267 of the TFEU. The question referred was whether a member state could be liable to compensate individuals who sustain damages as a result of breach of EU law by the state legislatures. The ECJ held that the principle of state liability for breach of EU law was inherent in the system of the TFEU and it was irrelevant which organ of the state was responsible for the breach[1696]. It then stated that conditions for state liability depended on the nature of the breach of EU law causing the damage or loss[1697]. The Court acknowledged that national legislatures had wide discretionary powers in the field of legislation and in such cases three conditions had to be met before a state incurs liability for legislative acts and these are:

(a) the rule of law infringed must be intended to confer rights on individuals;
(b) the breach must be sufficiently serious; and
(c) the must be direct casual link between the breach of the obligation resting on the state and the damage sustained by the claimant[1698].

[1695] Cases C-46 and 48/93.
[1696] Ibid para 31. The Court cited the *Francovich* case para 35 in support of this principle.
[1697] Ibid para 38 the Court again cited the *Francovich* case para 38.
[1698] Ibid para 51.

The two TFEU articles which were breached are directly effective hence condition (a) was automatically satisfied. On condition (b), the Court held that for liability to attach the member state concerned must have "manifestly and gravely disregarded the limits on its discretion."[1699] The ECJ then went on to stipulate the factors which a national court must take into account when assessing whether or not there was a manifest and grave disregard by the member state stating:

> "The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law.
>
> On any view a breach of Community law will clearly be sufficiently serious if it persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case law of the Court on the matter from which it is clear that the conduct in question constituted an infringement." [1700]

When the *Factortame* case[1701] was returned to the UK national court, the court found that the adoption by the UK of legislation which is contrary to clear rules of EU law was sufficiently serious to give rise to liability.

In a subsequent case, *R v HM Treasury, ex parte British Telecommunications plc*[1702], concerning the incorrect implementation of a directive by the UK, a situation in which a member state does not enjoy much discretion, the ECJ re-stated the three conditions for

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[1699] Ibid para 55.
[1700] Ibid para 56-57.
[1701] *R v Secretary of State for Transport ex parte Factortame Ltd* (No 2) [1999] 3 WLR 1062.
[1702] Case C-392/93.

liability[1703]. It stated that although it was a question for the national court to determine whether a breach was sufficiently serious, in this case it had all the necessary facts and thus could advise the national court on the applicability of the conditions[1704]. The ECJ then held that one of the relevant factors which was the clarity and precision of the rule breached was not satisfied in the case. The directive in question was imprecisely worded and was capable of the interpretation given to it by the UK. This interpretation was shared by other member states and it "was not manifestly contrary to the wording of the directive or the objective pursued by it."[1705] In addition, there was no ECJ case law on the point and the Commission had not questioned the UK's implementing legislation[1706]. The Court therefore found that the breach by the UK was not sufficiently serious.

4.9.5.2 Executive acts

The ECJ has also held that the conditions for state liability remain the same even in cases involving executive acts as opposed to legislative acts of a member state. In *R v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd*[1707], the Ministry had refused licences for the export of livestock to Spain for slaughter because it was of the view that Spain was acting contrary to Directive 74/557 which concerned the stunning of animals before slaughter. This was an executive act, but ECJ held that the refusal by the Ministry constituted a quantitative restriction which was contrary to Article 35 (former 29 EC Treaty) of the TFEU and which could not be justified under Article 36 (former 30 EC Treaty) of the TFEU. The Court reiterated the conditions for determining sufficiently serious breach laid down in the *Brasserie du Pecheur* and *Factortame* cases with a view to ensuring a common standard for liability throughout the EU[1708]. The Court, however, acknowledged that the concept of "sufficiently serious breach" will vary depending upon the facts of each case. In the case it said:

[1703] Ibid para 39.
[1704] Ibid para 41.
[1705] Ibid para 43.
[1706] Ibid para 44.
[1707] Case C-5/94.
[1708] Ibid para 25.

> "…..where, at the time when it committed the infringement, the member state in question was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach."[1709]

4.9.5.3 Judicial acts

Could a member state be liable for breach of EU law by its national courts or tribunals? Under normal circumstances member states are liable for such breaches in exceptional cases only. In the EU, the *Kobler* [1710]concerned that situation. The case concerned a German national who had worked as an ordinary professor in an Austrian university for ten years. He applied for a special length-of-service increment which was normally paid to professors with fifteen years experience exclusively at Austrian universities, arguing that he had completed the requisite length of service, if the duration of his service in universities of other member states of the EU was taken into account. After the Austrian national court had referred the case on this point to the ECJ, it took account of the judgment in *Schoning-Kougebetopoulou*[1711]. In that case the ECJ had held that the provisions of EU law on freedom of movement for workers within the EU precluded a clause in a collective agreement which applied to the public service of a member state. The clause provided for promotion on grounds of seniority for employees of that service after eight years' employment in a salary group determined by that agreement, without taking account of previous periods of comparable employment completed in the public service of another member state. The Austrian court then withdrew the question it had referred for a preliminary ruling and, without referring a second question to the ECJ, confirmed that the refusal of the application (for the length of service increment) of the person was justified on the ground that the special length-of-service increment was a loyalty bonus which objectively justified a derogation from the EU law provisions on

[1709] Ibid para 28.
[1710] Case C-224/01.
[1711] Case C-15/96.

freedom of movement for workers. Kobler then brought an action for damages before the referring court for breach of EU law.

The matter was referred to the ECJ for a preliminary ruling. The ECJ confirmed that the principle stated in the *Brasserie du Pecheur* and *Factortame* cases that member states are obliged to make good damage caused to individuals by infringements of EU law for which they are responsible, applies in cases where the alleged infringement stems from a decision of a court adjudicating at last instance where the rule of EU law infringed is intended to confer rights on individuals, the breach is sufficiently serious and there is a direct causal link between that breach and the loss or damage sustained by the injured party[1712]. The Court made it clear that, as regards the second condition, in order to determine whether the infringement is sufficiently serious when it stems from a decision of a court, the competent national court, taking into account the specific nature of the judicial function, must determine whether the that infringement was manifest[1713].

Finally, the Court held, it is for each member state to designate the court competent to determine disputes relating to reparation[1714]. In the instant case, the Court noted that while generally it was for the national court to determine whether a breach was sufficiently serious, in the case it had sufficient material before it to determine the question[1715]. It thus held that as regards the existence of a serious breach, the infringement by the Austrian court did not have the requisite manifest character for liability under EU law[1716]. This was because EU law did not expressly cover the point of law at issue and so, there was no ECJ case law on the point and the reply was not obvious[1717]. Secondly, the infringement was not intentional but was a result of an incorrect reading of a judgment of the Court[1718]. The Court further stated that in a case where the infringement concerns a decision of a court of last instance, in order to establish that the infringement was sufficiently serious, it must be shown that the

[1712] *Kobler* case op cit para 59.
[1713] Ibid.
[1714] Ibid.
[1715] Ibid para 101.
[1716] Ibid para 124.
[1717] Ibid para 122.
[1718] Ibid para 123.

infringement was manifest[1719] which is an onerous task thus affording national courts some degree of protection. In the SADC context I opine that the purported distinction between legislative, executive and judicial acts for purposes of state liability for unlawful acts ought to be avoided. This could lead to unnecessary legalism at the expense of ensuring that people derive benefits which are conferred by the Treaty or where appropriate, relevant protocols. The sole criterion should be whether the breach of SADC law is "sufficiently serious" to warrant liability irrespective of the nature of the act in issue.

4.9.5.4 Conclusion

The decisions of the ECJ discussed above concerning the approach of the ECJ to the liability of member states of the EU in relation to legislative, executive and judicial acts of organs of the states can equally be applied in the SADC context. We have observed in Chapter 2 that despite the absence in the SADC law of an express provision which renders either SADC institutions or member states liable for unlawful acts in breach of SADC law, it is possible that the Tribunal can find such liability on the basis of general principles of international law, or of the principles of law common to the laws of the member states. If such approach is adopted, the Tribunal would be well advised to consider the principles stated above. The previous approach of the ECJ of setting different criteria for the liability of EU institutions on the one hand and the liability of member states on the other ought to be avoided as it may create two different standards on the same mater: the application of SADC law. That situation is undesirable.

4.10 EU substantive law: Free movement of goods

4.10.1 Introduction

[1719] Ibid para 126.

There are two key matters which are critical to the establishment of a common market in the EU and these are the free movement of goods and the free movement of workers. We have noted that in the SADC context there is provision in the Treaty for SADC to develop policies aimed at the progressive elimination of obstacles to the free movement of capital, labour, goods and services and people generally among member states[1720]. In relation to the free movement of goods, SADC has developed the SADC Trade Protocol which was discussed in Chapter 2. In respect of the free movement of capital and labour SADC has not yet adopted any legal instrument governing such movement while, in relation to services, the Trade Protocol requires that SADC member states liberalise trade in services in line with the WTO's General Agreement on Trade in Services[1721]. Currently it is only in the area of trade that SADC has made some advances and the free trade area envisaged by the Trade Protocol became operational as from 2009[1722].

The TFEU contains provisions on the free movement of goods[1723], workers[1724], services[1725] and capital[1726] and the ECJ has developed a vast body of case law on the interpretation of those provisions. However, for purposes of this study I consider only the provisions on free movement of goods, an area where SADC law has advanced to the point of implementation. The purpose of considering these provisions is to demonstrate how the ECJ has contributed to the attainment of the objectives of the EU through creative interpretation of the law in that area. EU substantive law now covers a wide range of issues ranging from social, political and economic issues to matters of the environment. It is not possible in a limited study such as this to cover all these areas thus I have selected the areas where the ECJ has been very active in the interpretation of EU law and where SADC activity is likely to be visible in the very near future and this the area of the free movement of goods.

[1720] Article 5.2(d) Treaty.
[1721] Article 23 Trade Protocol.
[1722] The SADC Free Trade Area was launched by the SADC 28th Summit on 17 August 2008. Information on the FTA can be accessed on the website www.sadc.int/fta (visited 09/02/10).
[1723] Articles 28-36 TFEU.
[1724] Ibid Articles 45-48.
[1725] Ibid Articles 56-62.
[1726] Ibid Articles 63-66.

4.10.2 Free movement of goods

From its inception the EEC (later EC and now EU) was principally concerned with the establishment of an internal market for all member states of the EU. This market was to be characterized by the abolition, as between member states, of obstacles to the free movement of goods, persons, services and capital. This necessarily involved two main activities: the prohibition, as between member states, of customs duties and quantitative restrictions on the import and export of goods, and all other equivalent measures, and the establishment of "a customs union which shall cover all trade in goods and which shall involve the prohibition between member states of customs duties on imports and exports and all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries"[1727]. The objective was not only to create an internal free trade area within the EU where there are no duties imposed at internal borders, but also a customs union where there is a common external tariff. Goods entering the EU are subject to the same external tariff, irrespective of where they enter it. Once goods from third countries have been subjected to the appropriate duties on crossing the external border of the EU, they are regarded as being in "free circulation" and are to be treated as any other goods originating in the EU. The whole objective of the common market is to benefit the producers in the form of a larger market (the whole EU) and the consumer who is given a wider variety of goods at competitive prices.

These objectives of the EU can be contrasted to those of SADC. We have noted that one of the activities of SADC in pursuance of its objectives is the development of policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services and people generally[1728]. This principle is expanded on in the Trade Protocol which, as we have noted, sets out the actual activities to be carried in attaining a free trade area in the region. The Trade Protocol goes as far as facilitating the free movement of goods by the gradual removal of tariffs and non-tariff barriers which hinder intra-SADC trade. To this end, the Trade Protocol resembles the TFEU but the

[1727] Ibid Article 28.
[1728] Article 5.2(d) Treaty.

Trade Protocol does not go further to establish a customs union as in the EU. However, this is not an alien concept in Southern Africa as there already exists a customs union in the form of the Southern African Customs Union (SACU) comprising some of the SADC member states[1729]. It is not thus far fetched to imagine that after the creation of a free trade area in SADC, the next move will be the establishment of a customs union. To this end the experience of the EU in the development of their internal market and the customs union, especially the active role of the ECJ in ensuring that the EU Treaty objectives are attained, will be of great use to SADC and the Tribunal.

Before moving on to the relevant TFEU provisions, I must note that tariff barriers between member states of the EU have since long been removed[1730] and so have border controls[1731]. The EU is currently grappling with the issue of trying to create a single undivided market in products, goods and services (common market) for the whole EU. This has not been easy to achieve largely because of the imposition, by member states, of not so obvious barriers to the free movement of goods in the form of different product and other standards, and many national measures aimed at consumer and environmental protection. While these different standards have created barriers to the attainment of a common market, the EU itself is busy creating EU-wide standards through harmonizing measures. Until common standards are reached, producers will have to rely on Articles 34 and 35 of the TFEU (which prohibit quantitative restrictions and equivalent measures on imports and exports) and the intervention of the ECJ to ensure that national rules do not have the effect of excluding their products from the market.

Another problematic area is the area of taxation where the rates are not standard throughout the EU. The TFEU prohibits any form of direct or indirect discriminatory taxation on products from other member states and the imposition of internal taxation in

[1729] See Chap 2 for discussion on SACU which appears to be the oldest customs union in the world having been established in 1910 and consists of five states which are all members of SADC.
[1730] Customs duties on imports between member states were to be abolished by the end of the transitional period which was 31 December 1969(former Article 13 of the EC Treaty) and customs duties and charges on exports were to be eliminated by 31 December 1961(former Article 16 EC Treaty).
[1731] Border controls on goods were removed by the Single European Act of 1986.

such a way as to afford indirect protection to other products[1732]. For its part, the Trade Protocol deals with the issue of taxation in two respects. First, Article 4.5 allows member states to impose 'across-the-board internal charges' which might include taxation. Secondly, Article 11 Trade Protocol obliges member states to grant unconditionally to goods traded within SADC, the same treatment given to national goods. This provision effectively prohibits discriminatory internal taxation as envisaged in Article 110 of the TFEU. The problems which have been encountered by the EU and the role of the ECJ in the implementation of the TFEU provisions on prohibition of customs duties and charges having equivalent effect (Articles 28 and 30 of the TFEU), and prohibition on quantitative restrictions on imports and exports and measures having equivalent effect (Articles 34 and 35 of the TFEU) are all considered in this section. The provisions on taxation, though important, are not considered owing to the limited nature of this study.

4.10.3 Elimination of customs duties and other fiscal charges

Before the Treaty of Amsterdam came into force in 1999, the TFEU provisions regulating customs duties and other charges were former Articles 9 to 17. Article 9 (which is now Article 28 of the TFEU) of the EC Treaty provided that the EU was based on a customs union involving the prohibition between member states of customs duties and charges having equivalent effect and the adoption of a common customs tariff in relation to third states. Article 12 of the EC Treaty prohibited new customs duties from being introduced (compare Article 4.4 of the Trade Protocol which prohibits the raising of existing import duties). Article 13 of the EC Treaty required existing customs duties on imports to be phased out by December 1969, (compare Articles 3.1(b) and 4.1 of the Trade Protocol which require elimination of barriers to trade including import duties within eight years of the Trade Protocol coming into effect), Article 16 of the EC Treaty required abolition of existing customs duties on exports by 31 December 1961 (compare Articles 3.1(b) and 5.1 of the Trade Protocol which provide for the elimination of barriers to trade within eight years of the Trade Protocol coming into effect and prohibit the application of export

[1732] Article 110 TFEU prohibits discriminatory internal taxation while Article 113 TFEU empowers the EU to harmonise rates of indirect taxation in the EU.

duties on goods). Articles 13 and 16 of the EC Treaty have since been repealed, while Article 12 of the EC Treaty was amended to cover all situations and is now the current Article 30 of the TFEU which prohibits, as between member states, customs duties on both imports and exports and charges having equivalent effect. The old Article 12 of the EC Treaty was held by the ECJ to be directly effective and the same should be the case with the new Article 30 of the TFEU [1733]. Case law developed by the ECJ on both the old and new provisions on customs duties is still valid and will now be considered.

4.10.3.1 Meaning of term "goods"

The term 'goods' is not defined in the TFEU and neither is it in the Trade Protocol. It was then left to the ECJ to determine the scope of the term and it did so in the case *Commission v Italy*[1734] and the definition could prove to be of use to the Tribunal.

Italy imposed a tax on the export of articles of an "artistic, historical, archeological or ethnographic nature". The Commission instituted infringement proceedings against Italy pursuant to Article 258 of the TFEU alleging that this tax was in breach of the former Article 16 of the EC Treaty which required the abolition of duties and equivalent charges on exports by 31 December 1961. Italy argued, among other matters, that the tax was being levied on "cultural articles" which were being exported and such articles should not be regarded as goods. The argument was rejected by the Court which held as follows:

> "Under Article 23 (now 28 TFEU) of the Treaty the Community is based on a customs union 'which shall cover all trade in goods'. By goods, within the meaning of that provision, there must be understood products which can be valued in money and which are capable, as such, of forming the subject of commercial transaction.

[1733] *Van Gend en Loos* case op cit.
[1734] Case 7/68 [1969] ECR 423.

> The articles covered by the Italian law, whatever may be the characteristics which distinguish them from other types of merchandise, nevertheless resemble the latter, inasmuch as they can be valued in money and so be the subject of commercial transactions. That view corresponds with the scheme of Italian law itself, which fixes the tax in question in proportion to the value of the articles concerned."[1735]

The definition of goods given by the ECJ is wide enough to capture anything that can be valued in monetary terms. However, in a later case the ECJ distinguished "goods" from "services". The *Jagerskiod v Gustafsson* case[1736] concerned the question whether the grant of fishing rights and issuing of fishing permits constituted "goods" within the meaning of the TFEU. The Court held that the granting of fishing rights and the issuing of permits could be valued in money and were capable of forming the subject of commercial transactions[1737]. However, these were not a tangible product as they constituted an intangible benefit even if the rights were set out in a document[1738]. Therefore, the rights could not be considered as "goods" but could constitute a "service" covered by Article 56 of the TFEU[1739].

Articles 28 and 29 of the TFEU deal with goods originating from third states which are considered to be in "free circulation" in the EU. This means that once the goods have lawfully entered the EU (i.e. all import formalities have been completed and duties paid) through any of the member states they are to be treated in the same way as goods originating from the EU[1740]. This provision is necessary having regard to the fact that the EU is a customs union with a common external customs tariff. In the case of SADC there is understandably no such provision because there is no customs union as yet. Thus goods which are from third states may be subject to import duties in each of the member states despite that they are already in circulation in SADC.

[1735] Ibid 428-429.
[1736] Case C-97/98.
[1737] Ibid para 34.
[1738] Ibid paras 36-38.
[1739] Ibid para 39.
[1740] Article 33.3 AEC Treaty describes goods in free circulation along the same lines as Articles 28 and 29.

4.10.3.2 Relevance of effect not purpose

The ECJ has established the principle that the application of Article 30 of the TFEU to a particular case depends on the effect of the duty or charge which is relevant, and not its purpose which is irrelevant. Thus the Court is not concerned with the reason why the member state imposed the duty but its effect on the free movement of goods within the EU. In *Commission v Italy*[1741] cited above, another argument advanced by Italy was that the purpose of the tax was not to raise revenue, but was to protect the artistic heritage of the country. This argument was again rejected by the ECJ which stated that:

> "Article 25 (now 30 TFEU) prohibits the collection in dealings between member states of any customs duty on exports and any charge having equivalent effect, that is to say, any charge which, by altering the price of an article exported, has the same restrictive effect on the free circulation of that article as a customs duty. This provision makes no distinction based on the purpose of the duties and charges the abolition of which it requires."[1742]

The reasoning of the ECJ was pragmatic: it was intended to ensure that all fiscal barriers which would otherwise hinder the free movement of goods were removed from the borders of members states. If this were not the case the impact of Articles 28 to 30 (former 23 to 25 EC Treaty) of the TFEU on the free movement of goods would have been weakened. The argument that the imposition of an export tax was for a legitimate purpose if accepted by the Court would have required the Court to adjudicate on what other legitimate reasons were sufficient to take them outside the TFEU. In this regard the stated Court in *Commission v Italy*[1743]:

> "…the purpose of the abolition of customs barriers is not merely to eliminate their protective nature, as the Treaty sought on the contrary to give general scope and

[1741] Case 7/68 [1969] ECR 423.
[1742] Ibid 429 para 2.
[1743] Case 24/68.

> effect to the rule on elimination of customs duties and charges having equivalent effect, in order to ensure the free movement of goods.
>
> It follows from the system as a whole and from the general and absolute nature of the prohibition on any customs duty applicable to goods moving between member states that customs duties are prohibited independently of any consideration of the purpose for which they were introduced and the destination of the revenue obtained therefrom.
>
> The justification for this prohibition is based on the fact that any pecuniary charge, however small, imposed on goods by reason of the fact that they cross a frontier constitute an obstacle to the movement of such goods."[1744]

By placing emphasis on the effect rather than the purpose of a national measure by a member state, the ECJ was aiming at ensuring that the broader objectives of the EU Treaty namely, the elimination of any fiscal obstacles to the free movement of goods, were attained. The Tribunal when faced with similar issue might adopt a similar approach and there is much to be said of that approach.

4.10.3.3 Charges having an equivalent effect

The TFEU distinguishes between customs duties on the one hand and charges having an equivalent effect (CEEs) on the other. The Trade Protocol, however, makes reference to "import duties" which are then defined as meaning "customs duties or charges of equivalent effect imposed on, or in connection with, the importation of goods consigned from any Member State to a consignee in another Member State."[1745] Despite this difference in terminology, it is submitted that the concepts are the same in both provisions. The essence here is that we are talking about "customs duties" or "charges of,

[1744] Ibid paras 6-7.
[1745] Article 1 Trade Protocol.

or having equivalent effect" in both cases and the case law which has been developed by the ECJ in relation to both concepts is pertinent.

An issue which has arisen before the ECJ is what amounts to "charges having an equivalent effect"? The ECJ considered the scope of CEEs in *Commission v Italy*[1746]. Italy imposed a levy on goods which were exported to other member states to finance the collecting of statistical data relating to trade patterns. The Commission challenged the legality of such a charge pursuant to its powers under Article 258 of the TFEU. The ECJ reasoned that the extension of the prohibition on customs duties to CEEs was intended to supplement the prohibition against obstacles to trade created by customs duties hence the two concepts are complementary and aimed at preventing the imposition of any pecuniary charge on goods circulating in the EU by reason of the fact that they cross a national border[1747]. The Court stated:

> "…..Consequently, any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense, constitutes a charge having equivalent effect within the meaning of Articles 23 and 25 (previous 9, 12, 12 and 16) of the EC Treaty, even if it is imposed for the benefit of the State, is not discriminatory or protective in effect and if the product on which the charge is imposed is not in competition with any domestic product."[1748]

The thrust of the judgment is that the TFEU prohibits customs duties in the strict sense comprising a tax or levy which is imposed simply because of the fact that the goods cross a frontier and any other charges levied because the goods cross a frontier. The Court also gave a very broad definition of what constitutes CEEs, and that definition may be a useful guide to the Tribunal when confronted with a similar problem. The Court has strictly interpreted the provisions on customs duties and CEEs allowing very few exceptions, but

[1746] Case 24/68.
[1747] Ibid para 8.
[1748] Ibid para 9.

are there any exceptions? We noted that the Trade Protocol contains an exception in cases where the fee or charge is levied as costs commensurate with a service rendered to the importer[1749]. Even though the ECJ has allowed such exception, its approach to the whole question of CEEs is still pertinent to the future work of the Tribunal.

4.10.3.4 Provision of a service

The ECJ seems to have accepted the principle that where a charge imposed is merely payment for a service which the member state rendered directly to the importer, then the charge should not be regarded as a CEE provided the charge levied is proportional to the service provided. The exception in relation to provision of a service is also recognized in the Trade Protocol, Article 4.6 of which provides that the article shall not apply to fees and other similar charges commensurate with the costs of any services rendered.

The above provision of the Trade Protocol, like the principle developed by the ECJ, places emphasis on two aspects namely the provision of a service and proportionality of the charges to the service rendered. The ECJ has dealt with both issues and the cases and reasoning used by the Court could be of use to the Tribunal.

The principles noted above were applied by the ECJ in *Commission v Belgium* [1750]. EU rules allowed imported goods to be given customs clearance at public warehouses located inside a member state rather than at the frontier. Belgium levied storage charges on goods which were stored temporarily at such warehouses at the request of the trader concerned. Charges were also levied on imported goods which simply passed through the warehouse for customs clearance and were not in fact stored there. The Commission instituted infringement proceedings against Belgium, arguing that these charges were in breach of Articles 28 and 30 (former 23 and 25 EC Treaty) of the TFEU. The Court started off by recalling its previous case law on the point stating that any pecuniary charge, however

[1749] Article 4.6 Trade Protocol.
[1750] Case 132/82.

small and whatever it is called, which is imposed unilaterally on goods simply because they cross a frontier is a CEE, even if not levied by the state[1751]. The Court then said:

> "….The position is different only if the charge is question is the consideration for a service actually rendered to the importer and is an amount commensurate with that service, when the charge concerned, as in this case, is payable exclusively on imported goods."[1752]

The Court then made a distinction between the two types of charges levied by Belgium. On the first charge it found that the "..placing of goods in temporary storage in the special stores of public warehouses clearly represents a service rendered to the traders."[1753] In addition, the Court found the temporary storage of such goods can only be done at the request of the trader and ensures their storage without payment of duty until the trader decides how to deal with them[1754]. Thus the payment for the temporary storage of the goods was justified in respect of the first charge. In relation to the second charge, the Court held that the charges amounted to a CEE which was prohibited by Articles 28 and 30 of the TFEU. It rejected the contention by Belgium that it was open to the importer to avoid payment of the disputed charges by choosing to have his goods cleared through customs at the frontier which service is free[1755]. In addition, Belgium had argued that by using a public warehouse, the importer is enabled to have the goods cleared through customs near the places for which his products are bound and he is therefore relieved of the necessity of himself either having at his disposal premises suitable for their storage, or using private premises which are more expensive than public warehouses. The Court rejected these contentions saying:

> "..It follows from the foregoing, that when payment of storage charges is demanded solely in connection with the completion of customs formalities, it

[1751] Ibid para 8.
[1752] Ibid para 8.
[1753] Ibid para 10.
[1754] Ibid.
[1755] Ibid para 13.

> cannot be regarded as the consideration for service actually rendered to the importer."[1756]

Any argument that a charge is in consideration for a service actually rendered to the importer has been closely scrutinized by the ECJ. In many of its decisions the Court has shown a marked reluctance to accept that a particular charge is a fee falling outside Article 30 of the TFEU. In *Ford Espania v Spain*[1757] the Court stated that even if a specific benefit to the person or body paying the charge can be identified, the state imposing the charge will still infringe Article 30 of the TFEU unless it can be shown that the sum demanded is proportionate to the cost of the benefit[1758]. In that case, Spain demanded from Ford, 0.165 per cent of the declared value of cars and other goods imported into Spain. Spain claimed that the sum related to services rendered in connection with clearing the goods through customs. The Court held that even if the specific benefit conferred on Ford could be shown, the flat-rate way in which the charge was calculated was evidently not fixed according to the cost of the alleged service and was thus in breach of Article 30 of the TFEU[1759].

Where the service was not rendered directly to the importers or exporters because it is beneficial to the economy as whole, the Court has held that it falls foul of Article 30 of the TFEU. In *Commission v Italy*[1760] the Italian Government argued that a charge which was imposed at the border constituted consideration for the collection of statistical information. It was argued that the information would provide importers with trade patterns and therefore place them in a better competitive position in the Italian market. The Court rejected this argument stating:

> "..The statistical information in question is beneficial to the economy as a whole and *inter alia* to the relevant administrative authorities….Even if the competitive position of importers and exporters were to be particularly improved as a result,

[1756] Ibid para 14.
[1757] Case 170/88.
[1758] Ibid para 1.
[1759] Ibid.
[1760] Case 24/68.

> the statistics still constitute an advantage so general, and so difficult to assess, that the disputed charge cannot be regarded as the consideration for a specific benefit actually conferred."[1761]

The Court then ruled that the charge was contrary to Article 30 of the TFEU[1762].

Even where the service is more directly to the importer or exporter, the Court has still shown reluctance to rule that the charge is consideration for a service rendered such as in *Bresciani v Administrazione Italiane delle Finanze*[1763]. The Italian authorities imposed a charge for compulsory veterinary and public health inspections carried out on importation of raw cowhides. The case was referred by the domestic court under Article 267 of the TFEU 234 for a preliminary ruling on whether the charge for the inspection constituted a CEE. After discussing the facts of the case and the relevant principles already established by the ECJ in connection with customs duties and CEEs[1764], the Court stated as follows:

> "….Nor, in determining the effects of the duty on the free movement of goods, is it of any importance that a duty of the type at issue is proportionate to the costs of a compulsory public health inspection carried out on entry of the goods. The activity of the administration of the State intended to maintain a public health inspection system imposed in the general interest cannot be regarded as a service rendered to the importer such as to justify the imposition of a pecuniary charge. If, accordingly, public health inspections are still justified at the end of the transitional period, the costs which they occasion must be met by the general public which, as a whole, benefits from the free movement of Community goods."[1765]

Thus, where a charge is imposed for a public inspection carried out for the benefit of the general public, the service is not rendered directly to the importer. The service is for the

[1761] Ibid para 16.
[1762] Ibid para 17.
[1763] Case 87/75.
[1764] Ibid paras 6-9.
[1765] Ibid para 10.

benefit of the general public hence the general public must meet the costs of the service. The same applies even where EU law itself permits an inspection to be done by the state, the national authorities cannot recover the costs from the importers[1766].

But where EU law makes it mandatory that an inspection be carried out the costs of such inspection may be recovered and are not caught by Article 30 of the TFEU as was held by the ECJ in *Commission v Germany*[1767]. German regional authorities charged certain fees on live animals when they were imported into Germany. These charges were to cover the costs of inspections undertaken pursuant to EU Directive 81/389. The question before the ECJ was whether such charges constituted CEEs which were prohibited by Article 30 of the TFEU. The Court, after reviewing its previous case law, held as follows:

> "…However, the Court has held that such a charge escapes that classification if it relates to a general system of internal dues applied systematically and in accordance with the same criteria to domestic products and imported goods alike….if it constitutes payment for a service in fact rendered to the economic operator of a sum in proportion to the service…,or again, subject to certain conditions, if it attaches to inspections carried out to fulfill obligations imposed by Community law…….Since the contested fee was charged in connection with inspections carried out pursuant to Community provision, it should be noted that according to the case law of the Court ……such fees may not be classified as charges having an equivalent effect to a customs duty if the following conditions are satisfied:
>
> (a) they do not exceed the actual costs of the inspections in connection with which they are charged;
> (b) the inspections in question are obligatory and uniform for all products concerned in the Community;

[1766] *Commission v Belgium* Case 314/82.
[1767] Case 18/87.

(c) they are prescribed by Community law in the general interest of the Community;

(d) they promote the free movement of goods, in particular by neutralizing obstacles which could arise from unilateral measures of inspection adopted in accordance with Article 36 (30 EC Treaty) of the TFEU."[1768]

The Court then found that the contested fee in the case at hand satisfied the conditions hence it could be levied by the German authorities. These conditions which are ostensibly very stringent have been applied in subsequent cases such as *Bauhuis v Netherlands*[1769] which concerned a challenge to a fee imposed by the Dutch Government for veterinary inspections of pigs imported into the Netherlands. Some of the checks were carried out to meet rules of national law while others were made to meet the requirements of an EU directive. The Court held that where such checks are mandatory under EU law and are part of the process of ensuring the free movement of goods, they are permitted under Article 30 of the TFEU provided the fee charged is proportionate to the actual cost of the inspection[1770].

4.10.4 Elimination of quantitative restrictions and measures having equivalent effect[1771]

The elimination of any restrictions on the free movement of goods is critical to the aim of the EU which is the creation of an internal (common) market. Article 34 (former 28 EC Treaty) of the TFEU provides that "quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between member states". The prohibition on restrictions on imports is mirrored in a similarly worded Article 35 (former 29 EC Treaty) of the TFEU which prohibits restrictions on exports. Both these prohibitions are qualified by the right of member states to impose limited restrictions on trade if they can justify them under the exceptions laid down in Article 36 (former 30 EC Treaty) of the TFEU or

[1768] Ibid paras 6 and 8.
[1769] Case 46/76.
[1770] Ibid para 31.
[1771] See Fairhurst op cit Chap 18.

in some cases under the so called *Cassis* rule of reason which is discussed later. The idea behind the provisions is to balance the competing interest of free trade within the EU and protecting the interests of member states where they feel matters of national interest, such as security, may be compromised. The EU is in the process of harmonizing national standards of consumer and environmental protection so that in areas so harmonized, the will be no room for national exceptions to the free movement of goods.

Many cases which have come before the ECJ have involved a consideration of whether national measures infringe the provisions of the TFEU and/or fall within the exceptions under Article 36 (former 30 EC Treaty) of the TFEU. Articles 34 and 35 (former 28 and 29 EC Treaty) of the TFEU to some extent resemble Articles 28 and 30 (former 23 and 25 EC Treaty) of the TFEU – which, as we have noted, prohibit imposition of customs duties and charges having equivalent effect on imports and exports. Similarly, Articles 34 and 35 of the TFEU are aimed at national quantitative restrictions on imports and exports and other measures having equivalent effect to quantitative restrictions. The two articles are directly effective and a member breaching them can be liable for damages under the *Francovich* doctrine, if the requirements for such liability are met. The wording of the two articles appears to suggest that they are directed at states and thus cannot be used by private persons against each other[1772]. The prohibitions apply to all kinds of products including agricultural produce, originating in member states and from third countries but in free circulation in the EU. As with customs duties, the term "goods" has been given a broad meaning by the Court and covers "manufactured material objects"[1773] which include plants, vegetables, fruit and livestock, animal products[1774] and even generated electricity[1775]. But items such as coins and banknotes are not covered as their transfer is subject to the rules on transfer of capital[1776].

[1772] Both articles end with the phrase "shall be prohibited between Member states" implying that the measures in question can only be those taken by states and not private persons.
[1773] *Cinetheque* Cases 60 and 61/84.
[1774] *Societe Civile Agricole* Case C-323/93.
[1775] *Commission v Netherlands* Case C-157/94.
[1776] *Aldo Bordessa and Other* Joined Cases C-358 and 416/93.

The TFEU provisions can be compared to the relevant provisions of the Trade Protocol which are Articles 6 to 11. We have noted that Article 6 of the Trade Protocol directs member states to adopt policies and implement measures to eliminate or refrain from imposing non-tariff barriers to trade within SADC. Non-tariff barriers to trade are defined as barriers to trade, other than import and export duties. Articles 7 and 8 of the Trade Protocol are more specific in that they deal specifically with prohibitions on quantitative restrictions on both imports and exports except under the exceptions provided in the Trade Protocol[1777]. Member states are prohibited from applying any new quantitative restrictions on both imports and exports and, in the case of imports, member states are required to phase out existing restrictions on imports of goods originating in member states. The term "quantitative restriction", which is not defined in the TFEU is, however, defined in the Trade Protocol as "prohibitions or restrictions on imports into, or exports from a member state whether made effective through quotas, import licences, foreign currency allocation practices or other measures and requirements restricting imports or exports[1778]". This definition is not exhaustive and leaves it open, it is submitted, to the Tribunal to determine on a case by case basis whether a particular national measure falls within the definition or not. This is so because the definition simply gives examples of what amounts to quantitative restrictions and without limiting itself goes on to include the general phrase "or other measures and requirements restricting imports or exports". It is submitted that the effect of this provision is the same as "other measures having equivalent effect to quantitative restrictions" referred to in Articles 34 and 35 (former 28 and 29 EC Treaty) of the TFEU. It follows that since the scope of measures amounting to quantitative restrictions referred to in the Trade Protocol is not exhaustive concrete examples of what have been held to amount to quantitative restrictions or measures having equivalent effect by the ECJ will still be relevant to the work of the Tribunal in this area.

In this section I therefore consider the case law and principles developed by the ECJ on what amounts to quantitative restrictions which are prohibited as well as measures having

[1777] Article 9 Trade Protocol.
[1778] Article 1 Trade Protocol.

equivalent effect (MEEs). In addition, in this section I also consider the case law developed by the ECJ in relation to the exceptions contained in Article 36 (former 30 EC Treaty) of the TFEU and the *Cassis* principle of reason. These provisions are contrasted with the exceptions in Article 9 of the Trade Protocol as well as the security exception in Article 10 of the Trade Protocol. I consider the topic under the following heads: nature of measures, quantitative restrictions, measures having equivalent effect, justifications under Article 36 (former 30 EC Treaty) of the TFEU and the *Cassis* rule of reason.

4.10.4.1 Nature of measures

Articles 34 and 35 of the TFEU are directed at governments of states and thus prohibit measures adopted by the state and not by private individuals. These provisions can be compared to Articles 28 and 30 of the TFEU which cover all charges which are payable only because goods cross a frontier whatever their purpose. The Court has also held that Article 34 of the TFEU is binding on institutions of the EU, and that it would be prepared to strike down a Council regulation if it were satisfied that the regulation imposed a burden which was disproportional to the free movement of goods[1779]. Articles 34 and 35 of the TFEU form part of a larger strategy by the EU to free-up trade and to prevent member states from adopting hidden protectionist policies aimed at frustrating the free movement of goods. The same strategy includes the regulation of state monopolies under Article 37 (former 31 EC Treaty) of the TFEU and the granting of state aid under Articles 107-109 (former EC Treaty) of the TFEU. Under Articles 34 and 35 of the TFEU measures by private persons are not considered state measures and thus fall outside the scope of those articles.

What exactly constitutes "state measures" was considered by the ECJ in *Commission v Ireland*[1780]. The Irish government introduced a "Buy Irish" campaign. In 1978, the Irish Government introduced a three-year programme to help promote Irish products. The campaign was launched by a speech of the Irish Minister of Industry, Commerce and

[1779] *Rene Kieffer and Romain Thill* Case C-114/96.
[1780] Case 249/81.

Energy. A number of measures were adopted, of which two were carried out: the encouragement of a "Buy Irish" symbol for goods made in Ireland, and the organisation of a publicity campaign by the Irish Council in favour of Irish products designed to encourage consumers to buy Irish products. In an action brought by the Commission under Article 258 of the TFEU for breach of Article 30 of the TFEU, Ireland defended itself by arguing that it never adopted "measures" for the purposes of Article 30 of the TFEU; it was the Irish Council which did so. It further argued that any financial aid granted to the Irish Council should be considered under Articles 107-108 (former 87-88 EC Treaty) of the TFEU (state aids to industries) and not under Article 30 of the TFEU. The members of the Irish Council were appointed by the Irish Government and the Council was funded in proportions of 6:1 by government and private industry.

The question to be determined by the ECJ was whether or not the campaign constituted a measure undertaken by the state. The Court held that the Irish Council was part of the state because the Irish government appoints its members, grants it public subsidies, and defines the aims and broad outline of the campaign conducted by the Council to promote the sale and purchase of Irish goods[1781]. The Court also rejected the argument advanced by the Irish government that the prohibition imposed by Article 30 of the TFEU only applies to "measures" which must be construed to mean "binding provisions emanating from a public authority", and that no such measures had been adopted by the government which confined itself only to giving moral and financial aid to activities pursued by private persons[1782]. The Court stated that such a practice cannot escape the prohibition laid down in Article 30 of the TFEU solely because it is not based on decisions which are binding on undertakings[1783]. The Court further stated that even measures adopted by the government of a member state which do not have binding effect, may be capable of influencing the conduct of traders and consumers in that state and thus frustrating the aims of the EU[1784].

[1781] Ibid para 15.
[1782] Ibid para 21.
[1783] Ibid para 28.
[1784] Ibid.

The principles developed above were applied by the Court in *Apple and Pear Development Council v K. J. Lewis Ltd*[1785] where there was a statutory obligation on growers of fruit to pay a levy to the Development Council. The Court stated that a body such as the Development Council which is set up by the government of a member state and is financed by a charge imposed on growers cannot, under EU law, enjoy the same freedom as regards advertising enjoyed by producers themselves or producers' associations of a voluntary character[1786].

Similar reasoning was applied by the Court in *R v Pharmaceutical Society, ex parte API*[1787]. The Society was an independent body which had the responsibility for the regulation of standards among UK pharmacists. In order to practice as a pharmacist one had to register with the Society. In addition, the Society had certain statutory functions under the Pharmacy Act 1954 (UK). The Court held that the Society had a sufficient measure of state support or statutory underpinning to be a state entity for purposes of Article 34 of the TFEU[1788]. Thus a rule by the Society which required pharmacists to supply under prescription only a named branded drug was *prima facie* in breach of Article 34 of the TFEU.

While Articles 34 to 36 of the TFEU deal with state measures or measures by public bodies, private persons may also seek to exclude foreign competition. Articles 101 and 102 of the TFEU are designed to prevent national cartels and national monopolies from using private economic powers to exclude goods from other member states from the national markets. However, where the private body is granted a monopoly by the state which enables it to restrict importation of foreign goods into the national market, there may be an overlap between Articles 34 and 102 of the TFEU and in such cases the state may be liable for excluding foreign products in breach of Article 34 of the TFEU.

[1785] Case 222/82.
[1786] Ibid para 17.
[1787] Cases 266 & 267/87.
[1788] Ibid para 16.

The Trade Protocol requires member states to adopt policies and implement measures to eliminate all existing non-tariff barriers to intra-SADC trade, and to refrain from imposing any new non-tariff barriers to intra-SADC trade[1789]. On quantitative restrictions, the protocol specifically prohibits member states from applying new quantitative restrictions on imports and similarly prohibits member states from applying restrictions on exports[1790]. There is no doubt that measures adopted by a member state contrary to the provisions of the Trade Protocol can be held invalid by the Tribunal in the same way that the ECJ has done. What is doubtful, however, is whether the prohibition on imposition of quantitative restrictions would apply to private persons as well. For this to happen would require a bold move by the Tribunal which would have to disregard the clear wording of the provisions of the Trade Protocol which imposes obligations on member states. At the same time, it would not make much sense if private persons were allowed to apply quantitative restrictions which in effect hamper intra-SADC trade. In the EU, we have noted that the situation of private persons is covered by the TFEU provisions on competition and national monopolies. The Trade Protocol does not contain similar provisions, save that Article 25 of the Trade Protocol requires member states to implement measures within SADC that prohibit unfair business practices and promote competition. Thus it is left to the member states to regulate the activities of private persons whose activities may amount to imposition of quantitative restrictions. This situation is clearly undesirable as there may exist divergences in the measures adopted by the member states. A solution could be the adoption by SADC of common competition policies and measures which could then be applied by all member states.

It must also be noted here that, in the SADC context, some of the measures encountered in the EU could also fall under SADC's trade laws which are contained in the Trade Protocol. Article 16 of the Trade Protocol obliges member states to base their sanitary and phytosanitary measures on international standards, guidelines and recommendations, so as to harmonise sanitary and phytosanitary measures for agricultural and livestock production. In this regard member states may enter into consultations with the aim of

[1789] Article 6 Trade Protocol.
[1790] Articles 7 and 8 Trade Protocol.

reciprocal recognition of national measures in accordance with the WTO Agreement on the Application of Sanitary and Phytosanitary measures. Article 17 of the Trade Protocol deals with standards and technical regulations on trade and requires SADC member states to use international standards as the basis for their trade related measures except where such measures are not effective or appropriate to meet legitimate objectives. If a member state's standards-related measures conform to international standards then it is presumed that they do not create an unnecessary obstacle to trade. To this extent SADC member states have signed a Memorandum of Understanding on Standardisation, Quality Assurance, Accreditation and Metrology (SQAM) whose objective is to establish the formal framework in which the co-operation amongst the national institutions in SQAM shall take place in SADC. This framework is referred to in the memorandum as the SADC SQAM Programme. The objectives of the SADC SQAM Programme are the progressive elimination of technical barriers to trade among the member states and between SADC and other regional and international trading blocks, and the promotion of quality and of an infrastructure for quality in the member states. If a measure taken by a member state is in line with Articles 16 or 17 of the Trade Protocol then it does not become a quantitative restriction prohibited by Articles 7 or 8 of the Trade Protocol.

4.10.5 Quantitative restrictions

Although not defined in the TFEU, the concept of "quantitative restrictions" has not caused serious problems for the ECJ. In *Geddo v Ente Nazionale Risi*[1791] the ECJ described the concept as:

> "The prohibition on quantitative restrictions covers measures which amount to a total or partial restraint of, according to the circumstances, import, exports, or goods in transit."[1792]

[1791] Case 2/73.
[1792] Ibid para 7.

Thus the concept of quantitative restrictions includes an outright ban on imports or exports or the imposition of a quota, i.e. numerical restriction on the quantity of goods to be imported or exported. The concept is, however, not likely to present problems for the Tribunal because it is relatively straight-forward and examples of what amounts to quantitative restrictions are enumerated in the definition of quantitative restrictions contained in the Trade Protocol[1793]. The concept which is likely to present problems, is that of "other measures and requirements restricting imports or exports". As we shall see, the concept of "measures having equivalent effect" in the TFEU which is similar to the SADC concept, has presented numerous problems for the ECJ. The latter has developed a large number of principles based on the concept of "measures having equivalent effect" and these are considered in the ensuing sections.

4.10.6 Measures having equivalent effect to quantitative restrictions (MEEs)

*4.10.6.1 The **Dassonville** formula*

The scope of Article 34 of the TFEU in relation to MEEs and the definition (referred to as the *Dassonville f*ormula) of what constitutes an MEEs was considered in the case *Procureur du Roi v Dassonville*[1794].

A Belgian importer of Scotch whisky was prosecuted for selling whisky with false certificates of origin contrary to a law which required certificates of origin to be indicated on the containers. He had imported the whisky from France and it had been difficult to obtain the certificates from the producers. He argued that the Belgian law infringed Article 34 (former 28 EC Treaty) of the TFEU, in that it made the importation of whisky from anywhere other than the state of origin more difficult. The Belgian court referred the matter to the ECJ under Article 267 of the TFEU. The Court then defined MEEs as:

[1793] Article 1 Trade Protocol.
[1794] Case 8/74.

> "..All trading rules enacted by member states which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an equivalent effect to quantitative restrictions.
>
> Consequently, the requirements by a member state of a certificate of authenticity which is less easily obtainable by importers of an authentic product which has been put into free circulation in a regular manner in another member state than by importers of the same product coming directly from the country of origin constitutes a measure having an effect equivalent to a quantitative restriction as prohibited by the Treaty."[1795]

According to the Court, the crucial element in establishing the existence of an MEE is *its effect and not a discriminatory intent* on the part of the member state. This approach can be contrasted to customs duties and CEEs in which, as we have seen, emphasis is placed on the *effect* of a fee or charge on the free circulation of goods in the EU rather the *purpose* for which the fee or charge is levied. Another point to note is that the definition of a MEE as provided by the Court is very broad such that it captures every conceivable measure which a member state may attempt to impose. We shall see later when we deal with measures which do not distinguish between importers and domestic producers that the Court has now tried to narrow the ambit of the *Dassonville* formula. The EU has also issued Directive 70/50/EEC which gives some guidelines on what kind of activities constitute 'measures' infringing Article 34 of the TFEU. While this directive might not be of much significance in the EU context since most of the measures covered were removed during the transitional period, its significance lies in the fact that it draws a distinction between measures which apply only to imported products often referred to as "distinctly applicable measures", and measures which apply to both domestic and imported products referred to as "indistinctly applicable measures"[1796]. I now consider each of these measures separately in order to demonstrate what sort of measures the ECJ has had to deal with and the case law which has been developed.

[1795] Ibid paras 5 and 9.

[1796] While the EU Directive 70/50 does not specifically use the terms "distinctly" and "indistinctly" these terms are now used in EU legal parlance to describe the concepts covered in the directive. See Steiner and Woods op cit 221-222 and Fairhurst op cit 455 and 461.

4.10.6.2 Distinctly applicable measures

As stated above, these measures apply only to imported or exported goods, and not to domestically produced goods and the ECJ has had to strike down many national rules on the basis that they amount to MEEs. I now consider some examples of measures which have been held by the ECJ to constitute MEEs.

4.10.6.2.1 Import and export restrictions

Import and export restrictions such as the requirement for licences, could constitute barriers to intra-EU trade and the ECJ has had occasion to rule on the compatibility of such measures with TFEU provisions. In *International Fruit Company v Produktchap voor Groenten en Fruit (No. 2*)[1797] the ECJ held that import or export licences are caught by Articles 34 and 35 of the TFEU when it stated:

> "Consequently, apart from the exceptions for which provision is made by Community law itself those provisions preclude the application to intra-Community trade of a national provision which requires, even purely as a formality, import or export licences or any other similar procedure."[1798]

This should be so because the requirement for a licence means that before such licence is obtained, goods cannot be imported or exported; secondly, the licence may be rejected; and thirdly, the application itself involves paperwork which is time consuming and costly thus reducing the competitiveness of the goods when eventually imported or exported[1799]. In *Commission v Italy*[1800], Italy had adapted procedures and data requirements which applied only to the importation of cars which meant that their registration was longer-more complicated and expensive compared to the registration of domestically produced cars. The ECJ held that such procedures and requirements fell foul of Article 34 of the

[1797] Cases 51-54/71.
[1798] Ibid para 9.
[1799] See Fairhurst op cit 455.
[1800] Case 154/85.

TFEU. Again in *Rewe-Zentralfinanz v Landwirtschaftskammer*[1801] phytosanitary inspections were required on imported apples when similar inspections were not required for domestically grown apples. The ECJ held that the requirement for such inspections amounted to an MEE because it made imports more difficult or more costly[1802].

In *Commission v France*[1803] the ECJ made a landmark decision when it held that a failure to act by a member state could constitute an infringement of Article 34 of the TFEU. In the case[1804], fruit and vegetables imported into France from other member states were targeted by French farmers, who obstructed their transportation, preventing them from reaching their final destination. These activities had been going on for long periods of time and the Commission had received complaints of inactivity by French authorities in the face of violent acts by the French farmers. The acts included threats to shopping centres where the imported fruits and vegetables were sold, destruction of the goods and means of transport, and other acts of violence against the lorry drivers. These acts took place against imports, particularly from Spain and Belgium, between 1993 and 1997 without any intervention by the French police. France admitted that when some of these acts took place the police were either not present - despite being warned of the imminence of danger - or simply failed to intervene even where they could easily have prevented the occurrences. As regards the numerous attacks, only a small number of persons had been prosecuted, despite the fact that identifiable individuals had been filmed by television cameras. The Commission brought an action against France arguing that its failure to act impeded the free movement of goods imported from other member states in breach of Article 34 of the TFEU.

The ECJ acknowledged the difficulties faced by the French authorities in dealing with such situations but held that, having regard to the frequency and seriousness of the incidents cited by the Commission, the measures adopted by the French government were manifestly inadequate to ensure freedom of intra-EU trade in agricultural products on its

[1801] Case 4/75.
[1802] Ibid para 4.
[1803] Case C-265/95.
[1804] The facts of the case are set out in paras 2-13.

territory by preventing and effectively dissuading the perpetrators of the offences in question from committing and repeating them[1805]. The ECJ thus held that by failing to take necessary and appropriate measures to prevent the free movement of fruit and vegetables from being obstructed by actions of private individuals France had failed to fulfill its obligations under Article 34 of the TFEU[1806].

This case can be contrasted with the case of *Schmidberger*[1807] in which the Court came to the opposite conclusion. The case involved a demonstration organized by an environmental group in Austria. The demonstration resulted in the complete closure of a major transit route for a continuous period of 30 hours in June 1998. The ECJ held that a failure to ban such a demonstration is capable of restricting intra-EU trade in goods and must therefore be regarded as constituting an MEE which is incompatible with the obligations arising under Articles 34 and 35 of the TFEU read together with Article 4.3 (former 10 EC Treaty) of the TFEU, unless the failure to ban can be objectively justified[1808]. The case can be distinguished from *Commission v France* in that this case involved indistinctly applicable measures (the demonstration affected both domestic and imported goods) while *Commission v France* concerned distinctly applicable measures (only imported goods were targeted by the farmers). The Court found that the failure to ban the demonstration was objectively justified on the basis of respect for the fundamental rights of the demonstrators' freedom of expression and freedom of assembly which are enshrined in the ECHR and the Austrian Constitution[1809]. The Court also distinguished the facts of the case from *Commission v France* and found that unlike in the former case in this case:

(a) the demonstration was authorized;
(b) the obstacle to the free movement of goods resulting from the demonstration was limited;

[1805] Ibid para 52.
[1806] Ibid para 66.
[1807] Case C-112/00.
[1808] Ibid para 64.
[1809] Ibid paras 67-74.

(c) the purpose of the demonstration was not to restrict trade in goods of a particular type or from a particular source;

(d) the competent authorities had taken various measures to minimize as far as possible any disruption to road traffic;

(e) the incident was isolated and did not give rise to a general climate of insecurity as to have an impact on intra-EU flows as a whole;

(f) taking account of the member states' wide margin of discretion in the present case the national authorities were entitled to allow the demonstration as opposed to banning it as that would interfere unjustifiably with the fundamental rights of the demonstrators to assemble and express their opinion in public[1810].

The cases discussed above show the extent to which the ECJ has been prepared to broaden the scope of MEEs so as to include any conceivable measure which could hinder intra-EU trade. Whether the Court has succeeded is debatable. However, if the envisaged SADC free trade area is to succeed, the Tribunal might have to adapt a robust approach similar to that taken by the ECJ.

4.10.6.2.2 Promotion of domestic goods

One way in which a state may infringe Article 34 of the TFEU is by promoting or favouring domestic products to the detriment of competing imports. This aspect is not specifically mentioned in the definition of quantitative restrictions in the Trade Protocol, but it could easily be found to fall under the concept of "other measures and requirements restricting imports and exports" contained in the definition of quantitative restrictions[1811]. A good example of such practice is when a member state engages in a campaign to persuade consumers to buy domestic rather than imported products as was the case in *Commission v Ireland*[1812] which we discussed earlier. In that case the Court's reasoning reveals that it is more concerned about the substance rather than the form of the measure. The Court rejected the argument by Ireland that since the campaign itself appeared to

[1810] Ibid paras 84-89.
[1811] Article 1 Trade Protocol.
[1812] Case 249/81 discussed above in relation to what amounts to states measures.

have failed, EU law should not be concerned. The Court, applying the *Dassonville* formula, held that there is no need to prove that trade between member states has actually been affected by the measure, all that is necessary is for there to be a possibility of such an effect[1813].

In *Commission v Germany*[1814] the Court stated that it may be possible for origin-marking to be acceptable where it implies a certain quality in the goods, that they were made from certain materials, or by a particular form of manufacturing, or where the origin indicates a special place in the folklore or tradition of the particular region in question[1815], but such an exception has not been whole-heartedly embraced by the Court as illustrated in *Commission v Ireland*[1816]. The case concerned Irish legislation which required imported articles of jewelry depicting motifs or possessing characteristics which suggested they were souvenirs of Ireland to bear an indication of their country of origin or the word "foreign". In an action brought against Ireland by the Commission, the ECJ stated that:

> "…by granting souvenirs imported from other member states access to the domestic market solely on condition that they bear a statement of origin, whilst no such statement is required in the case of domestic products, the provisions contained in the Sale Order and Importation Order [of Ireland] indisputably constitute a discriminatory measure.."[1817]

It concluded that that the requirement of the Irish legislation that imported jewelry bear an indication of origin or the word 'foreign' was an MEE within the meaning of Article 34 of the TFEU[1818].

However, the ECJ has determined that not all measures which promote domestic goods are caught by Article 34 of the TFEU as shown in *Apple and Pear Development Council*

[1813] Ibid para 25.
[1814] Case 12/74.
[1815] Ibid para 7.
[1816] Case 113/80.
[1817] Ibid para 17.
[1818] Ibid para 18.

v K. J. Lewis Ltd[1819]. The Apple and Pear Development Council was set up by the UK Government. It was financed by a mandatory charge imposed on UK fruit growers. Part of the Council's role was to market the goods. It brought action against certain fruit growers who refused to pay the charge. They argued that the charges were contrary to Article 34 (former 28 EC Treaty) of the TFEU. The ECJ after finding that the body was an entity of the state whose measures could infringe Article 34 of the TFEU, went on to state that such a body is under a duty not to engage in any advertising aimed at discouraging the purchase of products of other member states or at disparaging them in the eyes of the consumers[1820]. It also prohibited such bodies from advising consumers to buy domestic products solely because of their national origin[1821]. However, the ECJ stated that:

> "..On the other hand Article 28 does not prevent such a body from drawing attention, in its publicity, to the *specific qualities* of fruit grown in the Member State in question or from organizing campaigns to promote the sale of certain varieties, mentioning their particular properties, even if those varieties are typical of national production."[1822] (my emphasis)

Thus, member states may promote varieties of fruit drawing attention to their particular qualities, but they must not go beyond the boundary by advertising with intent to discourage the purchase of imported products. However, difficulties may arise in practice as to where to draw the line between the different forms of advertising.

Member states can also favour domestic products in the field of public procurement, i.e. public service contracts. In *Du Pont de Nemours Italiana SpA v Unita Sanitaria Locale No. 2 Di Cascara*[1823] the ECJ held that a member state which reserved a proportion of its public supplies to products which were made in a particular depressed region of the

[1819] Case 222/82.
[1820] Ibid para 18.
[1821] Ibid.
[1822] Ibid para 19.
[1823] Case C-21/88.

country, automatically contravened Article 34 of the TFEU in that it hindered the free movement of goods because it impeded imports[1824].

4.10.6.2.3 Price-fixing regulations

Price-fixing is another way in which states can treat imports less favourably than domestic products because by fixing maximum or minimum sale prices, the state makes it more difficult for an importer to market its products in a given state.

4.10.6.3 Indistinctly applicable measures

We have noted that EU Directive 70/50 covers both distinctly and indistinctly applicable measures which amount to MEEs. Article 3 of that directive covers indistinctly applicable measures which apply to both imported and domestic products but which have a harsher impact on imported products. The article specifically refers to measures relating to the marketing of products dealing with shape, size, weight, composition, presentation or identification, which apply to both domestic and imported products where "the restrictive effect of such measures on the free movement of goods exceeds the effects intrinsic to trade rules" - that is where "the restrictive effects on the free movement of goods are out of proportion to their purpose" or where "the same objective can be achieved by other means which are less of a hindrance to trade." This provision appears to permit the imposition of indistinctly applicable rules provided they comply with the principle of proportionality. The ECJ have had regard to the principles contained in the directive in developing its jurisprudence on national measures that appear to apply indistinctly to both domestic and imported products.

In the landmark case *Rewe-Zentrale AG v Bundesmonopolverwaltungv fur Branntwein*[1825] (commonly referred to as 'the *Cassis de Dijon* Case') the ECJ laid down an important principle. The applicant wished to import the liqueur 'Cassis de Dijon' into

[1824] Ibid paras 11-13.
[1825] Case 120/78.

Germany from France. The German authorities refused the importation because the French liqueur was not of sufficient strength to be marketed in Germany. Under German law liqueurs had to have an alcoholic strength of 25%, whereas that of the French liqueur was between 15% and 20%. The importer challenged the decision on the basis that the German rule infringed Article 34 of the TFEU and the case was referred to the ECJ under Article 267 of the TFEU. The ECJ accepted that in the absence of any common rules in the EU governing the production and marketing of alcohol, it was up to the member states to regulate these activities in their territories.[1826] The Court reaffirmed the *Dassonville* formula when it stated:

> "It therefore appears that the unilateral requirement imposed by the rules of a member state of a minimum alcohol content for the purposes of the sale of alcoholic beverages constitutes an obstacle to trade which is incompatible with Article 30 of the Treaty."[1827]

It must be noted here that the formula applied in this case because even though the German rules applied to both domestic and imported products, it nevertheless inhibited trade between member states because the rules applied are different from those which apply in the product's country of origin, i.e. France. This imposed a dual burden on the French producer who would have to comply with the requirements of French law as well as German law. He would have to change his method of production in France in order to meet the German requirements thus placing him at a disadvantage to the German producer who simply had to comply with the German requirements[1828]. This dual burden placed on the French producer inhibited EU trade. In addition, all the member states of EU could have different rules relating to production and marketing of alcohol meaning that producers in the different states would have to adapt different manufacturing process for the market of each state[1829]. The ECJ formulated another important principle in the

[1826] Ibid para 8.
[1827] Ibid para 14. In the *Dassonville* case para 5 the Court said: "All trading rules enacted by member states which are capable of hindering, directly or indirectly, actually or potentially, intra-Community [EU] trade are to be considered as measures having an equivalent effect to quantitative restrictions".
[1828] Fairhurst op cit 462-463.
[1829] Ibid 463.

same case usually referred to as 'the rule of mutual recognition'. The principle was stated as follows:

> "…There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State; the sale of such products may not be subject to a legal prohibition on the marketing of beverages with an alcoholic content lower than the limits set by national rules."[1830]

There are some derogations from this rule which are considered in the next section. I must now consider some examples of indistinctly applicable measures which have been identified in the jurisprudence of the ECJ. These measures include origin marking, national quality standards, some administrative practices, and price-fixing regulations. We should bear in mind that in the SADC context, if any of these measures are approved pursuant to Article 16 or 17 of the Trade Protocol, then they do not constitute quantitative restrictions prohibited by the Trade Protocol.

4.10.6.3.1 Origin marking

The requirement that goods display a mark indicating their origin has also been raised as a being an MEE. In *Commission v UK*[1831], UK legislation required that certain goods which were sold in retail markets had to be marked with their country of origin. The Commission took infringement proceedings against the UK under Article 258 of the TFEU, claiming that this requirement was in breach of the former Article 34 of the TFEU in that it constituted an MEE. French manufactures had complained that goods for the UK market had specially to be origin-marked, which increased production costs on their part. The Commission also contended that such origin-marking encouraged consumers to exercise their prejudices in favour of national products and was likely to reduce the sale of EU-produced goods. The UK Government defended the origin-marking legislation on

[1830] *Cassis* case op cit para 14.
[1831] Case 207/83.

the grounds that the origin details gave important information to the consumer about the nature and quality of the product, and that the requirement of origin marking was non-discriminatory because it applied to both domestic and imported products. Considering the second of the UK's arguments (i.e. that the measure applied equally to imported and national products), the ECJ stated as follows:

> "..it has been recognised that the purpose of indications of origin or origin marking is to enable consumers to distinguish between domestic and imported products and this enables them to assert any prejudices which they may have against foreign products. As the Court has had occasion to emphasise in various contexts, the Treaty, by establishing a common market and progressively approximating the economic policies of the Member States, seeks to unite national markets in a single market, the origin marking requirement not only makes the marketing in a Member State of goods produced in other Member States in the sectors in question more difficult; it also has the effect of slowing down economic interpenetration in the Community by handicapping the sale of goods produced as a result of a division of labour between Member State."[1832]

The Court did not agree with the contention that origin-marking was a necessary consumer protection measure but, agreed with the Commission's contention that it encouraged the exercise of national prejudices as well as increasing production costs for imported goods[1833]. It held that the UK measures amounted to an MEE even though it applied to both domestic and imported products. While the reasoning of the Court here was directed at the concept of creation of a single market in the EU, it is submitted that the rationale applies in the SADC context even though the initial aim is the creation of a free trade area. If SADC member states are allowed freely to impose origin marking requirements on imported products, then the result would be the same: the measures could constitute a hindrance to intra-SADC trade.

[1832] Ibid para 17.
[1833] Ibid para 18.

4.10.6.3.2 National quality standards

Compliance with national quality standards is another area in which the ECJ has found some measures to constitute MEEs. In *Commission v Ireland*[1834] the Commission brought an action under the former Article 258 of the TFEU against the Irish Government for allowing a specification relating to a water supply contract in Dundalk which it alleged breached the Article 35 (former 29 EC Treaty) of the TFEU. The specification stipulated that pipes had to be certified as complying with Irish Standard 188. Only one manufacturer located in Ireland made pipes which complied with this standard. This was an indistinctly applicable measure because the requirement applied to all pipes whether Irish or imported. One of the bids was based on the use of pipes not conforming to this standard although it did comply with international standards. Dundalk Council refused to consider the bid for that reason. The question before the ECJ was whether this specification constituted a barrier to the importation of pipes for this contract. The Court stated as follows:

> "….The Commission's complaint does not relate to compliance with technical requirements but the refusal of the Irish authorities to verify whether those requirements are satisfied where the manufacturer of the materials has not been certified by the IRIS to IS 188. By incorporating in the notice in question the words 'or equivalent' after the reference to this Irish standard as provided for by Directive 71/305 where it is applicable, the Irish authorities could have verified compliance with the technical conditions without from the outset restricting the contract to tenderers proposing to utilise Irish materials."[1835]

In the above case, the ECJ held that while it was perfectly reasonable to specify the quality of pipes to be used for the transmission of drinking water, the attainment of that object could as well have been achieved by allowing the use of pipes which had been

[1834] Case 45/ 87.
[1835] Ibid para 22.

produced abroad to a standard which was equivalent to the Irish standard. Thus, the Court considered the effect of the national practice, rather than its legal form.

4.10.6.3.3 Administrative practices

Another area in which EU states have fallen foul of Article 34 (28 EC Treaty) of the TFEU is the application of certain administrative practices. In *Commission v France*[1836] the Commission alleged that France had violated Article 34 by delaying a request to approve postal franking machines from other member states .This was an indistinctly applicable measure because approval was required for both the domestic and imported machines. However, administrative practices resulted in the approval of foreign machines being delayed. A UK manufacturer had failed to secure the approval of the French authorities, despite repeated applications, and even after France had repealed an earlier law which explicitly stated a preference for domestic machines. The Court held that the fact that a law or regulation such as that requiring prior approval for the marketing of postal franking machines conforms in formal terms to Article 34, is not sufficient to discharge a member state of its obligation under that provision[1837]. It further held that under the guise of a general provision permitting the approval of machines imported from other member states, the administration might very well adopt a systematically unfavourable attitude towards imported machines, either by allowing considerable delay in replying to applications for approval or in carrying out the examination procedure, or by refusing approval on the grounds of various alleged technical faults for which no detailed explanations are given or which prove to be inaccurate[1838]. It concluded that by refusing without proper justification to approve postal franking machines from another member states, French was in breach of its obligations under Article 34 of the TFEU[1839].

4.10.6.3.4 Price–fixing regulations

[1836] Case 21/84.
[1837] Ibid para 11.
[1838] Ibid.
[1839] Ibid para 15.

Article 34 of the TFEU can also catch price-fixing regulations which apply to both imported and domestic goods, as was declared by the ECJ in *Openbaar Ministerie v Van Tiggele*[1840]. Dutch legislation provided for minimum selling prices for certain spirits. A seller sold spirits for less than this minimum and was prosecuted. In his defence he argued that the legislation breached Article 34 of the TFEU and was therefore inapplicable. The question referred to the ECJ was whether this minimum price constituted an MEE within the meaning of Article 34 of the TFEU. The Court held that for the purposes of the prohibition it is sufficient that the measures in question are likely to hinder, directly or indirectly, actually or potentially, imports between member states even though they are applicable without distinction to domestic products and imported products[1841]. Imports may be impeded, in particular when a national authority fixes prices or profit margins at such a level that imported products are placed at a disadvantage in relation to identical domestic products either because they cannot profitably be marketed in the conditions laid down or because the competitive advantage inferred by lower cost prices is cancelled out[1842]. In the case the Court concluded that the Dutch measures in question were in breach of Article 34 of the TFEU.

4.10.6.4 Dual-burden and equal-burden rules

In this area of indistinctly applicable measures the ECJ has had to deal with the problem of dual-burden and equal-burden rules. Dual-burden rules exist as in the *Cassis* case where one member state imposes certain rules relating to the manufacture of goods (e.g. butter must be packaged in cube-shaped containers to distinguish it from margarine) and these rules apply equally to domestic and imported goods. In such case an exporter in another member state would have to comply with this requirement as well as the requirements of the state of production thus incurring a dual burden. The *Cassis* case would render such rules, i.e. of the importing state, incompatible with Article 34 of the TFEU unless they could be saved by one of the mandatory requirements, or Article 36 of the TFEU. Equal-burden rules on the other hand, apply to all goods domestic and

[1840] Case 82/77.
[1841] Ibid paras 12 and 13.
[1842] Ibid para 14.

imported. They also regulate trade in some way but do not have a protectionist effect in the sense that *prima facie* they do not favour domestic goods over imports. This may be the case say, where the rule requires that all products marketed in the state must be subject to a veterinary inspection, a requirement which applies to both domestic and imported products. This requirement may have an impact on the volume of trade, but the impact is equal between both domestic and imported products. Dual-burden rules fall within Article 34 of the TFEU, but there had been some confusion regarding equal-burden rules with the ECJ holding in some cases that they fell within[1843] Article 34 of the TFEU, and in some cases they did not[1844].

This confusion continued until it was finally cleared by the ECJ itself in *Criminal Proceedings against Keck and Mithouard*[1845]. The defendants (Keck and Mithouard) were prosecuted in a French court for having resold goods at a loss, a practice that was contrary to French law. In their defence they pleaded, *inter alia*, that this rule constituted an MEE and was unlawful under Article 34 of the TFEU. The case was referred to the ECJ under Article 267 of the TFEU. The Court reiterated the *Dassonville* formula, but stated that it is not the purpose of national legislation imposing a general prohibition on resales at a loss to regulate trade in goods between member states, although such legislation might restrict volume of sales since it deprives traders of a method of sales promotion[1846]. But, because of the tendency of traders to invoke Article 34 of the TFEU in challenging any such rules whose aim is to limit commercial freedom even where such rules were not aimed at products from other member states, it was necessary for the Court to re-examine and clarify its case law on the matter[1847]. The Court then went on to restate the principle in *Cassis de Dijon* that MEEs include rules that lay down requirements to be met in respect of the physical characteristics of the products even if they are indistinctly

[1843] E.g. *Quietlynn Ltd v Southend-on-Sea Borough Council* Case C-28/89 where the Court held that a UK law restricting the sale of lawful sex products to shops that had been licensed by the local authority fell outside the scope of Article 34 (former 28 EC Treaty) of the TFEU.
[1844] E.g. *Torfaen Borough Council v B&Q plc* Case 145/88 where the Court held that a UK law prohibiting sale of goods on Sundays subject to certain exceptions and which applied to both domestic and imported goods breached Article 34 (former 28 EC Treaty) TFEU.
[1845] Cases C-267 and 268/91.
[1846] Ibid paras 11 and 12.
[1847] Ibid para 14.

applicable, unless they are justified by a public interest objective[1848]. The Court then laid down the principle in respect of measures relating to selling arrangements as follows:

> "..However, contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the *Dassonville* judgment….provided that those provisions apply to all affected traders operating within the territory and provided that they affect in the same manner, in law and fact, the marketing of domestic products and of those from other Member States."[1849]

The Court thus laid down the principle applicable to cases involving equal-burden rules. It distinguished between rules which relate to the *physical characteristics* of the goods themselves in terms of packaging, composition, size, etc which fall foul of 34 of the TFEU, and rules relating to *selling arrangements* which fall outside Article 34 of the TFEU provided that the following conditions are met:

(a) the provisions of the rule apply to all traders operating within the national territory; and
(b) they affect in the same manner, in law and fact, the marketing of domestic goods and imports.

The Court thus established that "selling arrangements" will not breach 34 of the TFEU provided they are non-discriminatory and they include price restrictions as in *Keck* or any rules which govern the way products or services are sold or advertised.

[1848] Ibid para 15.
[1849] Ibid para 16.

The *Keck* rule has been applied in subsequent cases such a *Criminal Proceedings against Tankstationt' Heukseke vof v JBE Boermans*[1850]. National rules provided for the compulsory closure of petrol stations at certain times. The Court applied the *Keck* general rule and held that the rules did not fall within Article 34 of the TFEU because they related to selling arrangements which applied equally to all traders without distinguishing between origin thus it was an equal burden rule. The Court said:

> "The conditions laid down in the judgment last cited (Keck) are fulfilled in the case of rules such as those at issue in the main proceedings. ..The rules in question relate to the times and places at which the goods in question may be sold to consumers. However, they apply to all relevant traders without distinguishing between the origin of the products in question and do not affect the marketing of products from other Member States in a manner different from that in which they affect domestic products."[1851]

The second condition that the rule must apply in the same manner, in law and fact, to the marketing of domestic and imported products was considered in *Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP)*[1852]. The case concerned a Swedish law which prohibited the advertising of alcoholic beverages in periodicals. It was argued that this breached Article 34 of the TFEU. The Court stated that if national rules restricting or prohibiting certain selling arrangements are to avoid being caught by Article 34 of the TFEU, they must not be of such a kind as to prevent access to the market by products from another member state or to impede access any more than they impede the access of domestic products[1853]. The Court then stated that:

> "Even without it being necessary to carry out a precise analysis of the facts characteristic of the Swedish situation, which it is for the national court to do, the Court is able to conclude that, in the case of products like alcoholic beverages, the

[1850] Cases 401 and 402/92.
[1851] Ibid paras 13 and 14.
[1852] Case C-405/98.
[1853] Ibid para 18.

> consumption of which is linked to traditional social practices and to local habits and customs, a prohibition of all advertising directed at consumers in the form of advertisements in the press, on the radio and on television, the direct mailing of unsolicited material or the placing of posters on the public highway is liable to impede access to the market by products from other Member States more than it impedes access by domestic products, with which consumers are instantly more familiar."[1854]

The Court then concluded that the prohibition thus fell within Article 34 of the TFEU by stating that:

> "Articles 30 (34 TFEU) and 36 of the Treaty do not preclude a prohibition on the advertising of alcoholic beverages such as that laid down in Article 2 of the Alkoholreklamlagen, (the Swedish Law) unless it is apparent that, in the circumstances of law and of fact which characterise the situation in the Member State concerned, the protection of public health against the harmful effects of alcohol can be ensured by measures having less effect on intra-Community trade."[1855]

In another case *Vereinigte Familiapresse*[1856] the Court held that the rule in question was not a selling arrangement. A German newspaper publisher was selling newspapers in the German and Austrian markets in which readers were offered the opportunity to take part in games with prizes. This practice breached the Austrian Unfair Competition Act 1992. A competitor tried to stop the imported German papers and the case was referred to the ECJ. The Court rejected the Austrian argument that this was a mere selling arrangement since the prohibition affected the content of the newspaper and its access to the Austrian market. The Court stated that even though the national law was directed against a method of sales promotion, in this case it bore on the actual content of the products, in so far a the

[1854] Ibid para 21.
[1855] Ibid para 34.
[1856] Case 368/95.

competitions in question form an integral part of the magazine in which they appeared[1857].

4.10.7 Justifications under Article 36 (former 30 EC Treaty) of the TFEU and the Cassis rule of reason

Article 36 of the TFEU contains some justifications to the application of Articles 34 and 35 which allow member states to prohibit or restrict imports and exports "on grounds of public morality, public policy or public security, the protection of health and life of humans, animals and plants, the protection of national treasures possessing artistic, historic or archeological value or the protection of industrial and commercial property." The prohibitions or restrictions, however, are only allowed to the extent that they do not "constitute a means of arbitrary discrimination or a disguised restriction on trade between member states." We have noted that the Trade Protocol contains similar provisions although they are slightly differently worded. Article 9 of the Trade Protocol permits derogations from the obligations under Articles 7 and 8 of the Trade Protocol on grounds of public morality or public order, protection of human, animal or plant life or health, compliance with WTO provisions, protection of intellectual property rights, or to prevent deceptive trade practices, protection of strategic metals, protection of protection of national treasures possessing artistic, historic or archeological value, relief of critical food shortages, conservation of natural resources and compliance with international obligations. As with Article 36 of the TFEU, these derogations are permitted only in so far as they do not constitute a means of arbitrary discrimination or a disguised restriction on trade between SADC member states. There is a specific security exception contained in Article 10 of the Trade Protocol. The scope of the Trade Protocol exception is far wider than the scope of Article 36, but, for purposes of this study, I consider only those exceptions which have been the subject of the attention of the ECJ. I thus consider the exceptions relating to public morality[1858], public policy and security[1859], public health,

[1857] Ibid para 11.

[1858] The concept of public morality is not entirely new to the legal systems of the SADC states. For example the Constitution of Namibia refers to it in Article 21(2) while the Constitution of Zimbabwe refers to it in

and protection of industrial and commercial property. For the purposes of completeness I also assess the development by the ECJ of the so-called *Cassis* rule of reason which is an additional justification which EU member states can use to derogate from Articles 34 and 35 of the TFEU in relation to indistinctly applicable measures.

The derogations contained in Article 36 of the TFEU are considered to be exhaustive and have been narrowly interpreted by the ECJ[1860]. The Court has held that the purpose of Article 36 is not to give states exclusive jurisdiction on the matters contained therein, but merely to allow states to derogate from the principle of free movement of goods to the extent that this is justified by the article[1861].

The Article 36 derogations apply to both distinctly and indistinctly applicable measures and any national measures falling outside Article 36 of the TFEU are often rejected by the Court unless they can be justified under the *Cassis* doctrine. Again, Article 36 of the TFEU exceptions can only be advanced by member states to justify any measures in the absence of EU-wide provisions aimed at harmonizing the national legislation protecting the interest which the national measure seeks to protect. Thus in *Lucien Ortscheit GmbH v Eurim-Pharm GmbH*[1862], German legislation prohibited the advertising of foreign drugs which had not been authorized for use in the German market, but which could, under certain conditions, be imported into Germany. The Court found that the measure was distinctly applicable and equivalent to a quantitative restriction. It noted, however, that "it is also settled law that the health and life of humans rank foremost among the property or interests protected by Article 36 of the Treaty and that it is for the member states, within the limits imposed by the TFEU, to decide what degree of protection they intend to ensure."[1863] This was so because at the present stage of harmonization there was no

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Articles 19(5)(a), 20(4) and 21(3). This is in the context of situations where rights of individuals can derogated from on the grounds of morality.

[1859] The security exception is also found in some constitutions such as that of Namibia (Article 21(2)) and the Constitution of the Republic of South Africa article 37 which permits derogations from the Bill of Rights in cases of emergencies which threaten the life of the nation.

[1860] Fairhurst op cit 473.

[1861] *Commission v Germany (Re Health Control on Imported Meat)* Case 153/78.

[1862] Case 320/93.

[1863] Ibid para 16.

procedure for EU authorization or mutual recognition of national authorizations[1864]. In such cases it was for member states, within the limits imposed by the TFEU, to decide on the degree of protection to be given.

However, if there is EU legislation covering the subject matter there is no room for national measures that are incompatible with it, and Article 36 of the TFEU cannot be relied on as justification for a national measure. The ECJ came to a similar conclusion in R *v Ministry of Agriculture, Fisheries and Food, ex parte Compassion in World Farming Ltd*[1865]. The applicants argued that the Minister was entitled to ignore the effect of new a Council directive on the treatment of farm animals in transit, and stop the export of live animals in compliance with Article 36 of the TFEU, since the directive did not conform to an international convention on the humane treatment of animals. The Court rejected the argument holding that Article 36 of the TFEU could not be used to justify a national prohibition because the directive was intended to deal exhaustively with the situation relating to the treatment of animals[1866]. The rule, however, applies where the EU has introduced consistent and exhaustive measures to cover the type of importation in question. The rule does not preclude restrictions on imports where these are authorised by the directive.

A state which relies on a justification under Article 36 of the TFEU bears the burden of producing evidence in support of the ground. The principle of shifting the evidential onus applies not only to the measure itself but also to individual action based on the measure. In *Officier van Justitie v Sandoz BV*[1867], Sandoz wished to sell confectionary in the Netherlands to which vitamin supplements had been added. The confectionery was freely sold in Belgium and Germany. The Dutch authorities refused permission for it to be sold on the grounds that the vitamins were a risk to health. On reference under Article 267 of the TFEU, the ECJ was in no doubt that the measure was in breach of Article 34 of the TFEU, but in the absence of EU harmonizing measures on the kind of additives which

[1864] Ibid para 18.
[1865] Case C-1/96.
[1866] Ibid paras 50-56.
[1867] Case 174/82.

were acceptable, it was open to member states to determine under Article 36 of the TFEU the kind and extent of protection to be given[1868]. However, the Court held that the state must first establish the existence of the risk. As to the onus of proof the Court stated:

> "..It is therefore for the national authorities who rely on that provision in order to adopt a measure restricting intra-Community trade to check in each instance that the measure contemplated satisfies the criteria of that provision…Community law does not permit national rules which subject authorization to market to proof by the importer that the product in question in not harmful to health."[1869]

Even if a measure can be justified under Article 36 of the TFEU, a member state will still have to satisfy two other criteria: namely that there must be no arbitrary discrimination between imported and domestic products or a disguised restriction on trade between member states[1870]. In addition, the national measure must be proportionate to any risk and must not restrict trade any more than is necessary to protect the legitimate public interest recognized by Article 36 of the TFEU [1871]. I now consider the individual exceptions.

4.10.7.1 Public morality

What constitutes public morality differs from society to society as well as from state to state and each society or state has its own idea of what constitutes morality among its population. Neither Article 36 of the TFEU, nor any EU secondary legislation, defines what constitutes morality and it has been left to the ECJ to develop the concept of what might be considered morally unacceptable or acceptable in the whole EU. The ECJ has, for example, refused to rule that termination of pregnancy is intrinsically immoral and cannot, therefore, constitute a service under Article 56 (former 49 EC Treaty) of the TFEU, because it is, in fact, lawfully carried out in several member states[1872]. In *HM*

[1868] Ibid paras 16 and 17.
[1869] Ibid paras 22-24.
[1870] Article 36 TFEU.
[1871] See *the Henn and Derby* case discussed in the next section on public morality.
[1872] *Society for the Protection of the Unborn Child v Grogan* Case C-159/90. In response to the contention on the immorality of abortion the Court said: "Whatever the merits of those arguments on the moral plane,

Customs and Excise Commissioners v Schindler and Others[1873] the Court observed, with regard to gambling, that, "Even if the morality of lotteries is at least questionable, it is not for the Court to substitute its assessment for that of the legislature where that activity is practised legally."[1874]

The Court may, however, have to assess whether or not national rules are applied proportionately and without discrimination. The issue of morality came again before the Court in relation to Article 36 of the TFEU in an Article 267 reference from the House of Lords of the UK. In *R v Henn and Darby*[1875], the defendants were convicted of being "knowingly concerned in the fraudulent evasion of the prohibition of the importation of indecent or obscene articles" contrary to the UK legislation on customs and excise. The articles involved in the charges formed part of a consignment of several boxes of obscene films and magazines which had been transported from Holland by ferry but were of Danish origin. The UK House of Lords referred a number of questions to the ECJ. One question related to whether a law of a member state prohibiting the importation of pornographic articles is a quantitative restriction. The Court had no doubt that it was, since a prohibition on imports is "the most extreme form of restriction."[1876] However, the ECJ stated that member states had wide discretion on the issue and were free to take such action in appropriate circumstances:

> "In principle, it is for each Member State to determine in accordance with its own scale of values and in the form selected by it the requirements of public morality in its territory. In any event, it cannot be disputed that the statutory provisions applied by the UK in regard to the importation of articles having an indecent or obscene character come within the powers reserved to the Member States by the first sentence of Article 30 (now Article 36)."[1877]

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they cannot influence the answer to the national court' s first question. It is not for the Court to substitute its assessment for that of the legislature in those Member States where the activities in question are practised legally." para 20.

[1873] Case C-275/92.

[1874] Ibid para 32.

[1875] Case 34/79.

[1876] Ibid para 12.

[1877] Ibid para 15.

In *Conegate limited v HM customs and Excise*[1878], the ECJ had another opportunity to deal with a case involving moral issues. In that case goods had been seized by the UK customs authorities. The goods consisted of inflatable sex dolls and other erotic articles. The importers argued that the situation was different to that in *Henn and Darby* because sex dolls, although not permitted to be publicly displayed, could be lawfully sold throughout the UK. The Court of Justice agreed saying:

> "Although Community law leaves the Member States free to make their own assessments of the indecent or obscene character of certain articles, it must be pointed out that the fact that the goods cause offence cannot be regarded as sufficiently serious to justify restrictions on the free movement of goods where the Member State concerned does not adopt, with respect to the same goods manufactured or marketed within its territory, penal measures intended to prevent the distribution of such goods in its territory."
>
> It follows that a Member State may not rely on grounds of public morality in order to prohibit the importation of goods from other Member States when its legislation contains no prohibition on the manufacture or marketing of the same goods in its territory."[1879]

The principle established by the ECJ here is that it must be left to each member state to decide the limits of the concept of morality. For obvious reasons this leads to much uncertainty and inconsistencies in application of EU since states are bound to differ on the subject.

4.10.7.2 Public policy and public security

[1878] Case 121/85.
[1879] Ibid paras 15 and 16.

These two grounds are interrelated but it is only the security exception which features in Article 10 of the Trade Protocol as a ground to justify derogation from the provisions of the protocol. In the EU context, few attempts have been made by EU governments to justify restrictive measure on these grounds. Public policy was, however, successfully advanced by the UK Government in *R v Thompson and Others*[1880]. The defendants traded in coins, some of which were old UK gold coins that were no longer legal tender. They were convicted in England of being knowingly concerned in the fraudulent evasion of the prohibition on importation of gold coins into the UK. On a reference to the ECJ under Article 267 of the TFEU, they contented, that the provisions under which they had been convicted breached Article 34 and 35 (former 28 and 29 EC Treaty) of the TFEU. The UK Government defended the legislation on the ground that it was an important aspect of public policy to protect the national coinage and the Court agreed. The ECJ held that a ban on destroying old coinage with a view to it being melted down or destroyed in another member state was justified on grounds of public policy under Article 36 of the TFEU because it was based on the need to protect the right to mint coinage which is traditionally regarded as involving the fundamental interests of the state[1881].

The Irish Government successfully invoked public security arguments in *Campus Oil v Ministry for Industry and Energy*[1882]. Irish legislation required importers of petroleum products to purchase up to 35 per cent of their requirements from Ireland's state-owned refinery at prices fixed by the Minister. There was no doubt that the requirement breached Article 34 (former 28 EC Treaty) of the TFEU. The government, however, argued that the measure was necessary on the ground that the importance of oil for the maintenance of the life of the country made it essential to maintain fuel capacity in Ireland. The system it had adopted was the only means by which a fuel reserve could be built up. The Court agreed that petroleum products were of fundamental importance to the country's existence, since they were needed for the country's institutions, vital services and the survival of its inhabitants[1883]. The Court therefore accepted the public

[1880] Case 7/78.
[1881] Ibid para 34.
[1882] Case 72/83.
[1883] Ibid para 34.

security justification. It did, however, warn the Irish Government that the purchasing obligation could be continued only if there was no less restrictive measure which was capable of achieving the same objective; nor should the quantities covered by the scheme exceed the minimum supply requirements without which the public security of the state would be affected[1884]. The scheme had, in, other words, to be proportionate to the anticipated risk.

The reasoning in the *Campus Oil* case has been criticized and has not been successfully argued since then[1885]. In *Cullet*[1886] the French Government contented before the ECJ that national rules fixing retail selling prices for fuel were justified on grounds of public order and security which would arise in relation to retailers affected by unrestrained competition. The Advocate-General warned against the dangers of responding to public agitation:

> "The acceptance of civil disturbance as a justification for encroachments upon the free movement of goods would….have unacceptably drastic consequences. If road-blocks and other effective weapons of interest groups which feel threatened by the importation and sale at competitive prices of certain cheap products or services, or by immigrant workers or foreign businesses, *were accepted as justification, the existence of the four freedoms of the Treaty could no longer be relied upon.* Private interest groups would then, in the place of the Treaty and Community (and, within the limits laid down in Treaty), determine the scope of those freedoms. In such cases the concept of public policy requires, rather effective action on the part of the authorities to deal with the disturbances."(my emphasis)[1887]

The Court raised doubt about the incapacity of the French authorities in the face of rampaging fuel retailers on the streets of France. It said:

[1884] Ibid paras 44-49.
[1885] Steiner and Woods op cit 243.
[1886] Case 231/83.
[1887] Ibid para 5.3 of the Opinion.

> "..in that regard, it is sufficient to state that the French Government has not shown that it would be unable, using the means at its disposal, to deal with the consequences which an amendment of the rules in question in accordance with the principles set out above would have upon public order and security."[1888]

In another case involving oil refineries *Commission v Greece*[1889] national rules in issue were held to be disproportionate by the ECJ.

In the SADC context we have noted that security exception is contained is a separate Article 10 of the Trade Protocol where it subsists in conjunction with "the purpose of maintaining peace." This separation from the general provisions perhaps emphasizes the seriousness with which SADC states view this exception to the liberalisation of trade in SADC. It is not difficult to visualize situations where states may seek to restrict imports among SADC states in the interests of national security in view of the several conflicts of both a political and military nature currently existing in the region. In these situations the Tribunal is expected to carry out a balancing exercise between the interests of intra-SADC trade and the national interests of SADC member states.

4.10.7.3 Public Health

States may take discriminatory measures such as bans, and the licensing and inspection of imports for health reasons, and this is justifiable under Article 36 of the TFEU. However, for the measure to be capable of justification as a health measure, it must form part of a seriously considered health policy and the state must be able to prove a real health risk[1890].

[1888] *Culet* case op cit para 33.
[1889] Case 347/88.
[1890] *Duphar BV* Case 238/82.

This requirement of a seriously considered health policy was not met in *Commission v UK (Re Imports of Poultry Meat*)[1891]. In September 1981, the UK banned the import of turkeys from all EU member states except Denmark and Ireland. There was evidence before the ECJ that- in the two years before the ban, there had been a steep rise in turkey imports for the Christmas market from France and other member states. This had been followed by complaints about unfair competition from UK poultry producers who were troubled by government subsidies which they claimed were made available to French producers of poultry. The stated purpose of the imposition of a sudden ban on the import of French turkeys was to prevent the outbreak of Newcastle Disease, a serious poultry infection. The evidence presented before the Court showed that there had been no recent outbreak in France. The Court was not convinced by the UK's justification and found on the facts that the real aim of the 1981 measures was to block, for commercial and economic reasons, imports of poultry products from other member states, in particular from France.

On the facts the ECJ found that the 1981 measures did not form part of a seriously considered health policy[1892]. In held further that taken together, these facts were sufficient to establish that the 1981 measures constituted a disguised restriction on imports of poultry products from other member states, in particular from France, unless it can be shown that, for reasons of animal health the only possibility open to the UK was to apply the strict measures which were at issue in the case and that therefore the methods prescribed by the 1981 measures were not more restrictive than was necessary for the protection of poultry flocks in the UK[1893]. The Court found that the measures taken by the state were not proportionate to the perceived risk therefore the measures breached Article 34 of the TFEU[1894].

In many of the cases brought before the ECJ the question has revolved on whether there is in fact a health risk which justifies the measure taken by the state. The Court will then

[1891] Case 40/82.
[1892] Ibid paras 37-38.
[1893] Ibid para 40.
[1894] Ibid para 44.

be required to assess the scientific evidence available, and if satisfied of the existence of the risk, determine whether the measure is proportionate to the risk. One example of the application of these principles is *Commission v UK (Re UHT Milk)*[1895]. In that case, the Commission brought Article 267 of the TFEU proceedings against the UK for imposing a requirement that UHT milk should be marketed only by approved dairies or distributors. The government argued that this was necessary to ensure that milk was free from bacterial or viral infections. The effect of the restriction was that all imported milk had to be repackaged and re-treated. The Court rejected these measures as inappropriate and unnecessary[1896]. There was evidence that milk in all member states was of similar quality and subject to equivalent controls[1897]. The restrictions, therefore, were unjustified[1898]. The Court has also held that German legislation, which prohibited the import from other member states of meat products manufactured from meat not coming from the country of manufacture of the finished product, could not be justified on health grounds since there was no reason to believe that the risk of contamination increased simply because the fresh meat crossed an EU frontier[1899].

Another example is *Commission v France*[1900] where French legislation prohibited the marketing of milk substitutes. The French Government attempted to justify the prohibition on the grounds, first, that the milk substitutes had a lower nutritional value and secondly and that there were harmful to some people. The Court rejected both arguments[1901]. The fact that milk substitutes had a lower nutritional value than milk products hardly constituted a health risk when consumers had so many other food products to choose from[1902]. Milk products themselves could cause a risk to some individuals with certain allergies or suffering from certain diseases and labeling would

[1895] Case 124/81.
[1896] Ibid para 25.
[1897] Ibid paras 25-26.
[1898] Ibid para 33.
[1899] *Commission v Germany* Case 153/78.
[1900] Case 216/84.
[1901] Ibid para 20.
[1902] Ibid para 15.

provide consumers with the necessary information to enable them to make a properly informed choice[1903].

Apart from cases relating to health risks poised to humans, the ECJ has also dealt with cases involving plant and animal health. *Rewe-Zentralfinanz eGmbH v Landwirtsshaftskammer*[1904] concerned phytosanitary inspections of imported apples by German authorities. The inspection was meant to control a pest called San Jose scale and it was clearly in breach of Article 34 (former 28 EC Treaty) of the TFEU. The ECJ held that though the inspection was discriminatory in that it applied to imported apples only, it was justified since the imported apples constituted a real risk which was not present in domestic apples[1905]. In the case of animals, the ECJ has held that a prohibition on the import onto the Island of Laeso of Danish bees and reproductive material for them was justified under Article 36 of the TFEU[1906]. This was so because the measure was intended to protect indigenous bee populations which could be extinguished through cross-breeding if foreign breeds were allowed onto the island[1907].

4.10.7.4 Protection of industrial and commercial property

Industrial and commercial rights are valuable rights relating to the protection and distribution of goods and services. Such rights are protected by patents, trade marks, copyrights and similar devices. Each member state has devised its own system for protecting the investment, creativity and innovation which has gone into a new product or system. The period of protection may vary widely between member states and between different kinds of industrial property rights. Since each form of industrial property is defined under national law, it would seem *prima facie* not to be a matter within EU competence and, indeed, Article 345 (former 295 EC Treaty) of the TFEU appears to emphasise the exclusive competence of each member state in this matter and provides

[1903] Ibid para 16.
[1904] Case 4/75.
[1905] Ibid paras 8 and 9.
[1906] *Ditlev Bluhme* Case C-67/97 para 38.
[1907] Ibid paras 33 and 37.

that the Treaties shall in no way prejudice the rules in member states governing the system of property ownership.

The ECJ has had to deal with matters relating to industrial property and in that regard has attempted to draw a distinction between rules affecting the ownership of such rights and their exercise. It has declared that the protection given to the different systems of property ownership in different member states by Article 345 of the TFEU, does not allow national legislatures to adopt measures relating to industrial and commercial property which would adversely affect the principle of free movement of goods within the common market[1908]. It has also emphasised that this Article 36 of the TFEU exception cannot "constitute a means of arbitrary discrimination or a disguised restriction on trade between Member State."[1909] However, for the purposes of this study, the experience of the ECJ may not be so relevant because the question of intellectual property rights is dealt with differently in SADC. While Article 9 of the Trade Protocol refers to the protection of intellectual property rights as one of the bases on which states may impose quantitative restrictions on both imports and exports, the measures adopted for the protection of intellectual property rights must be in accordance with the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights[1910]. This would imply that once the restriction is imposed in line with the WTO agreement then it does not amount to a prohibited restriction unless it can be shown to constitute a means of arbitrary or unjustifiable discrimination between member states or a disguised restriction on intra-SADC trade[1911].

4.10.8 The Cassis rule of reason: Justification for indistinctly applicable measures

In the *Cassis* case considered above we noted that the ECJ held that Article 34 of the TFEU applies to indistinctly applicable measures (i.e. measures which apply to both imported and domestic products) which impact upon the free movement of intra-EU trade

[1908] *Spain v Council* Case C-350/92.
[1909] Ibid paras 20-21.
[1910] Article 24 Trade Protocol.
[1911] Article 9 Trade Protocol.

.The first *Cassis* principle (the rule of mutual recognition) was discussed earlier and it provides that once goods have been lawfully marketed in one member state, they should be free to be marketed in any other member state without restriction. However, this is subject to the second principle, the "rule of reason", or the "mandatory requirements defence."

In the *Cassis* case, the applicant wished to import the liqueur 'Cassis de Dijon' into Germany from France. The relevant authorities refused to allow the importation because the French liqueur was not of sufficient alcoholic strength of 25 per cent whereas that of the French liqueur was between 15 per cent and 20 per cent. The applicant argued that this was an MEE, since it prevented that French version of the drink being marketed in Germany. The ECJ held that in the absence of common rules relating to the production and marketing of alcohol it is for the member states to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory. It stated:

> "Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognised as being necessary in order to satisfy mandatory requirements relating in particular to the *effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer*."[1912](my emphasis)

In the case the ECJ found that the unilateral requirements imposed by the German rules of a minimum alcohol content for the purposes of the sale of alcoholic beverages constituted an obstacle to trade which is incompatible with the provisions Article 34 of the TFEU. This was despite that the German government had raised various grounds as justification for the measures and these included protection of public health and protection of the consumer against unfair commercial practices.

The four matters identified by the ECJ which may prevent a rule from being caught by Article 34 of the TFEU can be summarized as:

[1912] Ibid para 8.

fiscal supervision

public health

fairness of commercial transactions

protection of the consumer.

Any measure which can be shown to be necessitated by any of the above needs will not be caught by Article 34 of the TFEU. The justifications listed are a creation of the ECJ and are separate and distinct from the Article 36 of the TFEU derogations considered above. As the case with Article 36 justifications the state which asserts the ground for justification has the onus of providing supporting evidence.

This list is not exhaustive (note the use of the words ‘relating in particular to…’) it can be expanded by the Court in subsequent cases. The Court has added others to that list. I will not go into much detail on the grounds developed by the ECJ because I feel that many of them are superfluous as they are already covered in Article 36 of the TFEU such as public health. It is also my view that the Tribunal when exercising its jurisdiction under this head should rather confine itself to what is enumerated in the Trade Protocol rather than amend the protocol through the back door as it were.

4.10.9 Conclusion

After the discussion on the EU legal provisions on the free movement of goods within the EU we have noted that the ideal of the internal (common) market within the EU is premised on two central features: the creation of a customs union: and the free movement of goods within the EU. The objective of free movement of goods is premised on the elimination of customs duties and other equivalent charges, and the elimination of quantitative restrictions and measures having equivalent effect. We have noted that the ECJ has played a vital role in attaining the objectives of the EU by elaborating on the meaning of the relevant treaty provisions. The case law developed by the ECJ, while not directly applicable in the SADC context, could, however, serve as guidelines for the

Tribunal when interpreting similar provisions of the Treaty. Of particular importance in this respect, are the cases relating to indistinctly applicable measures which impose dual burdens on the importer. The distinction which has been drawn by the ECJ in relation to the differentiation between measures relating to the physical characteristics of the goods, and those relating to selling arrangements is a practical solution. Unfortunately the distinction as can be seen from the cases has become highly technical and revolves on the discretionary powers of the Court since each such measure is considered on its merits. This situation creates uncertainty in the law as one can only be able to say a measure breaches or does not breach the TFEU after the ECJ has made a determination. SADC can forestall this uncertainty, by setting out in advance what acts by states or private persons should constitute prohibited measures.

Similarly, the case law developed by the ECJ on the justifications under Article 36 of the TFEU could offer guidance on the interpretation of the relevant provisions of the Trade Protocol[1913]. In addition to the grounds contained in Article 36 of the TFEU, the ECJ has developed additional grounds which member states can use to justify measures under the so called *Cassis* rule of reason. One question which may be raised in the SADC context is whether the Tribunal should in future give itself the power to extend the grounds for justification specified in the Trade Protocol. A serious objection to this approach is that it allows the Tribunal to amend the Trade Protocol while it has no authority to do so. But in practice circumstances may arise where such action is necessary but, in my view, the inclusion of additional grounds for justification should be left to the member states to decide through amendments to the protocol if necessary. In addition, in my view, the grounds mentioned in the Trade Protocol, if generously interpreted, should be wide enough to accommodate every other justification which member states can try to raise. For example, measures which are necessary to prevent deceptive trade practices could be interpreted to include measures meant to protect consumers or to ensure fairness of commercial transactions under the *Cassis* principles developed by the ECJ. The development of parallel grounds for justification, as has been done with the case of public health under Article 36 of the TFEU and under the *Cassis* principle, is also superfluous

[1913] Article 9 Trade Protocol.

and highly undesirable as it creates more confusion and uncertainty in the law and must be avoided by the Tribunal.

4.11 Enforcement

In this chapter on EU law we have seen that EU law is largely enforced in the national courts of the member states through the application of the principles of direct and indirect effect, as well as the principle of state liability for damage caused in the application of EU law. In addition, under Article 267 of the TFEU national courts may refer cases involving EU law to the ECJ for a preliminary ruling but the actual enforcement of the law is done in the national courts. In all these cases the person who wishes to enforce EU law is required to invoke national remedies against the other parties who may be a member state or a private person. Of significance in this regard is the development of the principle of effective judicial remedies for the enforcement of EU as a general principle of EU law[1914].

However, the position on the enforcement of judgments of the ECJ deserves some comment. Such judgments can arise in several ways: after proceedings against a member state by the Commission or another member state under Articles 258 or 259 of the TFEU; after judicial review proceedings of acts of, or failure to act by, EU institutions under Articles 263 or 265 of the TFEU; and after a successful action for damages against EU institutions under Article 340 of the TFEU. For the purposes of this study the enforcement action of concern is that which arises after proceedings under Article 258 and 259 have been successful. The enforcement procedure is governed by Article 260 of the TFEU, and I briefly consider it in this section. The article provides that if the ECJ finds that a member state has failed to fulfill its obligations under the TFEU, the member state shall take measures to comply with the judgment. If the Commission considers that a member state has failed to comply with a judgment of the ECJ, it shall issue a reasoned opinion to that member state as in Article 258 of the TFEU proceedings. If the member

[1914] *Johnston v Chief Constable of the RUC* Case 222/84 and the discussion on the application of general principles of EU law above.

state fails to comply with the judgment within the time frame set by the Commission, the Commission may bring the matter before the ECJ and in doing so it shall specify the amount of the lump sum or penalty payment to be paid by the member state concerned. The ECJ may then impose a lump sum or penalty payment on the member state. Prior to the TEU, Article 260 of the TFEU had no sanction, all the ECJ could do was to make a declaration that a member state was acting in breach of its EU obligations. The incorporation of financial sanctions into Article 260 of the TFEU strengthens the Commission's hand in ensuring that member states comply with their obligations under the Treaties and the Commission has accordingly used its powers on several occasions under that article[1915]. This procedure of judicial enforcement of judgments against recalcitrant member states is not present in the SADC set up. Article 32 of the Protocol obliges member states to comply with judgments of the Tribunal failing which the matter may be referred to the Tribunal. The Tribunal has no enforcement powers but can only report a failure to the Summit for action. The Summit is then empowered under Article 33 of the Treaty to impose appropriate sanctions. Thus the ultimate enforcement of SADC law is left to the highest political organ of SADC, which is the Summit and not the judiciary as in the EU.

[1915] *Commission v Hellenic Republic Case* C-387/97 and *Commission v France* Case C-64/88.

CHAPTER 5

5 LESSSONS FOR THE SADC TRIBUNAL

5.1 General

After having considered the various aspects of this study, I am now in a position to consider what lessons can be drawn by the Tribunal from the experience of similar institutions discussed in the preceding chapters. Before going into detail, I need to make few general comments in relation to three matters namely, the law-making function in SADC, the relationship between the Tribunal and the other African courts, and the methods of interpretation of treaty law.

In so far as law-making in concerned, we have seen that in SADC, the function is reserved for SADC institutions such as the Summit or the Council and other institutions exercising powers delegated by the Summit. One thing which is apparent from the Treaty is that even though it refers to subsidiary legal instruments such as protocols, it does not specify the nature of actual legal instruments to be adopted or what their effect is in the national legal systems of the member states. This omission creates a certain amount of legal uncertainty as to the very nature of SADC law itself.

We have noted that in the EU, the TFEU is very specific on the types of legal instruments which can be adopted by the EU institutions, as well as the various procedures which are available to the EU institutions to adopt the instruments. The TFEU goes further to state the effect of each of these legal instruments thus removing any doubt or ambiguity in this regard[1916]. In the case of the AU, we have noted that in the same respect, the AEC Treaty specifies the various types of legal instrument which can be adopted by the institutions of the AU as well as the relevant organs which are empowered to adopt the instruments[1917]. Of greater importance is the fact that the AEC Treaty also specifies the effect of the

[1916] Article 288 of the TFEU.
[1917] Articles 10 and 13 of the AEC Treaty and the discussion on the AU and its Court of Justice Chap 2 *supra*.

decisions and regulations of the AU institutions on the member states[1918]. The CJ Protocol then goes on to confer jurisdiction on the CJ of the AU to resolve disputes over the interpretation of these legal instruments which include the decisions and regulations. The approach taken by the EU and the AU in this regard is commendable, as it ensures legal certainty and completeness of the legal regime. SADC might consider adopting a similar approach especially in areas which go beyond mere intergovernmental cooperation and encroach on the rights and obligations of private persons.

On the relationship between the Tribunal and other African courts, we have noted the existence of several courts or tribunals which are meant to perform functions similar to the Tribunal. These include the regional courts of ECOWAS and the EAC, the COMESA court, and the Court of Justice of the AU[1919]. There is no doubt that the Tribunal can use the experience gained by these courts when confronted with similar issues, but the weight to be attached to decisions of these courts is not known. In the case of the CJ, it would probably have made sense if the Treaty or the Protocol had mentioned something on the hierarchical relationship between the Tribunal and that court. For example, it was possible to make the CJ an appeal court from decisions of the Tribunal impacting on matters peculiar to the whole AU, or at the most for the Tribunal to seek an advisory opinion on such matters from the CJ. The need for such a mechanism becomes acute in the light of Articles 10 and 13 of the AEC Treaty which provide that decisions AU Assembly and regulations of the AU Council shall bind member states, organs of the AU and regional economic communities[1920]**.** This approach, if adopted by all the courts of the regional economic communities of the AU, would at least ensure uniformity in the application of the international law applicable to the whole AU.

We have noted that neither the Treaty nor the Protocol stipulates the methods which the Tribunal will use when interpreting SADC law, and presumably it was left to the Tribunal to devise its own methods having regard to applicable principles of international law and the experience of other international courts. In this respect the Vienna

[1918] Ibid.
[1919] These are discussed in Chap 2 *supra*.
[1920] See Chap 2 section on the AU and its Court of Justice for discussion of these provisions.

Convention on the Law of Treaties 1969 and the experience of the ICJ are pertinent[1921]. I must, however, note that a wholesale adoption of the Vienna Convention and the ICJ jurisprudence may not be very appropriate for the Tribunal simply because the conventions and the methods applied by the ICJ are primarily meant for application of the law between states, and not between private persons or between private persons and states. The approach of the ECJ, and perhaps the CJ, when it becomes functional should guide the Tribunal. In the case of the ECJ, we have noted that even though it applies the traditional approaches used in international law such as the literal, contextual and teleological methods, its primary objective is to ensure that the objectives of the TFEU are attained. This underlying policy of the ECJ is important in many respects for the Tribunal in the sense that by placing emphasis on the objectives or purposes of the Treaty, the Tribunal would be able to disregard the other rules of interpretation and apply the teleological method where necessary. The ECJ has done this and has created, as we have seen, many important principles of EU law by disregarding the literal or contextual approach to treaty interpretation.

Having made these general remarks I now conclude the study by considering the various options available to the Tribunal in respect of each area of study examined namely, access to the court, jurisdiction, sources of law, and enforcement of the law.

5.2 Parties (access to the Tribunal)

We have noted that in so far as access to the Tribunal is concerned, the SADC approach is very liberal in respect of private persons. SADC deviates from the traditional international law approach of denying or granting private persons limited access to international courts and this is commendable. We have seen the difficulties experienced in the UN during the *South West Africa* cases where it was not possible to get a legally binding decision because UN institutions could not be parties before the ICJ[1922]. The only way in which private persons can have access to the ICJ is through the mechanism of

[1921] Only seven of the SADC member states have ratified the Convention. See discussion on international treaties as a source of law in the ICJ chap 2 *supra.*
[1922] Chap 3 section on access to the ICJ.

diplomatic protection which does not afford adequate protection to the person because it is dependent on the discretion of the state which may decline to take up a case on behalf of its national. There are also the requirements of nationality and exhaustion of local remedies which must be satisfied before the claim can be admitted. The denial of access to international courts is rather unfortunate especially in this era where many legal relationships can be easily created between private persons and states[1923]. In this connection I also considered the application of the doctrine of exhaustion of local remedies in the international courts and the principles developed should offer guidelines to the Tribunal when applying that principle in the SADC context.

It is hoped that the Tribunal will adopt a liberal approach as with the ICJ, and apply the principle with a view to ensuring that the private person is not unnecessarily denied access to justice[1924]. The concepts of a private person having "exhausted all available remedies" or being "unable to proceed under the domestic jurisdiction" if applied restrictively by the Tribunal, can work to the disadvantage of private persons. On the other hand, the Tribunal will have to contend with another important interest namely, the possibility of its being overwhelmed by undeserving actions against member states by private persons which could seriously jeopardize the operations of the Tribunal. On this point, I should point out that the principle of exhaustion of local remedies is not applicable in the EU although as we have noted private persons generally have no right of direct access to the ECJ in cases involving states. It must also be noted in passing that the restriction of access to the ECJ in annulment proceedings under the TFEU has been problematic and has generated a large volume of case law on what amounts to an act which is of direct and individual concern to a prospective party[1925]. Fortunately these issues are unlikely to arise is SADC since there is no such restrictions on the capacity of private persons to bring cases before the Tribunal against either member states or SADC institutions.

[1923] For example the ICSID is an attempt to alleviate the plight of private persons who may want to enforce or defend their rights through international adjudication.

[1924] The Tribunal dealt with the principle of exhaustion of domestic remedies in the *Campbell* case where it held that they had been exhausted. Future cases will arise when different factual scenarios requiring modification of the principle.

[1925] Individuals can bring annulment proceedings against acts of EU institutions directly before the ECJ under Article 263 (former 230 EC Treaty) TFEU provided they meet the conditions set in the article.

5.3 Jurisdiction of the Tribunal

In so far as the jurisdiction of the Tribunal is concerned, the issues which are likely to arise before it are whether any particular dispute falls within the ambit of Article 14 of the Protocol. This means that for a matter to be justiciable before the Tribunal, it must fall within the ambit of SADC law, namely the Treaty, protocols and other legal instruments, acts of SADC institutions or agreements between states which confer jurisdiction on the Tribunal. Problems may arise in relation to whether all "acts of SADC institutions" are subject to the jurisdiction of the Tribunal, or if not, which of those acts should be justiciable. We have noted that the ICJ has attempted to draw a distinction between legal and political questions. The principles developed by that court on what amounts to a legal question should offer guidance to the Tribunal. The principle is that the dispute or issue should be capable of being resolved by the application of law. In addition, the Tribunal should also be guided by the principle, developed by the ICJ, that in cases which involve both legal and political questions, the court should assume jurisdiction even though the matter may have political consequences. Of greater relevance is the ECJ's approach which places emphasis on the *effect* of the act in question and finding jurisdiction if the court is satisfied that the act is intended to or is capable of producing legal affects in the sense that it alters a person's legal position.

The question of what type of matters can be brought before the Tribunal against states, SADC institutions and private persons, can also arise in the SADC context. We have noted the various types of action which can be brought against EU member states before the ECJ, ranging from direct breaches of treaty obligations to failure to implement EU secondary legislation. The type of defences which states may raise in respect of actions against them have also been considered in relation to the EU, and we have noted that the ECJ has been very strict in this regard, rejecting most of the defences raised. This approach ensures that states take their obligations under the treaty seriously and the

Tribunal should adapt a similar approach. To do otherwise could jeopardize the attainment of the objectives of SADC.

We have noted that the preliminary jurisdiction of the Tribunal is similar to that of the ECJ and that the ECJ has actively encouraged the national courts of EU states to refer matters to it. This again is commendable as it ensures the uniform and consistent interpretation and application of EU law by the national courts of the member states. The Tribunal should draw inspiration from the experience of the ECJ, especially in relation to the nature of matters which may be referred, the identification of the courts or tribunals which may refer, the duty or discretion to refer, and circumstances where it is not necessary to refer. A word of caution must be sounded in relation to this last aspect for which the ECJ has developed two important principles. This first is that of precedent: where the ECJ has already made a determination on the matter to be referred, the national court need not again refer the matter to the ECJ. This principle has merit in that cases which are similar to cases already decided by the court need not again be referred. Difficulties may arise in determining whether the case is similar to the one previously decided. The attitude of the ECJ in admitting references in such cases, but referring the national court to the relevant decision appears to be appropriate as different national courts may come to different conclusions as to the effect of a previous decision of ECJ.

The other principle developed by the ECJ is that of *acte clair* and we have seen the difficulties inherent in its application by national courts. The principle, as we noted, is that the national court need not refer where the answer to a question of interpretation is so obvious as to leave no scope for reasonable doubt. The Tribunal would be well advised not to follow this principle as it creates problems as experienced in the EU.

The experience of the ECJ in exercising its review jurisdiction can be of benefit to the Tribunal when reviewing acts of SADC institutions. We have already noted that the ECJ has developed a standard test for what acts may be reviewed and this should by a starting point for the Tribunal. Being an area of potential controversy, the Tribunal may consider the sort of acts of government bodies which are reviewable under the national laws of

member states. The grounds for review set out in the TFEU and their application by the ECJ should be of use to the Tribunal as well.

The question of liability of member states or SADC institutions for unlawful acts or omissions occurring within the SADC context, as we have noted, is not specifically addressed by the Treaty or protocols. I have urged that the Tribunal should find such liability on the basis of general principles of international law which require states to make good any harm they have caused to other states or private persons. The Tribunal may be assisted in this regard by the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts[1926]. Article 2 of the Draft sets out the elements of an internationally wrongful act of a state as being state conduct consisting of an action or omission which is attributable to the state under international law and constitutes a breach of an international obligation of the state. Article 3 of the Draft deals with what characterizes the state for purposes of liability, while Articles 4 to 11 set out the details of what and how acts are attributable to the state. Articles 12 to 15 give details of what constitutes a breach of an international obligation, while Articles 20 to 26 set out defences to actions. The defences include consent, self-defence, countermeasures in retaliation for a prior unlawful act, *force majeure*, distress, necessity, and compliance with norms of the nature of *jus cogens*. Article 31 places the state under an obligation to make full reparation for injury caused by the wrongful act while Articles 34 to 37 detail the forms of reparation which are available for wrongful acts. These are restitution, compensation and satisfaction. The principles expounded in these provisions are important in that they reflect customary international law on the subject which, as I have urged, should form part of the rules and principles of public international law to be applied by the Tribunal.

Apart from the general principles as expounded by the ILC, the ECJ has, in the EU context, developed its own principles governing liability of EU institutions and member states of the EU for breach of obligations under EU law. We have noted that the liability

[1926] The text of the report was adopted by the ILC in 2001 and submitted to the UN General Assembly which adopted it as resolution 56/83 of 12 December 2001 as corrected.

of EU institutions is provided for in the TFEU, while that of member states is not and is a creature of treaty interpretation by the ECJ. The TFEU does not set out the principles governing the liability of EU institutions, the development of which is left to the ECJ through the development of general principles of law common to the member states. The ECJ has developed the principles governing liability of the EU as the occurrence of actual damage to the claimant, unlawful act on part of the institution, and existence of a direct casual link between the act and the alleged damage. In the case of state liability, the basis for liability to compensate arises in case of directives where the result aimed at by the directive confers rights on individuals, the content of the rights can be identified from the directive, and the existence of a casual link between the act of the state and the damage. In both cases, breaches of EU obligations arising from legislative acts must be *sufficiently serious* to warrant the incurring of liability by a member state or an EU institution. It is clear from this review of principles of liability that the Tribunal has at its disposal a wide range of principles governing both the liability of SADC institutions and member states.

The Tribunal in exercising its advisory jurisdiction could rely on the experience of other tribunals which have similar jurisdiction, such as the ICJ or the CJ of the AU, if it becomes functional. The ICJ and the CJ are, however, restricted to giving opinions on "legal questions". We have noted that in the case of the ICJ, that court has developed a number of principles which may or may not be of use to the Tribunal. The major principles developed in this regard are that the ICJ will not give an opinion if doing so would amount to deciding on a dispute between states, thus undermining the principle of consent, the ICJ will not give an opinion to a UN agency on matters falling outside the scope of its activities, and that the advisory opinions of the ICJ are not binding on states hence cannot be enforced under the UN Charter.

The first principle might not apply to the Tribunal since the issue of consent does not arise because the jurisdiction of the Tribunal is compulsory[1927]. But, as the experience of the ICJ has shown, states are very sensitive to matters being taken by UN institutions to the ICJ through the advisory opinion route. We have noted the experience of South

[1927] Article 15.3 Protocol.

Africa in the Namibian cases and its refusal to comply with the advisory opinions of the ICJ. As for the Tribunal, another factor is that once an opinion is requested by the authorized institution, the Tribunal appears to have no discretion in the matter according to the wording of the relevant treaty provision[1928]. It is my view that the Tribunal should not be obliged to give an opinion, in particular, in cases involving disputes between states which have not been referred to it. Rather, the Tribunal ought to require the states themselves to bring proceedings before it. The principle that the opinion requested by the UN organ must relate to a matter within the scope of its activities, does not apply to the Tribunal because the Treaty does not impose such a restriction. However, the Tribunal must exercise restraint in this regard and give opinions only in respect of legal questions, even though the Treaty does not impose restrictions on the nature of opinions which may be given. This is to ensure that the Tribunal maintains its character of being a judicial body performing judicial functions as opposed to giving opinions on political questions. The Treaty does not mention the effect of a legal opinion on SADC institutions or states, thus the effect of such opinions is uncertain. It is submitted that the opinions should have the same effect as those of the ICJ, they have no legal force but may assist SADC institutions or states in carrying out their functions under the Treaty.

The Tribunal is empowered to grant interim measures pending the full hearing or determination of a case and we have seen that the Tribunal has already done so, although in a case which was unopposed[1929]. In exercising this power in future, the Tribunal could also have regard to experience of the ICJ which has had occasion to deal with such matters.

5.4 Sources of law

The primary source of law for the Tribunal will be the Treaty which is also the SADC constitutive document. The manner in which similar courts have dealt with their primary

[1928] Article 16.4 Treaty which uses the mandatory word “shall” give the opinion.
[1929] *Campbell* case T 02/ 2007.

law and constitutive documents is of importance. For example, we have seen that the ICJ has given a teleological interpretation to the UN Charter by holding that the UN has implied legal personality enabling it to bring claims on behalf of its servants in the international arena[1930]. On the other hand, the ECJ considers the TFEU to be the primary law of the EU to which all other subsidiary laws must conform. The Tribunal will get some inspiration from the manner in which the ECJ has interpreted some key provisions of the TFEU. The ECJ has been active in the interpretation of the TFEU provisions relating to the free movement of goods, workers, the right of establishment and provision of services within the EU. I discussed the provisions on the free movement of goods and creation of the EU common market, in order to demonstrate how the ECJ has been instrumental in the attainment of the objectives of the common market. I also contrasted the provisions of the TFEU to those of the Trade Protocol which are similarly worded. The Tribunal cannot simply ignore the jurisprudence developed by the ECJ in this regard, especially in relation to what amounts to charges having equivalent effect to customs duties, and to measures having equivalent effect to quantitative restrictions on imports and exports.

We have noted that the Tribunal has a wide mandate to apply both general rules and principles of public international law and any rules and principles of the law of the member states as sources of law. Under the rubric of this source, the Tribunal should be able to apply, where necessary, jurisprudence developed by the ICJ, the ECJ and other international courts or tribunals such as the CJ of the AU and some regional courts in Africa. It could also apply the jurisprudence of specialized courts such as the European Court of Human Rights and economic tribunals such as the arbitral panels of the World Trade Organisation[1931]. In so far as the ICJ is concerned, its experience in the application of the sources of law stated in Article 38 ICJ Statute will be of great significance. In relation to customary international law, we have seen that the ICJ has not been able satisfactorily to resolve the controversy relating to the elements of a custom which

[1930] *Reparation for Injuries Opinion* ICJ Reports 1949.
[1931] Arbitral panels are established by and function under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) 1994 which is one of the agreements annexed to the Agreement Establishing the WTO.

qualify it as law. We have noted the two approaches being the strict approach which requires proof of both state practice (the physical element) and *opinio juris* (the psychological element) and the liberal approach which holds that, on proof of sufficient state practice, the *opinio juris* should be presumed. The principles developed by the ICJ and the International Law Association which are discussed in Chapter 3 could be used as guidelines by the Tribunal. The other area of difficulty is that of the relationship between treaty law and subsequent customary international law, the issue being which of them must prevail in the event of a conflict. The ICJ has not been very clear on this aspect of customary international law. The Tribunal will have to devise its own methods of ascertaining the relevant customary law especially in respect of local or regional custom. It is inevitable that a body of custom peculiar to the SADC region will naturally develop because of the shared common political, economic and social values brought about by regional integration. The ICJ has applied general principles of international and national law under the rubric of "general principles of law recognized by civilized nations". In the SADC context, the Tribunal will have to apply similar principles since it is mandated to do so by the Protocol. In addition, the Tribunal could draw inspiration from the experience of the ECJ which, as we have noted, has developed a considerable body of jurisprudence based on the concept of "general principles of law" drawing from international and national law. In particular, the ECJ has managed to infuse fundamental human rights and freedoms into the *corpus* of EU law.

The ECJ has also developed some fundamental principles of EU law through its creative interpretation of EU legislation and three of these principles have been discussed throughout this study. The principles of supremacy of EU law over the national law of member states, direct and indirect effect of EU law in the legal systems of the member states, and the principle of state liability for breaches of EU law now form the core aspects of EU law. The Tribunal can also develop similar principles albeit with variations to suit the SADC context.

5.5 Enforcement

We have noted that SADC law in general can be enforced in the Tribunal through direct actions, as well as in national courts through the preliminary rulings procedure provided for in the Protocol. Important lessons can be drawn from the experience of the ECJ which has been involved in the enforcement of EU law for more than five decades. The problem of enforcement of specific judgments of the Tribunal has been noted, and we have observed that the ultimate responsibility for enforcement of judgments lies with the SADC Summit. The experience of the ICJ in this regard demonstrates the challenges which can be encountered in using this method of enforcement of judgments: states can simply refuse to comply with judgments of the court thus seriously undermining the authority of the court itself. This has actually happened in the case of the *Campbell* judgment which has been referred to throughout this study. The respondent state, Zimbabwe, has refused to comply with the judgment of the Tribunal and the matter has been referred to the Summit for a decision. Meanwhile, press reports from South Africa indicate that the North Gauteng High Court of SA has given a ruling confirming an out of court settlement between the government of SA and one of the applicants in the *Campbell* case to the effect that SA would honour the terms of the Tribunal's judgment[1932]. While the applicant might get relief in the SA legal system, that is not necessarily the case in Zimbabwe. The Zimbabwe government can refuse to honour the judgment or any obligations arising from it with impunity. The only remedy available appears to be political: through the involvement of the SADC Summit which has a final say on the matter. We have also noted that the EU in its early stages of development experienced similar problems when states refused to comply with judgments of the ECJ and in some cases prejudicing the rights of private persons who had no remedy against such states[1933]. The ECJ intervened in this regard by developing the principle of state liability for breaches of EU law. This is a remedy which enables private persons to obtain remedies against states in the national courts of the member states which is now widely invoked by private persons in the EU. The Tribunal can devise a similar remedy to ensure the effectiveness of SADC law. We have seen that at the political level, the EU tried to solve

[1932] See the *Business Day* report of 27/11/09 which can be accessed on www.businessday.co.zw (visited 13/01/10).

[1933] See *Commission v Italy* Case 7/68 [1968] ECR 423 and *Commission v France* Case 232/78 [1979] ECR 2729 in which cases both Italy and France refused to comply with judgments of the ECJ leading to institution of proceedings to ensure compliance by the Commission.

the problem of non-compliance with ECJ judgments by amending the TFEU to provide for the imposition of financial penalties to induce member states to comply with judgments of the ECJ. This move is commendable in that defaulting states do so with full knowledge that they may incur financial liability for non-compliance with a judgment. Private persons are assured that, at least there are judicial, as opposed to political, means of enforcing judgments against states. SADC might consider adapting a similar approach of enforcement of judgments against defaulting states. This can be achieved by amending the Treaty to make provision for the imposition of financial penalties against member states which fail to comply with judgments of the Tribunal. This does not mean that the political means of enforcement are without any significance. The reference of a case to the Summit where a state has refused to comply with a judgment of the Tribunal may have serious political consequences which may include suspension of the member's rights or even expulsion from the organization thus both means of enforcement can be maintained in SADC.

APPENDIX

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Protocol on Immunities and Privileges	17 Aug 1992	30 Sep1993
Protocol on Shared Watercourse Systems	28 Aug 1995	28 Sep 1998
Protocol on Energy	24 Aug 1996	17 Apr 1998
Protocol on Transport, Communication and Meteorology	24 Aug 1996	6 July 1998
Protocol on Combating Illicit Drugs	24 Aug 1996	20 Mar 1999
Protocol on Trade	24 Aug 1996	25 Jan 2000
Charter of the Regional Tourism Organisation of Southern Africa (RETOSA)	8 Sep 1997	8 Sep 1997
Protocol on Education and Training	8 Sep 1997	31 July 2000
Protocol on Mining	8 Sep 1997	10 Feb 2000
Protocol on the Development of Tourism	14 Sep 1998	26 Nov 2002
Protocol on Health	18 Aug 1999	14 August 2004
Protocol on Wildlife Conservation and Law Enforcement MOU on Cooperation in Standardisation, Quality	18 Aug 1999	30 Nov 2003
Assurance, Accreditation and Metrology in SADC	9 Nov 1999	16 July 2000
Protocol on Legal Affairs	7 Aug 2000	
Revised Protocol on Shared Watercourses	7 Aug 2000	22 Sep 2003
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Protocol Against Corruption	14 August 2001	--
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Agreement Amending the Protocol on Tribunal and the Rules of Procedure	3 Oct 2002	3 Oct 2002
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Treaty on European Union 1992

Treaty of Lisbon 2007

Statutes

Constitution of Zimbabwe which was published as a Schedule to the Zimbabwe Constitution Order 1979 (S.I 1979/1600 of the United Kingdom)