

Regionalism: Lessons the SADC may learn from OHADA

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OPSOMMING

Regionalisme: Lesse wat die SAOG by OHADA kan leer

Meeste Afrikastate is klein en het nie die vermoë om effektief aan prosesse van die Wêreldhandelsorganisasie deel te neem nie. Hierdie onvermoë, saam met ander faktore, is die hoofrede vir die voortgesette marginalisering van die kontinent in die globale ekonomie en handel. Ten einde effektief aan genoemde prosesse deel te neem en in die voordele van die geglobaliseerde wêreld te deel, moet Afrikastate integreer. Regionalisme of integrasie is nie 'n doel op sigself nie maar is nodig vir die ekonomiese groei van Afrikastate. Dit skep groter markte vir handel en belegging en is 'n aansporing tot groter effektiwiteit, produktiwiteit en mededingendheid. In die lig hiervan stel die artikel drie kernargumente. Die eerste is dat regionalisme voordele bied wat Afrikastate kan ontgin ten einde marginalisering op globale vlak te oorkom. Die tweede argument is dat, terwyl die Suider-Afrikaanse Ontwikkelingsgemeenskap (SAOG) poog om besigheidsreg te harmoniseer, die Organisation for the Harmonisation of Business Law in Africa (OHADA) (*Organisation pour l'Harmonisation en Afrique du Droit des Affaires*) as voorbeeld kan dien aangesien dit reeds die grondslag gelê het vir die harmonisering van besigheidsreg in Afrika. Die derde argument is dat die SAOG-tribunaal verbeter moet word ten einde 'n meer regionale regsraamwerk binne die SAOG daar te stel. In hierdie verband belig die artikel sommige voordele van regionalisme in Afrika, die lesse wat die SAOG by OHADA kan leer, die voordele van 'n geharmoniseerde besigheidsreg teen die agtergrond van die OHADA-ondervinding en die moontlike wyses waarop die SAOG-tribunaal verbeter kan word.

1 INTRODUCTION

Regionalism is not a new phenomenon in Africa. It dates as far back as 1958.¹ Since 1958, there has been a remarkable increase in the number of regional integration agreements in Africa. There is the African Union at the continental level and a host of sub-regional initiatives such as OHADA, the SADC, the Economic Community of West African States (ECOWAS), the East African Community (EAC) and the Common Market for the Eastern and Southern African Region (COMESA), to name but a few. It is worth noting that in spite of the increase, the harmonisation of the business law of African states is limited. In French-speaking Africa, for instance, such attempts have been made in narrow

¹ Chanthunya "Regional integration" in Chipeta (ed) *Trade and investment in Southern Africa: Towards regional economic co-operation and integration* (1998) 1–5; Schillinger "Introduction" in Schillinger *et al Revisiting regionalism in Southern Africa* (2008) 12.

areas such as intellectual property,² insurance³ and investment⁴ under the auspices of the Intellectual Property Organisation (OAPI),⁵ Inter-African Conference on Insurance Markets (CIMA) and the Monetary and Economic Community of Central African States (CEMAC). However, no part of the African continent has witnessed regional legal reform on the scale of that was initiated by the Organisation for the Harmonisation of Business Law in Africa (OHADA).⁶

Taking into account these developments, the article deploys three arguments. The first is that regionalism offers benefits that may be exploited by African states to overcome the problem of marginalisation at the global level. Second, OHADA may serve as an example for the harmonisation of business law within the SADC region; and, third, a more integrationist legal framework cannot be achieved within SADC without an improvement in the effectiveness of the SADC Tribunal. The purpose of the article, therefore, is to highlight some of the benefits of regionalism in Africa, the lessons SADC can learn from OHADA, the advantages of harmonised business laws with a focus on the OHADA experience, and the likely paths along which the SADC Tribunal may be improved. The value of the article lies in the insights it offers into the harmonisation of business law in SADC and the advantages of this for member states.

2 REGIONALISM AND ITS BENEFITS TO AFRICAN STATES

There are many views on the definition of regionalism.⁷ Nye Joseph provided the point of departure by defining regionalism as “the formation of interstate associations or groupings on the basis of regions”.⁸ For Lee⁹ regionalism is “the adoption of a regional project by a formal regional economic organisation designed to enhance the political, economic, social, cultural and security integration and or cooperation of member states”; while, according to Lavergne,¹⁰ it is a “reflection of the growing appreciation of the benefits to be derived from regional unity and cooperation in meeting the challenges posed by increasingly competitive world markets”. Regionalism may also be defined as “efforts by a group of nations to enhance their economic, political, social and cultural interaction”.¹¹

In recognition of the need to participate in World Trade Organisation processes and reap the benefits of regionalism, several regional integration arrangements

2 Intellectual Property Law of 2 March 1977 revised on 24 February 1999.

3 Law of 10 July 1992.

4 Investment Charter 17/99/CEMAC-020-CM-03; see Pilkington “The security of transactions and investment in Africa” 33–39 (2003) (unpublished and on file with author).

5 *L'organisation Africaine pour la propriété intellectuelle* of 2 March 1977.

6 Tabe-Tabé *Company formation under the OHADA Uniform Act on Commercial Companies and Economic Interest Groups: Changes in the law hitherto applicable in the former West Cameroon* (LLD thesis University of Yaoundé 2009) 6.

7 Akokpari “Dilemmas of regional integration and development in Africa” in Akokpari *et al The African Union and its institutions* (2008) 86; Nyerere *Non-alignment in the 1970s* (1970) 12.

8 Nye *International regionalism* (1968) vii.

9 Lee *The political economy of regionalism in Southern Africa* (2003) 8.

10 Lavergne *Regional integration and cooperation in West Africa: A multidimensional perspective* (1997) 10.

11 Lee “Regionalism in Africa: Part of problem or part of solution” 2002 *Numero Special 1* and Rasamond *Theories of European integration* (2008) 203.

have been made by African leaders.¹² Despite valiant efforts, most of these regional attempts have not been successful¹³ for a number of reasons. These include overlapping membership, which according to Gathii is a classic case of the spaghetti bowl;¹⁴ lack of finance; and, most importantly, lack of political will on the part of African leaders to cede part of their sovereignty to regional institutions.¹⁵ In spite of the failure of regional integration arrangements, regionalism offers many benefits to African states if properly organised. Among other benefits, it gives African states the opportunity to pool their resources and avail themselves of regional institutional and human resources.¹⁶ As the World Bank puts it: “[The presence of regional institutions] can help facilitate domestic policy reform when local interest groups have conflicting preferences.”¹⁷ In other words, it saves African states the time and effort of having to enact domestic laws.

It also helps create a larger market for firms through which they may expand and become more competitive.¹⁸ This helps to overcome the relatively small sizes of most African markets by enabling them to produce on a larger scale to realise greater economics of scale.¹⁹ Moreover, the larger market induces relocation of firms to more favourable areas such as areas of cheap labour and ready access to credit, which would allow them to benefit from economies of scale. (One adverse consequence of this, however, might be the over-concentration of firms in one country at the cost of others – trade diversion.) Most importantly, regionalism increases the bargaining power of small countries in particular, which would not have been possible on an individual basis. Moreover, it helps reduce the risk of conflicts between countries through the provision of conflict resolution mechanisms.²⁰

This is not to say that regionalism is enough. Regionalism is necessary but not a sufficient condition for growth. There are other factors which must be considered for the growth of Africa. As Ouattara points out, good governance, sound macro-economic policies, rule of law, constant transparency and a stable and rational regulatory and incentive framework, are needed.²¹ Therefore, any country or region that seeks to attract foreign investment in order to create much-needed economic growth and new employment²² must have a legal system built

12 See para 1 above.

13 Bach *Introduction in regionalisation in Africa: Integration and disintegration* (1999) 2. Regional integration attempts in Africa have no doubt recorded a number of achievements but there are still challenges to be addressed for their survival such as a lack of financial resources; Kamala *The achievements and challenges of the new East African Community Co-operation* (<http://bit.ly/uMBbat>; accessed 23 November 2011).

14 Gathii *African regional trade agreements as flexible legal regimes* (2011) 6-8.

15 Alan *Regional integration and food security in developing countries* (2003) ch 3.

16 Ouattara *Regional integration in Africa: An important step towards global integration* (<http://bit.ly/t4Lyh5>; accessed 11 November 2011).

17 See the World Bank *World development report* (2005).

18 Economic Commission for Africa *Assessing regional integration in Africa* (2004) 12.

19 Ouattara (fn 16 *supra*) 1.

20 *Idem* 14.

21 *Idem* 17.

22 Dupasquier and Osakwe *Foreign direct investment in Africa: Performance, challenges and responsibilities* (<http://bit.ly/sTnCzw> accessed; 23 November 2011). The authors highlighted a number of factors which, according to them, are responsible for the poor foreign direct investment in Africa. They include, among others, political and macro-economic instability; low growth; weak infrastructure; poor governance; and ill-conceived investment promotion strategies.

on the rule of law. It must also have transparent and accessible rules and an independent and non-corrupt judiciary.

3 LESSONS THE SADC CAN LEARN FROM OHADA

The section highlights some of the lessons the SADC can learn from OHADA and the advantages of such an experience, with a focus on OHADA. However, before engaging in the subject matter, an understanding of both SADC and OHADA is vital.

3.1 Southern African Development Community (SADC)

SADC is a “treaty-based organisation”,²³ in the sense that it was established within the framework of an agreement between the Southern African states – Angola, Botswana, the Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe following the adoption of the SADC treaty in 1992.²⁴ The main task of the SADC is to create a development community through regional co-operation and integration for the economic liberation and development of the community.²⁵ Towards this end, the SADC has created community organs to oversee the implementation of its objectives, and one of these organs is the Tribunal. The focus on the Tribunal is aimed at showing how important it is in the SADC harmonisation process. It is important in the sense that it can be used to further the harmonisation of law practices in the Community.

The Tribunal, which is based in Windhoek, Namibia, was established in 1992 by article 9 of the SADC treaty as one of the institutions of the SADC. Article 16(1) of the SADC treaty states that, “[t]he Tribunal shall be constituted to ensure adherence to and the proper interpretation of the provisions of this [SADC] treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it”.²⁶ It is also mandated to give “advisory opinions on such matters as the Summit or the Council *may* refer to it”.²⁷ It is unfortunate that the Tribunal has not lived up to expectations. This situation is arguably a consequence of the members’ failure to accord the Tribunal a compulsory status and the power to follow up on the implementation of its decisions. The Tribunal does not have compulsory jurisdiction. With the exception of the SADC Protocol on trade which contemplates the appointment of experts to adjudicate trade disputes

23 Sands and Klein *Bowette’s Law of international institutions* (2009) 16.

24 The Treaty of Southern African Development Community, Windhoek, 17 August 1992. The Treaty, after citing the objectives previously enunciated in the “Southern African Toward Economic Liberation – A Declaration by the Governments of Independent States of Southern Africa made at Lusaka, 1 April 1980” establishes the SADC (hereinafter “SADC Treaty”).

25 Art 21(3) (a) (b) (c) (d) (e) (f) and (g) of the SADC Treaty. Art 21 sets the areas of co-operation ranges from food security, agriculture, international relations and peace.

26 This refers to disputes pertaining to the treaty and other legal instruments, labour disputes between the community and its staff relating to conditions of employment; a 19 of the Protocol on Tribunal and Rules of Procedure Thereof as well as human rights disputes; see *Barry Gondo v The Republic of Zimbabwe* SADC (T) 05/2008.

27 A 16(4) of the SADC Treaty.

referred to the Tribunal²⁸ and the SADC Protocol on Finance and Investment,²⁹ most SADC protocols provide otherwise.³⁰ In essence, neither the member states nor natural and legal persons are obliged to refer their cases to the Tribunal.³¹

It can further be argued that the failure of the Tribunal is due to some members' deliberate denial of the application of the Tribunal's rulings against them. This played out in the case of *Mike Campbell (PVT) v Government of Zimbabwe*.³² Not only did the government of Zimbabwe fail to comply with the decisions of the Tribunal, but it made it clear that decisions of the Tribunal against Zimbabwe are null and void.³³ As President Mugabe puts it, "the judgments were 'nonsense' and 'of no consequences' [*sic*]. Land issues would be Zimbabwean affairs, not SADC affairs".³⁴ Surprisingly, no action was taken by the Summit to push Zimbabwe to comply with its treaty obligations. Instead, it ordered a review of the Tribunal's role, functions and terms of reference.³⁵ This lack of compliance has frustrated the drafters' initiatives, which was geared towards creating an effective and supranational entity – the Tribunal.³⁶ Nevertheless, efforts are underway to review the Tribunal.³⁷ The application of harmonised business laws requires a strong and independent institution to implement them. This very fact necessitates a review of the Tribunal.

3 2 Organisation for the Harmonisation of Business Law in Africa (OHADA)

This section discusses OHADA, outlines the lessons SADC can learn from the organisation, and indicates the advantages of such an experience.

3 2 1 Definition of OHADA

OHADA is an organisation that strives for the harmonisation of business law in Africa (OHBLA).³⁸ Underlying this is the aim to attract foreign investment in

28 A 32(6) of the SADC Protocol on Trade 2002 expressly provides that if a matter regarding the interpretation and application of the protocol cannot be resolved amicably, then it must be referred to the Tribunal.

29 A 24(3) of the SADC Protocol on Finance and Investment 18 August 2006. Under a 24(3), disputes relating to this protocol are first settled through negotiation within three months, failing which it shall be referred to the Tribunal for adjudication.

30 A 23 SADC Protocol on Education and Training 1997 provides that if a matter cannot be settled through negotiation, it shall be referred to an *ad hoc* working group designated by the committee of Ministers for resolution.

31 *Ibid.*

32 SADC (T) 2 2007; see Memory and Midgley "Land Reform in Zimbabwe: Context, Process, Legal and Constitutional Issues and Implications for the SADC Region" 2008 *Monitoring regional integration in Southern Africa yearbook* 1–40.

33 May "Legal opinion: Zimbabwe withdraws from SADC Tribunal" *Time Live Newspaper* 1.

34 See <http://bit.ly/u4Lss7>; accessed 12 September 2011.

35 *Ibid.*

36 Vines "Regional Integration in Southern Africa: Challenges and Opportunities" (speech delivered to the *Instituto Superior de Relacoes Internacionais* 26 March 2008 in Maputo, Mozambique).

37 The SADC Summit at a meeting in Kinshasa, DRC, directed the regional Ministers of Justice to "undertake a review of the operations of the Tribunal with the view of strengthening and improving its terms of reference"; see Ndlovu "SADC Tribunal Review: Does the Tribunal require Appellate Jurisdiction?" (2011, unpublished and on file with author).

38 Penda *The applicability of OHADA Treaty in Cameroon: The way forward* (<http://bit.ly/uJnZds>; accessed 20 October 2011).

order to foster regional economic integration and development of member states.³⁹ To this effect, nine uniform Acts have been adopted by the Council of Ministers⁴⁰ and four institutions created to oversee the implementation of the objectives of OHADA.⁴¹ The beginnings of OHADA can be traced to the signing of the Port Louis Treaty. The Port Louis Treaty on the Harmonisation of Business Law in Africa (OHADA) entered into force in 1995.⁴² To date, it has been ratified by 16 Western and Central African states, namely, Benin, Burkina Faso, Central African Republic, Chad, Cameroon, Comoros, Congo, Equatorial Guinea, Guinea, Guinea Bissau, Gabon, Ivory Coast, Mali, Niger, Senegal and Togo. The Democratic Republic of Congo's parliament has adoption under review.⁴³

Anglophone Cameroon⁴⁴ is distinct from the rest of the member states because it inherited a common law system of law from the British.⁴⁵ The OHADA member states inherited French civil law from their colonial past. In fact, French is their official language. Article 42 of the OHADA treaty provides: "*Le français est la langue de travail*", meaning that French is the working language of OHADA.⁴⁶ This is expected to change in the near future,⁴⁷ as OHADA embraces other African countries.⁴⁸

3.2.2 Lessons learned

The first lesson relates to the fact that collective effort is necessary in an era of globalisation. When states cooperate in the harmonisation of their business laws, the end result should be that the contracting states will enjoy simple, modern and accessible business laws. The provisions of OHADA's Uniform Acts (UAs)⁴⁹ are self-executing and enjoy precedence over nationally-enacted business laws.⁵⁰ This implies that upon ratification of the OHADA treaty by a state, the state

39 A 1 of the OHADA Treaty of 17 October 1993.

40 A 2. The tenth UA on contract law is under way; see Fontaine *OHADA Uniform Act on Contract Law: Explanatory notes to the preliminary draft* (<http://bit.ly/tqkpxF>; accessed 24 November 2011).

41 The Council of Ministers of Justice and Finance, the Permanent Secretariat, the Advanced Regional School of Magistracy and the Joint Court of Justice and Arbitration; a 27-41 OHADA Treaty.

42 The OHADA Treaty has been amended by the Treaty of Quebec 17 October 2008. The Treaty is not yet in force. See Vilder and Aude *Recent developments in OHADA Treaty: Continued efforts of harmonisation of business law in Sub-Saharan Africa* (<http://bit.ly/uT6ej1>; accessed 24 November 2011).

43 Moore "Community laws in international business transactions" in Tumnde *et al Unified business laws in Africa: Commercial perspectives on OHADA* (2009) 1.

44 Anglophone Cameroon refers to the North and South West English-speaking provinces of Cameroon.

45 Tumnde "Harmonisation of Business Law in Cameroon: Issues, Challenges and Prospects" 2010 *Tulane European and Civil Law Forum* 119-124.

46 Based on the dominance, all printing is done in French; a 63 of the OHADA Treaty; Enonchong "The Harmonisation of business law in Africa: Is article 42 of the OHADA Treaty a problem?" 2007 *J of African Law* 95-116.

47 Bourque "Four years on: One business law for 16 African countries" (<http://bit.ly/vTSgy9>; accessed 16 March 2011).

48 A 53 of the OHADA Treaty.

49 A 2.

50 A 10.

becomes automatically bound by the provisions of the treaty and the UAs.⁵¹ This eliminates any possibility of escape by contracting states from the provisions of the treaty and the UAs. Because the provisions of the UAs are automatically binding, there is no need for any transformation or enactment by national parliaments.⁵²

The second lesson relates to the fact that OHADA's elaboration and adoption process of the UAs allows for substantial consultation with sub-regional organisations⁵³ and participation of the member states through their governments and national commissions.⁵⁴ The one advantage of this is that it gives member states the opportunity to acquaint themselves with the laws and to make contributions. This, of course, leads to wide acceptance of the law. Regrettably, the harmonisation process does not take into account the views of all those who live daily with the law such as consumers, businessmen and, most especially, Anglophone Cameroonians. This has been the subject of criticism. The marginalisation of Anglophone Cameroon has caused great resentment and resistance by Anglophone practitioners, who see OHADA as a form of domination and as an instrument to undermine the cherished common law of the provinces.

In fact, while some judges in Cameroon west of the Mungo have persistently refused to apply the UAs, others only make allusions to the OHADA treaty without discussing the substantive law.⁵⁵ A case in point is that of *Mariner Max and DM Ltd v Dumas Jean Raymond*,⁵⁶ which involves mismanagement, fraud and misappropriation of a company's funds by the defendant (Raymond), a director and shareholder of the company. The applicants (DM Ltd) sought a restraining order against the defendant on the following terms:

"An order restraining the defendant from exercising the functions of director or any other administrative or supervisory functions, whatsoever in regard to the affairs of the company; to hand over all key documents of title, records of accounts, money and other objects which were the property of the company and from interfering with the day to day business of the company or from visiting the premises of the company save for the purpose of inspecting documents of accounts."⁵⁷

In deciding the matter the trial judge referred to the provisions of article 326 of the Uniform Act on Commercial Companies and Economic Interest Groups⁵⁸ and the Companies Ordinance of 1958 applicable in that part of the country. On appeal, his judgment was revised without reference to any provision of the uniform Act.⁵⁹ The same strand of reasoning was followed in the case of *Ngu*

51 *Ibid.*

52 Dugard *International law: A South African perspective* (2005) 47–78.

53 It is important to note that the draft UA on employment law is done in consultation with representatives from the West African Economic and Monetary Union (UEMOA).

54 Tumnde "Cameroon offers a contextual approach to understanding the OHADA Treaty and Uniform Acts" in Tumnde *et al* (2009) 47. The national commissions are composed of representatives from the legal and judicial profession and from academia, national parliaments and relevant ministries.

55 See Ekome "Landmark development in commercial law practice in Anglophone Cameroon: Conflicts beyond relief" 2002 *Juris-Périodique* 86.

56 Case 36/OM/200-2001 (unreported).

57 *Ibid.*

58 Hereinafter "OHADA Companies Act" 1998.

59 Tabe-Tabe (fn 6 *supra*) 9–10.

Chang Celestin and Maitre Mba Godwill v Celestin Asangwe,⁶⁰ wherein the uniform Act on Simplified Recovery Procedures and Enforcement Measures⁶¹ was set aside for Law 92/008 of 14 August 1992 relating to the execution of court judgments in Anglophone Cameroon⁶² on the basis that it was the applicable law in Anglophone Cameroon.⁶³ Despite the controversy surrounding the application of the uniform Acts in Anglophone Cameroon, Tumnde acknowledged the efforts made by the courts and legal practitioners of Anglophone Cameroon in understanding and implementing the laws.⁶⁴ One can also cite the efforts by the University of Buea in educating Anglophone Cameroonians on the uniform Acts.

Thirdly, OHADA is a pro-investment tool, meaning it encourages investment. The OHADA Companies Act (OCA) provides for a variety of business entities through which commercial activities can be conducted – private unlimited, sleeping partnerships, private limited, public limited, joint venture, *de facto* partnership companies and economic interest groups.⁶⁵ The one advantage of this is the fact that any person,⁶⁶ irrespective of its nationality or capital, wishing to engage in a commercial activity in the form of a company in one of the contracting states is given the opportunity to do so by choosing from the forms of company provided for by the Act.⁶⁷ Suffice to note that all of these corporate forms are known in the SADC region. In addition, there is provision for better information to shareholders and the protection of their interests through a specific warning procedure.⁶⁸ The procedure is an innovation in the company law of the member states.⁶⁹ It guarantees and reassures investors of their investments.

As well, different rights are in place to encourage and re-assure investors, namely, pre-emptive rights and double-voting provisions.⁷⁰ A pre-emptive right is a seasonal right, exercised only in the event of new issuance of shares. This right is limited to the existing percentage of ownership. Basically, if a shareholder holds 20 per cent of the shares of a company, in the event of new shares becoming available, he would be allowed to buy up to 20 per cent of the new shares at the issue price.⁷¹ This right is popular in France and not in the United States, where it is seen as a factor limiting management's ability to raise capital.⁷² The double voting right, on the other hand, is a right granted to shareholders

60 Case 59/92-2000 (unreported).

61 10 July 1998.

62 It was amended by Law 97/018 of 7 August 1997.

63 Ekome 2002 *Juris-Périodique* 86–88.

64 Akwanga *The OHADA Law: Kumba legal practitioners undertake new training* (<http://bit.ly/rwze6Z>; accessed 10 October 2011).

65 A 1–920 of the OHADA Companies Act.

66 *Idem* a 7–9. See Paillusseau “L’Acte Uniforme sur le Droit des Sociétés” 2001 *Petites Affiches* 19–29 and Anoukaha, Fushi and Tabe-Tabé “The law governing commercial companies in the OHADA Zone: A comparative study with Ghanaian and Nigerian laws” 2010 *Jurisclope* 7–15.

67 Baba “Harmonisation of business laws in Africa – An insight into the laws, issues, problems and prospects” in Tumnde *et al* 33–36.

68 Martor “The OHADA legal harmonisation process: The benefits for Africa’s development” 17–29 (2003, unpublished and on file with author).

69 A 150–158 of the OHADA Companies Act.

70 Moore “Harmonising business law in Africa: OHADA calls the tune” 2005 *Colum JTNL* 25.

71 *Idem* 55.

72 *Ibid.*

who hold shares for at least two years in their own name. Though it is not clear whether this right encourages investment, it is designed to encourage investment and to preserve the *status quo* of a company.⁷³

In addition, there is the concurrency mechanism – *concursum creditorum*.⁷⁴ This mechanism is designed to ensure an orderly and equitable distribution of debtor's assets among the creditors.⁷⁵ This mechanism increases the willingness of financial institutions and other creditors to provide financing for business activities and the purchase of equipment.⁷⁶ Ultimately, the success of OHADA in the enactment of UAs presupposes other things – for instance, the stage of integration in the region and, most importantly, the willingness of the contracting states to take the region and even the continent to the next level. In a nutshell, commitment by states is a prerequisite for a successful integration process. Without this, the whole project will remain a “pie in the sky”. As Ruppel rightly pointed out, “without political will and good faith on the part of . . . states to meet and comply with their obligations as spelt out in ratified treaties and conventions, economic regional integration is likely to remain a concept on paper”.⁷⁷

3 2 3 Advantages of harmonised business laws: OHADA experience

The principal advantage lies in OHADA's creation of a secure legal environment for its member states and investors, particularly foreign investors. Member states are provided with modern and simple business laws which are accessible through their publications in OHADA Official *Gazettes*, as well as on its website, www.ohada.com. The website is operated by UNIDA.⁷⁸ The merits of the UAs can be seen in the help they provide in the identification of the applicable law, the limitation of conflicts of laws problems, the difference of treatment and the encouragement of cross-border transactions among member states. Economic operators (investors) are now free to carry on business in the region and to transfer assets in the event of insolvency. According to Paillusseau,⁷⁹ “the unity of the applicable rules will facilitate considerably the operation, the legal organisation, functioning and commercial trade of a company that operates in several countries”. The Chad-Cameroon oil project is a good example of the operation of OHADA rules in a large-scale joint project between two OHADA countries.⁸⁰

Another benefit is the improvement of the reliability of the judicial systems within the member states⁸¹ through the creation of the Common Court of Justice and Arbitration. The CCJA functions as an appellate court for all of the judgments handed down by the national Courts of Appeal in matters relating to the

73 *Ibid.*

74 The currency of creditors' mechanism is well developed in Southern Africa.

75 A 2 UA Collective Proceedings 1999.

76 Gutterman and Brown *Commercial laws of East Asia* (1997) 29.

77 Ruppel “ECAS 2011 – 4th European Conference on African Studies Uppsala 15–18 June 2011: Panel 133: The question of land ownership in post-colonial African development” (<http://bit.ly/vge39r>; accessed 24 November 2011).

78 UNIDA is a unified system of business laws in Africa. It is located in Paris and is charged with the publication of the OHADA uniform Acts.

79 Paillusseau “Le Droit de l'OHADA: Un droit très important et original” 2004 *Juris-Classeur Périodique* 1–5.

80 Norton “Improvements in the reliability of national judicial systems: An under-appreciated secondary effect of OHADA” (<http://bit.ly/tMzRAU>; accessed 12 July 2010).

81 See <http://bit.ly/uNELU8>; accessed 12 September 2011.

uniform Acts.⁸² It is also a forum for international arbitration.⁸³ This combination is a novel idea which has been greatly welcomed.⁸⁴ This has brought particular advantages. The first and perhaps most obvious is that it saves time and money for parties and does not deprive parties of their day in court. Secondly, it makes it possible for economic operators to include an arbitration clause providing for arbitration proceedings in any of the member states governed by modern laws. The consequence is that investors are provided with legal and judicial certainty in the interpretation of the laws and settlement of contractual disputes, and, hence, investment is promoted. Thus, it is submitted that if such a route is undertaken by SADC member states, the same advantages will follow. The next part of this article presents the probable paths to the Tribunal's improvement.

4 PROBABLE PATHS TO THE TRIBUNAL'S IMPROVEMENT

In light of article 15(1) of the SADC Protocol on the Tribunal and Rules of Procedure Thereof,⁸⁵ the Tribunal can be considered as a final court of appeal rather than a court of first instance. On this basis, its value in the SADC's business law harmonisation process cannot be overemphasised. Like the CCJA, it would assist in the interpretation and application of the laws and settlement of conflicts relating to the laws. To achieve this, the Tribunal should be improved. One effort to do this is the decision taken by the Summit to review the role, functions and terms of reference of the Tribunal.⁸⁶ This led to the temporary suspension of the Tribunal pending the outcome of the review. According to Nicole Fritz,⁸⁷ "the suspension of the Tribunal is a fatal blow to the rule of law in the region⁸⁸ and to the obedience of member states to any supranational SADC values, institutions and decisions". The World Trade Institute Advisors (WTIA) was commissioned to do the review. After the company's study of the Tribunal, it came up with the following propositions:⁸⁹

- (a) Increase the powers of the Tribunal through the amendment of national laws;
- (b) directly apply and enforce the decisions of the court in the member states; and
- (c) make SADC laws supreme over domestic laws and constitutions.

It is unfortunate that some of these propositions have not yet been implemented. This in itself might partly be a consequence of the recommendations not being

82 Ferreira-Snyman "The harmonisation of laws within the African Union and the viability of legal pluralism as an alternative" 2010 *THRHR* 620.

83 Maidagi "Le Fonctionnement de la Cour Commune de Justice et Arbitrage de l'OHADA" Séminaire régional de sensibilisation sur la sécurité juridique et judiciaire des activités économique au sein de L'UEMOA, de la CEDEAO et de l'OHADA (<http://www.jur-scope.org>; accessed 8 January 2011).

84 See Boivin and Pic "L'Arbitrage International en Afrique: Quelques observations sur l'OHADA" 2002 *Revue Général de Droit* 847–864 858; see Nanette and Thouvenot "Les innovations de l'OHADA en matière d'arbitrage" 2004 *La Semaine Juridique* 28–35.

85 7 August 2000.

86 The SADC Summit Decision (fn 37 *supra*).

87 Fabricius "SADC deals blow to the rule of law" *Pretoria News* 23 May 2011 9.

88 Pana "SALC accuses the SADC leaders of sabotaging SADC Tribunal" *African News* 23 May 2011 1.

89 Bell "SADC Tribunal review upholds land grab judgment" *The Independent Voice of Zimbabwe* 12 April 2011 1.

what the SADC leaders had hoped for. In the author's view, this is because of a fear about loss of their sovereign powers to the Tribunal. Ruppel suggested the strengthening of the mandate of the Tribunal and a transfer of a certain amount of decision-making authority away from member states.⁹⁰ On a continent where there is a high regard for power, it must be acknowledged that persuading African leaders to transfer decision-making powers will not be an easy task. However, it is possible if these leaders are sufficiently committed to seeing the goals of regionalism become reality. For Ndlovu,⁹¹ "one of the ways to improve the Tribunal's operations and facilitate trade and legal certainty in the region is to clothe the Tribunal with appellate status".

This would be to redesign the Tribunal as a last resort court or a final court of appeal. The author agrees with Ndlovu, but the question remains as to the aim of the SADC drafters. Was it simply to create a tribunal for the regulation of SADC matters? Or was it to create a Tribunal that would serve as a court of last resort? This of course requires a look at the SADC treaty. It is submitted that it is clear, particularly from the wording of article 14 of the SADC Protocol on Tribunal and Rules of Procedure Thereof and article 16(1) of the SADC treaty, that the SADC drafters intended to create an appellate body. To this extent, therefore, one could speak of the likely paths along which the Tribunal could be improved.

Should SADC member states decide to improve the current Tribunal, they will need to take serious account of the following important points. First, like the CCJA, the Tribunal should be redesigned as an independent organ with compulsory status to hear business-related matters.⁹² The Tribunal should have compulsory jurisdiction to which member states are obliged to refer their business-related cases.⁹³ The granting of compulsory jurisdiction is vital in order to ensure uniform interpretation and application of the relevant business laws. This of course should be after exhaustion of local remedies as provided for in article 15(2) of the SADC Protocol on Tribunal and Rules of Procedure Thereof. Article 15(2) states: "No natural person shall bring an action against a State unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction." However, local remedies need not be exhausted if the applicant is able to prove that:⁹⁴

- (a) the local remedies are futile;
- (b) there is no possibility of effective redress under national law; and
- (c) the responsible state has waived compliance with this requirement.⁹⁵

90 Ruppel (fn 77 *supra*).

91 Ndlovu (fn 37 *supra*) 1.

92 A 14 of the OHADA Treaty.

93 See eg Marty "The ICC and the interaction of international and national legal systems" in Marty *The Rome Statute of the ICC: Commentary* (1915) 1919 in which he denotes a compulsory universal jurisdiction as an "obligation placed upon state parties to an international treaty by that treaty to exercise universal jurisdiction to bring perpetrators of crimes specified in the treaty to justice". The SACU Tribunal has similar powers but has not yet been established.

94 Dugard (2005) 293.

95 "In any event, it is worth noting that new s 16B of the Zimbabwean Constitution, which is the creation of Constitutional Amendment 17 of 2005, deprives affected landowners of their right to seek remedy within domestic courts." See s 16B (3) of the Zimbabwean Constitution and Ruppel and Bangamwabo "The SADC Tribunal: A legal analysis of its

As a matter of necessity, the Tribunal's advisory opinions should be binding, and, consequently, enforceable by the requesting parties. There is no way to achieve this other than by inserting a clause to this effect in the SADC treaty. Just like OHADA, national courts, member states, organs of the SADC and other organs that relate to the activities of SADC⁹⁶ should be allowed to request an advisory opinion relating to their business laws, the SADC treaty and any subsidiary instrument.⁹⁷

Ntumha notes that "integration will not make much progress until community decisions are given direct force of law over businesses and individuals operating in the member states".⁹⁸ Indeed, the decisions of the Tribunal by virtue of article 24(3) of the SADC Protocol on Tribunal and Rules of Procedure Thereof are binding on the parties to the dispute, but, practically, the decisions do not have an *erga omnes* effect.⁹⁹ Therefore, in the light of article 20 of the OHADA treaty, the decisions of the Tribunal should be mandatory in all respects and directly binding not only on the parties to the dispute, but also on the member states and the community institutions. Furthermore, the decisions should have legal effect on "their own and automatically without any intervention on the part of national authorities, in the internal affairs of member states, and must be implemented within their territories".¹⁰⁰ In order to facilitate the implementation of the Tribunal decisions, the Tribunal should be granted the authority to follow up on the implementation of its decisions. This, of course, will require a change in the wording of article 33(1) and (2) of the SADC treaty to the effect that in the event of non-compliance, the Tribunal should be able to take appropriate sanctions against the defaulting state.

Regrettably, the SADC treaty does not provide for any possible sanctions that may be imposed against a defaulting state.¹⁰¹ Of course, including such a provision in the SADC treaty would be a good thing, and would have the aim of promoting compliance with the objectives set by SADC and the decisions of the Tribunal.¹⁰² To do so, inspiration may be drawn from the United Nations legal framework and the WTO Dispute Settlement Understanding. Even though these sanctions will be applied at the cost of the people, they are necessary for the continuity of the organisation. Among other sanctions, tariffs may be imposed, the member state concerned could be temporarily suspended from the SADC, and all development aid could also be suspended.¹⁰³

mandate and role in regional integration" 2008 *Monitoring Regional Integration in Southern Africa Yearbook* 13.

96 In 1996, the ICJ refused upon the request by the World Health Organisation (WHO) to give advisory opinion on a matter related to the legality of the use by states of nuclear weapons in armed conflicts on the grounds that it would go beyond its judicial role in giving its opinion on so controversial a topic; see ICJ Reports 1996 66.

97 A 14 of the OHADA Treaty.

98 Ntumha "Institutional similarities and differences: ECOWAS, ECCAS and PTA" in Lavergne (fn 10 *supra*) 313.

99 This is with reference to the *Mike Campbell* case; see para 3 1 above.

100 Ntumba (fn 98 *supra*) 318.

101 A 33 of SADC Treaty.

102 See "The Security Council Sanctions Committees: An overview" (<http://bit.ly/u81gXz>; accessed 9 November 2011).

103 See the economic sanctions against Madagascar at <http://bit.ly/sheLIV> (accessed 9 November 2011); a 41 of the UN Charter; and a 22 of the Rules and Procedures Governing

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Another aspect worth considering is the current composition of the Tribunal. Article 16(3) of the SADC Treaty and article 4 of the SADC Protocol on Tribunal and Rules of Procedure Thereof provide for the appointment of judges. In terms of these provisions, ten judges are appointed for a period of five years renewable upon the agreement of all member states. These judges are indeed intended to represent the community at large, but the problem that is likely to arise in the near future is that of unequal representation. This, of course, will be raised by member states that are not represented at the Tribunal. To overcome the problem of unequal representation, inspiration may be drawn from article 31(1), 31(2) and 31(3) of the Statute of the International Court of Justice (ICJ).¹⁰⁴ Article 31 provides for the appointment of *ad hoc* judges by countries not represented at the ICJ. Article 31(1), 31(2) and 31(3) read:

- “(1) Judges of the nationality of each of the parties shall retain their right to sit in the case before the Court;
- (2) If the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge. Such person shall be chosen preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5; and
- (3) If the Court includes upon the Bench no judge of the nationality of the parties, each of these parties may proceed to choose a judge as provided in paragraph 2 of this Article.”

In the same vein, parties to a dispute should be given the opportunity to nominate a judge of their choosing. This should be in favour of countries not represented at the Tribunal, with the aim of ensuring that all states have a say in the decision-making process. It is instructive to note that if the Tribunal is improved, there could be immense and far-reaching implications for investors and the SADC community. First and foremost, for member states it will imply a review of their constitutional and criminal justice systems.¹⁰⁵ For the SADC, it will entail incorporation of a “compromissory clause” in which parties accept the Tribunal’s jurisdiction for any dispute relating to their business laws, the SADC treaty and other subsidiary instruments. Just like article 7(2) of the mandate for South West Africa, the clause should provide that: “For any dispute whatever between parties relating to the interpretation or application of the provisions of the business laws, the SADC treaty and its subsidiary instruments, such a dispute [should] be referred to the Tribunal.”¹⁰⁶

5 CONCLUSION AND RECOMMENDATIONS

For a successful harmonisation of the business laws by SADC, it is absolutely necessary for member states to recognise the importance of the project and to accept all that contribute to this goal such as the ceding or transfer of a certain amount of their sovereignty. Issues of sovereignty are encountered when it comes to integration, and successful economic regional integration requires such

the Settlement of Disputes; Annex 2 of the WTO Agreement (<http://bit.ly/uGd4p4>; accessed 9 November 2011).

¹⁰⁴ 26 June 1945.

¹⁰⁵ Macedo and Robinson *The Princeton principles on universal jurisdiction* (2001) 9.

¹⁰⁶ Although the mandate of the League of Nations was in the form of a resolution, it was accepted as “having the character of a treaty or convention”; see *South West Case Preliminary Objectives* 1962 ICJ Reports 318 331.

concerns to be dealt with sensitively and effectively.¹⁰⁷ Given its relevance and its place in such a project, SADC member states should be prepared to cede part of their sovereignty to SADC. In this respect, the constitutions of member states must provide in express terms for their governments to be able to transfer sovereign powers to the SADC.¹⁰⁸ In doing so, inspiration may be drawn from other constitutions.¹⁰⁹ The adoption of a treaty will serve as an indication that the states are willing to integrate their economies and to comply with the treaty provisions. In order to facilitate the implementation of the treaty provisions, the treaty should contain enforcement mechanisms with the aim of ensuring the compliance of treaty obligations.

To ensure that the business laws are well received and not resisted, the harmonisation process should be given a community-based perspective.¹¹⁰ Accordingly, a working committee composed of the different stakeholders should be established.¹¹¹ The committee should be entrusted with the task of investigating the feasibility of the project, carrying out a comparative study on the subject and presenting a draft document, which may be called “Comparative business law of Southern Africa”. Interestingly enough, a regional centre of studies on integration and SADC law was established at the Eduardo Mondlane University (UEM) in Maputo, Mozambique to this effect.¹¹² The document should be sent to a committee of experts from the region: senior civil servants; magistrates; lawyers; notaries; academics; and representatives of the business world.

The main task of the committee should be to draw up the documents taking into account the legal peculiarities of each legal system. In this respect, it is useful for SADC to choose international instruments such as the UNIDROIT Principles of International Commercial Contracts¹¹³ and the UNCITRAL Model Law on Cross-Border Insolvency¹¹⁴ as basis for the elaboration of its business laws. One advantage of the UNIDROIT principles is that “[they] are neither common law nor civilian but a genuine international synthesis of the contract law principles of the major legal systems of the world”.¹¹⁵ In addition, the laws

107 Ruppel (fn 77 above).

108 Sarooshi *International organisations and their exercise of sovereign powers* (2005) 65.

109 *Idem*. The constitutions of Germany and Netherlands may be considered. Article 24(1) and 24(2) of the German Constitution of 29 July 2009 provide that “the Federation may by legislation transfer sovereign power to intergovernmental institutions” and that for the maintenance of peace, the Federation may join a system of mutual collective security, and that in doing so it will consent to such limitations upon its rights of sovereignty as will bring about and secure a peaceful and lasting order in Europe and among the nations of the world. A 92 of the Constitution of the Netherlands of 17 February 1983 provides that “legislative, executive, and judicial powers may be conferred on international institutions by or pursuant to a treaty, subject, where necessary, to the provisions of a 91(3)”.

110 Cotterell *Law's community: Legal theory on sociological perspectives* (1996) 21 307–308 313–314.

111 This is the position of the SADC; see Economic Commission for Africa – Southern African Office: *A framework for mainstreaming regional integration in national development plans in the Southern Africa Development Community* (2009) 29.

112 See <http://bit.ly/s2DV5V>; accessed 12 April 2010).

113 See UNIDROIT Principles of International Commercial Contracts of 1994 (www.unidroit.org; accessed 11 July 2011).

114 30 May 1997 (<http://bit.ly/uhIb7Y>; accessed 11 July 2011).

115 See Date-Bah “The UNIDROIT Principles of International Commercial Contracts and the harmonisation of the principles of commercial contracts in West and Central Africa:

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should be easily comprehensible and accessible to lawyers, business and the local community. Not only will such a legal norm gain importance in the future, but it will also promote flexibility and bring together common law and civil law principles, and hence will be widely acknowledged.

In a nutshell, it is important for SADC to harmonise its business laws and to improve its current status, particularly that of the Tribunal, in order to give substance to the spirit of SADC. It is hoped that SADC states will engage with all of the above issues in order to overcome problems of marginalisation. It is said that good news travel fast. If SADC states engage with all of these issues, it is certain that other regional bodies will follow suit.

Reflections on the OHADA Project from the perspective of a common lawyer from West Africa” (<http://binged.it/vYmCUR>; accessed 24 November 2011).