

Addressing Human Rights in the Court of Justice of the Andean Community and the Tribunal of the Southern African Development Community

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ABSTRACT: The article compares how the regional tribunals of the Andean Community (CAN) and the Southern African Development Community (SADC) have dealt with human rights issues in order to explore options for South-South judicial cooperation through adjudicative cross-fertilization, while taking into account specificities that characterize both regions. In doing so, focus is placed on four elements: a) the scope of human rights covered by each of the regional tribunals; b) the *locus standi* of individuals before the tribunals; c) the added value of the regional tribunals; and d) the restrictive role of politics in the functioning of the tribunals.

KEYWORDS: regional tribunals • interregional cooperation • human rights • Tribunal of Justice of the Andean Community • Tribunal of the Southern African Development Community

The article is the culmination of a collaborative Jean Monnet Project funded by the European Union (EU) Commission. The project explored the tensions between free trade agreements (FTAs) and constitutional rights. Most of these constitutional rights include social and economic ones such as the right to food, shelter, health and water. In many instances courts at both the national and regional levels are keen to uphold these rights.

Los derechos humanos en el Tribunal de Justicia de la Comunidad Andina y el Tribunal de la Comunidad de Desarrollo del África Austral

RESUMEN: El artículo compara cómo han resuelto disputas sobre derechos humanos los tribunales regionales de la Comunidad Andina (CAN) y la Comunidad de Desarrollo del África Meridional (SADC). La comparación se hace con el fin de explorar opciones de cooperación judicial Sur-Sur. Se pone énfasis, entonces, en cuatro elementos: a) el alcance de los derechos humanos que abarca cada tribunal; b) el *locus standi* de los particulares; c) el valor añadido de los tribunales regionales y d) el papel restrictivo de la política en el funcionamiento de los mismos.

PALABRAS CLAVE: tribunales regionales • cooperación interregional • derechos humanos • Tribunal de Justicia de la Comunidad Andina • Tribunal de la Comunidad para el Desarrollo del África Meridional



Os direitos humanos no Tribunal de Justiça da Comunidade Andina e o Tribunal da Comunidade de Desenvolvimento da África Austral

RESUMO: Este artigo compara como os tribunais regionais da Comunidade Andina (CAN) e a Comunidade de Desenvolvimento da África Austral (SADC, por sua sigla em inglês) têm resolvido disputas sobre direitos humanos. A comparação se faz a fim de explorar opções de cooperação judicial Sul-Sul. Enfatizam-se, então, quatro elementos: a) o alcance dos direitos humanos que abrange cada tribunal; b) o *locus standi* dos particulares; c) o valor agregado dos tribunais regionais e d) o papel restritivo da política no funcionamento destes.

PALAVRAS-CHAVE: direitos humanos • Tribunal de Justiça da Comunidade Andina • Tribunal da Comunidade de Desenvolvimento da África Austral • integração regional • tribunais regionais

Introduction¹

The number of organizations created to foster regional integration has significantly increased since 1990. The “new” feature of what is known as “new” regionalism is the marked rise in the number of these institutions and arrangements that cover a wide variety of thematic issues that go beyond the traditional concept of economic integration. This development is one of the main traits of contemporary regionalism. Contemporary regionalism has, moreover, been characterized by the receptiveness of regional organizations to human rights precepts. The pursuit of human rights is considered as an objective in the treaties of many regional bodies. It appears that the drafters of such provisions craft these clauses as a matter of ritual. However, in those regional entities with active civil societies characterized by constitutional consciousness, regional policies are being forged to activate and fully use these treaty provisions on human rights. In this article, the focus will be on how the regional courts in the South, in particular, the tribunals of the Andean Community (CAN, from its Spanish initials) and the Southern African Development Community (SADC), have adjudicated on matters that pertain to human rights. It is important to evaluate how these entities, which were initially created with the goal of economic integration, have broadened their mandate over the years to entertain cases that hinge on human rights issues. This is important for a number of reasons.

Firstly, it provides an understanding of how willing regional courts may be to expand their mandates. Secondly, it indicates how politics still remains vital in judicial processes. In other words, even if the regional judicial authorities are boldly prepared to widen their mandates, this has to be understood within the clear limits of what is politically acceptable. However, in order to gain a broader vision, it is important to examine the role of the courts in regional integration in the South from the angle of human rights because regional integration cannot be an end in itself. It has to serve a purpose, and how better to examine whether these (human) purposes are being served than through the prism of a human rights perspective?

1 The authors are grateful to the reviewers and editors of *Colombia Internacional* for their useful comments.

The approach used in this article draws on international human rights law and international political economy. From the perspective of international human rights law, it draws on the global and regional human rights norms that have been adopted by states to explain their patterns of behaviour. Allusion is also made to the *dicta* of international courts. These developments cannot be separated from the international political economic context wherein developing countries turn to specific sets of rights to enhance their interests and claims in the global economic context dominated by neo-liberal inclinations.

We have selected two regions from the South for two reasons. Firstly, we seek to identify the patterns, trends and dynamics shared by the CAN and the SADC. What lessons can be drawn from the human rights protection experiences of these entities and what do the experiences of the courts tell us about the future of judicial activism at the regional level? This is important because it also offers the opportunity to identify potential areas for the cross-fertilization of approaches. In other words, how can South-South cooperation in judicial matters be increased in the area of human rights especially at the regional level? Secondly, there appears to be a major dearth or even gap in international legal scholarship on the collation or juxtaposition of shared or comparable regional judicial experiences from regions in the South.

The article proceeds as follows. The next part examines some of the major political developments in both regions. Considering that regional courts cannot be dissociated from the global tapestry of adjudicative bodies, in section two we analyse the architecture of regional courts within the context of the proliferation of international courts and tribunals. In section three we outline the rules governing the respective tribunals, while the major human rights cases heard before the regional tribunals of the CAN and the SADC are presented in section four. Finally, in section five, we draw and analyse trends from these cases. This is done in view of gaining a better understanding of elements such as the scope of human rights covered by each of the regional tribunals; the *locus standi* of individuals before the tribunals; the added value of the regional tribunals as such; and the restrictive role of politics for the tribunals.

1. Political Issues in Both Regions

Composed of Bolivia, Colombia, Ecuador and Peru, the CAN is a regional economic integration organization created in 1969 following the endorsement of the Cartagena Agreement. Initially, it was composed of Bolivia, Chile, Colombia, Ecuador and Peru. Venezuela delayed joining the agreement until 1973. In 1976, the Chilean military dictatorship announced its withdrawal from the Cartagena Agreement. Thirty years later Venezuela left the organization to join the Mercado Común del Sur (Mercosur) in 2012. Despite the extreme fragility of the political links between CAN members during the last decade, the institutional structure of the Andean integration organization is unanimously considered to be the most robust of all the integration processes in Latin America and the Caribbean. Andean countries and CAN institutions have played a crucial role in structuring the most recent Latin American regional integration experiences. In fact, the Andean regionalism process has always gone hand in hand with Latin American integration movements (Molano-Cruz 2011). On the other flank of the Atlantic, the SADC was created in 1992 to replace the Southern African Development Coordination Conference that was formed in 1981 as a regional response by Frontline States to resist the adverse policies of the South African Apartheid governments. The goals of the organization are the realization of sustainable economic growth, the provision of support for the socially disadvantaged and the promotion of common values through democratic and legitimate institutions, as well as the consolidation of democracy, security and stability (SADC 1992, Article 1(a)-(c); Smis and Kingah 2009). In 2010, the SADC became a free trade area. Plans to attain a customs union by 2010 proved to be overly ambitious. The SADC consists of fifteen member states: Angola, Botswana, the Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Swaziland, Seychelles, South Africa, Tanzania, Zambia, and Zimbabwe.²

2 Since 2009, Madagascar has been suspended following an unconstitutional takeover of government.

Both regions share important traits when we examine the question of overlapping memberships, wrangling in leadership and ties with the main regional power. Overlapping memberships are a common issue in both regions. In South America there are many regional organizations that are closely linked to political relations and alliances between given leaders. Besides the CAN, South America contains the Mercado Común del Sur (Mercosur), the Unión de Naciones de América del Sur (Unasur), the Alianza Bolivariana para los Pueblos de Nuestra América (ALBA) and, most recently, the Alianza del Pacífico. In Southern Africa there are also many instances of overlaps as some SADC States also belong to the East African Community (EAC), the Common Market for Eastern and Southern Africa (COMESA), the Economic Community of Central African States (ECCAS) and the Indian Ocean Commission (IOC). The motives and interests for preserving overlapping institutions vary in both regions. In those instances where overlaps have been regarded as too overwhelming, as in the case of African regional economic communities, there are now efforts led at the continental level to better rationalize the regional entities into building blocks that would eventually form a bigger African Economic Community (the AEC) due in 2028 (Bridges Africa 2012; UNECA 2012).

Wrangling in leadership is also common in both regions. In the past there have been some differences between the government of ex-president Álvaro Uribe of Colombia and the governments of Venezuela and Ecuador. However, this is changing since president Juan Manuel Santos came to power. While the leadership divide in the region appears to be more personal than ideological, political ideologies have played an important role in shaping how leaders perceive the purpose of regional integration. One of the reasons offered by Venezuela for leaving the CAN was that president Hugo Chávez believed the decision of Colombia and Peru to sign FTAs with the USA rendered the CAN weak. There have also been leadership disputes in Southern Africa, although these have mainly revolved around events in Zimbabwe and the question of how the region should respond to the humanitarian challenges this country has endured for many years. While some leaders, such as former South African president Thabo Mbeki, have adopted a more conciliatory approach, others, including president Ian Khama of Botswana, have been very

outspoken against the president of Zimbabwe, Robert Mugabe, and have appeared frustrated with the SADC's weakness in addressing the human rights abuses that have been taking place in the country.

Both regions behave differently when dealing with the supposed regional powers. Some of the member states in the respective regional organizations have explicit or implicit ambitions to lead the regions. In South America, efforts to reclaim leadership positions occur at different levels. In all of these efforts, Brazil stands out even if Venezuela, Colombia and Argentina are also important players in certain areas. For instance, Colombia has clearly been a leading nation within the CAN and events in the country tend to directly affect the other three members of the organization. This is the same scenario in Southern Africa, where South Africa is a leading nation both within Southern Africa and in the continent as a whole.

In the two regions, external influences both from the US, the European Union (EU) and increasingly from China cannot be dismissed. It is interesting to note that the perceived leaders in both regions, Colombia and South Africa, are close allies of the US, even if the latter has also shown a keen interest in allowing greater Chinese inroads into Africa.

2. Proliferation of International and Regional Adjudicative Bodies

Today, regionalism is not only characterized by a diversity in themes (security, cultural cooperation, the environment and human rights) and new forms of actors (corporations, social organizations and individuals). It is also characterized by a marked proliferation of regional institutions such as regional courts and tribunals, particularly in Africa, Latin America and Europe, Asia is lagging in this regard. From a neo-functional perspective, some scholars have argued that community law would spill over into new legal domains as litigants realise that regional courts' precedents can apply to a broad range of issues (Burley and Mattli 1993). At the global level, a normative structure for international trade also encourages the construction of new rules, which leads to new cases, which create additional opportunities for litigation and the expansion of norms (Stone Sweet 1999). The propagation of regional courts and tribunals, including the creation of those in South America and Africa, cannot be understood in a vacuum. This proliferation

has been taking place within the context of a noticeable increase in the number of international courts and tribunals both at the regional and global levels. However, the creation of many courts and tribunals in itself is a symptom of a subtler phenomenon: the fragmentation of the international legal order. This fragmentation is now characterized by a myriad of regimes in specific legal and thematic areas as well as in specific regions.

In terms of courts and tribunals, there has been increased activity in dispute settlement by judicial organs that have global jurisdiction. These include the International Court of Justice (ICJ), which has general jurisdiction; the World Trade Organization Dispute Settlement Body, which handles commerce-related litigation; the International Tribunal for the Law of the Sea, which has general jurisdiction on matters pertaining to the law of the sea; and the International Criminal Court (ICC), which is the forum for proceedings relating to serious crimes. Below these global courts and tribunals (albeit in the absence of any prescribed constitutional hierarchy) are an assortment of regional courts and tribunals that have jurisdiction to apply regional norms that may relate to trade and human rights questions.

While the creation of more courts and tribunals may appear to be anodyne, this is arguably not the case; besides the issue of costs, the proliferation of specialized or regional courts and tribunals raises critical concerns regarding the spread of incoherence in the international legal order (Spelliscy 2001, 152). As Thomas Franck argues, the problem with incoherence in the international legal system is that it dampens the legitimacy of the international legal order (Franck 1988). What is more, while the effectiveness of the international legal system may be hard to measure (Shany 2010), it has nonetheless been contended that an incoherent legal system may significantly weaken its effectiveness and validity (Kelsen 1992, 62).

The more practical dangers raised by the proliferation of courts and tribunals are described aptly by Joost Pauwelyn (2003), who notes that such problems are raised when two international tribunals or courts arrive at different conclusions to decisions based on the same issue or similar facts. For him, such a development may lead to a dent in the predictability of international law (2003, 114-115). The fallout in terms of legal certainty cannot be measured. These concerns have thus far proved rather academic and some scholars see little cause

for concern given that international courts can and do exchange experiences, particularly as the ICJ can coordinate the operations of regional courts if needed (Abi-Saab 1999, 926-928; Dupuy 1999, 807). Charney is even more upbeat, arguing that the proliferation of courts is actually a welcome development (1998, 347). Such proliferation becomes even more appealing if we regard it as a catalyst for competition amongst the courts and tribunals, which in turn will allow for decent engagement and a “race to the top” in terms of international adjudication.

The proliferation of courts mirrors a deeper issue in international law as a whole. This is the issue of fragmentation or the perceived sundering of international regulation due to the multiplicity of thematic areas into which international norms are expanding. In one sense, this is a process that cannot be avoided, mindful of the ever-expanding challenges that the world faces and given that cooperation appears to be the only viable solution to addressing these problems. It is in this sense that matters relating to the seas or international waters, trade, the environment, migration, health, human trafficking and terrorism, amongst others, cry out for collective approaches and common solutions. With regard to how these matters should be addressed, there is a global consensus that is frequently embodied in international norms and agreements. International law now encompasses a wide array of areas that go well beyond the traditional themes of state responsibility, state succession, immunity and territoriality, amongst others, to encapsulate a broad range of thematic issues. This can be attributed to a global or regional desire to solve common challenges (Brownlie 1987). Given this reality, the international legal order can be subject to a variety of both horizontal and vertical antinomies (Salmon 1965, 285). Such antinomies are largely explained by the fact that the various areas or fields of law, including trade, energy and security, are highly interdependent (Hafner 2002).

In the view of some scholars, fragmentation presents a significant challenge (Tammelo 1965, 347). The main issue that is often identified is the danger of opposition between norms. The central UN entity that drafts international treaties, the International Law Commission, has asserted that such situations may arise between conflicting general norms; disputing general and special norms; and finally quarrelling special norms relating to specific fields or areas (Koskenniemi 2003). Much as in the debate on the proliferation of courts and tribunals, there is a general view that the discussion on fragmentation is also

rather academic. Some jurists take for granted that conflicts within the international legal system are simply unavoidable (Rousseau 1932, 191-192; Jenks 1954, 451; Fischer-Lescano and Teubner 2004, 1004). Others are disinclined to regard the issue as a problem (Pauwelyn 2004, 904), especially if aspects such as trade, human rights, security and energy, amongst others, are seen as being part of a whole rather than as compartmentalized issues (Delmas-Marty 2003, 27). Bearing all these positions in mind, it is important and helpful to note that international law itself contains specific conflict of norms resolution principles that can be used as handy tools to avert conflicts. These are contained in the following Latin maxims: *lex speciali derogat lege generali* (special norms take precedence over general ones); *lex posterior derogat lege priori* (rules that are issued later in time take precedence); and *lex posterior generalis non derogat lege prior speciali* (special rules take precedence even over later general norms). This notwithstanding, a customary rule of *ius cogens* always takes precedence over a treaty even if the former is *generalis* or *prior* (Bos 1984, 97).

The existence of many courts and tribunals in itself epitomizes a divergence of international norms and has important implications for human rights in terms of the implementation and enforcement of the rules that codify them. If the protection of human rights has no borders, it is because human rights have become a global issue. Besides the regional courts and tribunals that may have jurisdiction for human rights questions, there are also the specialized continental courts of human rights (for instance, the Inter American Court of Human Rights, the African Court of Justice and Human Rights and the European Court of Human Rights). In addition to these regional adjudicative bodies that handle human rights issues are regional courts that were initially created to sanction norms on trade liberalization such as the Court of Justice of the European Union (CJEU). Such courts are expanding their competences to also entertain matters relating to human rights.

There is a dearth of comparisons of Southern regional courts and tribunals as such (Olmos Giupponi 2006; Nkatha Murungi and Gallinetti 2010). The Court of Justice of the Andean Community (CJAC) and the SADC Tribunal fall into this category of regional judicial organs initially created to address trade integration norms which have subsequently also addressed issues hinging on human rights.

The CJAC was established through a treaty signed in 1979 and entered into force in 1983. It has heard numerous contentious issues, actions for non-compliance and labour matters as well as cases revolving on annulment actions. Andean leaders adopted the Charter of the Promotion and Protection of Human Rights in 2002. Since then there has been a remarkable crescendo in terms of human rights matters evoked by the court through solid arguments to resolve differences and the utilization of constructive interpretation (Vargas Mendoza 2010). In the case of the SADC, the Tribunal was established through the SADC Treaty of 1992 but only began operations in 2005. Human rights matters are considered delicate in the SADC. A human rights mandate was contemplated for the SADC Tribunal in the parlays that preceded its creation, but the proposal was rejected (Ebobrah 2009). The CJAC and the SADC Tribunal are just two examples of the numerous regional tribunals that are proliferating around the world. Both of them were created to interpret the rules of the respective regional organizations. However, what is the nature of these rules and how does this relate to human rights?

3. Comparison of the Rules and Tribunals

a. Court of Justice of the Andean Community

The first article of the Cartagena Agreement states that the objectives of regional integration “are aimed at bringing about an enduring improvement in the standard of living of the sub-region’s population.” This means that people and the protection of people are matters directly linked to the Andean regional integration process. Article 87 of Chapter VII, relating to agricultural development programmes, stipulates that member countries shall harmonize their policies and coordinate their national plans in this sector, bearing in mind the improvement of the standard of living of the rural population. Furthermore, the member countries must take steps to satisfactorily meet the population’s food and nutritional requirements. In fact, Chapter XVI of the Agreement makes it clear that social and economic cooperation is only possible through a respect for human rights principles. Achieving social justice; strengthening non-discrimination, participation and the formation of citizenship values; promoting social support systems and embracing programmes on education and the protection and well-being of the working population, as well as women’s participation in economic activity

and child and family protection; and paying attention to the needs of ethnic and other minority groups must be the goals of regional programmes and regional actions aimed at the social development of the Andean people. In this way, the Charter of Andean integration connects regional processes with the promotion and protection of human rights.

In 2002, the Andean Council of Presidents adopted the Charter of Promotion and Protection of Human Rights. The Charter is considered a declaration of community values rather than a binding source of community law. The CJAC is the CAN's judicial body, created in 1979 by the Treaty Establishing the Tribunal of Justice of the Cartagena Agreement. The CJAC, based in Quito, ensures that regional laws are interpreted properly and are applied across all the member countries. Unlike the Andean Parliament, the Labour Council and the Business Council (also created in 1979 and whose role is advisory), the CJAC is a supranational institution.

Article 1 of the CJAC treaty defines the community legal corpus to include the Cartagena Agreement and its protocols; the Treaty Establishing the Tribunal of Justice; the decisions of the Andean Council of Foreign Ministers and the Commission of the Andean Community; resolutions of the General Secretariat; and agreements entered into by Member States in the context of Andean integration. Generally, the institutional decisions and resolutions pertain to the rights of workers, labour, education, consumer rights, intellectual property and public health, amongst others. Although the treaty does not refer to the supremacy of Andean community law, in the CAN structure the relationship between community law and the national law of member countries accords precedence to community rules. The CJAC treaty does expressly mention the doctrine of direct effect and Andean legislation does not require incorporation procedures to be applied in member countries.

The CJAC settles any dispute that may arise from any action relating to regional norms. Drafters of the treaty creating the CJAC granted it jurisdiction on two types of claims, namely, noncompliance actions (Article 17) and nullification actions (Article 27). Through the action for noncompliance, the Andean judicial body can adjudicate as to whether a member state has breached community law and establish a corresponding sanction. Individuals, corporations and member countries may raise complaints of noncompliance with the Andean General

Secretariat. With regard to the procedure of actions for nullification, individuals, companies and states may challenge the validity of decisions and resolutions issued by the two political decision-making bodies (the General Secretariat and the Andean Council of Foreign Affairs) and by the policy-making body (Andean Commission) that allegedly violate community law. In fact, an individual can bring an action to nullify decisions that have been taken by CAN authorities that affect the applicant's rights or legitimate interests. In addition, the CJAC has authority in terms of the interpretation of community law at the request (optional or mandatory) of national judges in pending proceedings (Articles 28-31). The purpose of a preliminary ruling is not the harmonization of the internal laws of member countries, but rather to ensure that community law is given the same interpretation in all member countries. Besides the power to settle disputes through arbitration, the CJAC has jurisdiction in labour disputes that may arise between the organs of the Andean integration system.

In 1996, the Cochabamba Protocol reinforced the authority of the CJAC. Since then, private litigants can apply directly to the CJAC if they disagree with the Secretariat's deposition of a complaint. Furthermore, private actors find it easier to start a procedure for an action for annulment. The Protocol also relaxed restrictions on preliminary references.

CJAC's membership is comprised of one judge for each member state. According to Articles 7 and 9 of the CJAC Treaty, judges must be nationals of a member country, be of high moral character and either fulfil the conditions for exercising the highest judicial office in their countries of origin or be jurists of recognized competence and probity. Plenipotentiary representatives from member countries unanimously appoint the judges. Each member state submits a list of three candidates from which the judges are eventually chosen. Andean judges serve for a six-year term that may be renewed once. They cannot engage in any gainful occupation, except in academia.

b. The SADC Tribunal

Article 4(c) of the SADC Treaty of 1992 stipulates that the SADC shall act in accordance with human rights principles. Although it is not explicitly stated as a goal, Article 5(1)(a) has vital implications for the pursuit of human rights, especially from the perspective of human development. It states that one of the

objectives of the regional body shall be to “promote sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration.”

Article 9(1)(g) states that the tribunal is one of the institutions of the SADC. It is significant that the tribunal is constitutionally and institutionally embedded within the treaty framework because this is not the case for the SADC’s Parliamentary Forum, which is completely excluded from the treaty. The main rules concerning the tribunal within the treaty are contained in Article 16. The article states that the main task of the tribunal is 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” (Article 16(1)). The composition, powers (jurisdiction) and procedures sanctioning the operation of the tribunal are contained in a SADC protocol regarded, importantly, as an integral part of the treaty (Article 16(2)).

With regard to the composition of the SADC Tribunal, which has its headquarters in Windhoek, Namibia, there cannot be less than ten judges. In addition to these, member states can also appoint five judges, who can be selected by the head of the tribunal for specific cases. A complete tribunal that is competent to hear a case is constituted of three judges, but a full bench requires five judges. No two judges can be of the same nationality (Tribunal Protocol, Article 3). The judges are recommended by the Council but are ultimately appointed by the Summit of Leaders. The judges are appointed for a period of five years, renewable once. With given exceptions to be determined by the head of the tribunal, the judges are not resident but part-time adjudicators with their services solicited as needed (Tribunal Protocol, Article 6).

In terms of powers, it is vital to note that the treaty envisages the power to provide advisory opinions as referred to it by the Summit or the Council (SADC 1992, Article 16(4); Tribunal Protocol, Article 20). Specifically, the tribunal has jurisdiction to interpret the SADC Treaty, protocols, and importantly, if so agreed, agreements entered into between given SADC States (Tribunal Protocol, Article 14). With regards to the scope of its jurisdiction, the tribunal can entertain disputes between states on the one hand and disputes between natural or

legal persons and states on the other. Legal or natural persons cannot bring actions against states unless national remedies have been exhausted. It is of crucial importance that once a claimant with *locus standi* before the court brings forth a claim, consent from the opposing party is not a requirement to entertain the cause of action (Tribunal Protocol, Article 15).

Regarding appeals, the decisions of the tribunal are not supposed to be subject to appeal as they are considered to be final. This is stated in Article 16(5) of the SADC Treaty. However, as discussed in the sample cases, the relevant political players within the SADC are basically the court of last resort given that they can veto the judgments and rulings of the tribunal.

From a procedural perspective, the SADC Tribunal is open to preliminary ruling proceedings. It can also exercise original jurisdiction on questions of interpretation submitted to it from national courts (Tribunal Protocol, Article 16). The tribunal has exclusive jurisdiction in state-Community disputes (Tribunal Protocol, Article 17). Such exclusivity in jurisdiction is also extended to cases between natural or legal persons and the Community (Tribunal Protocol, Article 18) as well as those between staff and the Community on employment-related matters (Tribunal Protocol, Article 19).

Finally in terms of enforcement, states have to take steps to enforce the rulings of the tribunal, but the final word in the ultimate event of non-compliance rests with the supreme political organ or the summit of leaders (Tribunal Protocol, Article 32). The hands of the tribunal are not only tied to the apron strings of the political elite but they are also tied to the Community's pool of financing (Tribunal Protocol, Article 33), which, again, is a function of the dues paid by member states.

4. Practice and Protection of Human Rights at the Regional Level

a. The Court of Justice of the Andean Community

After the CJEU and the European Court of Human Rights, the CJAC is the third most active international court. From 1984 to 2011, CJAC issued decisions on 2,003 prejudicial interpretations, 117 non-compliance actions, 52 annulment actions and 9 labour demands. The Andean experience shows that when countries resort to the dispute resolution mechanism, they are able to remedy

non-compliance of community law, particularly regarding trade matters (Fuentes and Allegret 2009). Most of the CJAC's activities have dealt with intellectual property, specifically the interpretation of Decision 486 of 2000, which is the governing document for intellectual property in the Andean Community. The Court has issued over 1,500 rulings (more than 90 percent of which involve intellectual property rights disputes). In fact, within the CAN, intellectual property is principally regulated at the regional rather than the national level (Alter, Helfer, and Guertzovich 2009).

The CJAC's workload relating to human rights has increased noticeably since 2003, one year after the Andean Council of Presidents adopted the Charter of Promotion and Protection of Human Rights. To protect human rights, the Andean Court has used techniques such as interpretations, arguments and the resolution of contradictions (Vargas Mendoza 2010). However, this regional court has also resorted to diplomatic mechanisms to protect the human rights of Andean citizens. On 25 June 2008, four Andean Judges sent a letter to the President of the CJEU to express their deep concern about the terms on which the new EU immigrant law (the Return Directive) were written. In the letter, the judges noted that the EU Return Directive equated undocumented immigrants to common criminals and allowed the deprivation of their rights for eighteen months without any recourse to the courts. Pointing to an opinion from the Inter-American Court of Human Rights and to the principle of non-discrimination in the International Law of Human Rights, Andean Judges stated that the principle of equality did not exclude the consideration of immigrant status and called for a just and humane treatment for migrants in Europe, comparable to that which Latin American countries had granted to European immigrants in the twentieth century.

In relation to questions on human rights handled by the CJAC, Mendoza has identified five sample cases (Vargas Mendoza 2010). In 2003, regarding the health registers of the product Vintix Coated Tablet, the Council of State of Colombia requested a preliminary ruling from the CJAC on the provisions enshrined in Articles 78 and 79 of Decision 344 of the Andean Commission (Process 37-IP-2003). In its ruling on decision 344, concerning the common system of intellectual property, the CJAC considered the issues of trade secrets and test data. The Andean tribunal ruled that common

laws included clear limits to the powers granted to trade secrets. By law or by court order, such information must be disclosed. In its *dictum*, the CJAC argued that the holder of the information covered by trade secrets cannot act in a manner that erodes fundamental rights. Three years later, in the case of *Colombian Association of Pharmaceutical Industries (Asinfar) vs. Colombian State*, the CJAC ruled in favour of the request by Asinfar, quashing Decree 2085 of the Colombian state for the breach of Decision 486, which replaced Decision 344. In its *dictum* the CJAC affirmed that:

The granting of exclusive rights for certain periods of time, may conflict with fundamental human rights such as health and life, since the consumption of drugs is related to its price and the monopoly price may make it impossible to access the drug, which can lead to disease and death to their potential customers. (Proceso 114-AI-2004)

For the CJAC, the Colombian state was in non-compliance with its obligations because Decree 2085 was not compatible with community law, public health or the integration process' aim of progressively seeking to meet the basic needs of the people of the Andean region (Proceso 114-AI-2004).

In the preliminary ruling involving the Colombian state and a pharmaceutical brand company, the CJAC ruled that the registration standards of a trademark covering pharmaceutical products for non-human use (such as products for veterinary purposes) must be extremely rigorous in order to avoid any risk to human health, animals or plants. Therefore, the CJAC found that the competent national authority should assess such health risks and avoid any mistakes in terms of the product consumed (Proceso 45-IP-2008). Therefore, in this case, the jurisprudence connected the interpretation of community law with health-related rights (public health) and environmental rights (animal and plant health).

Another important CJAC case concerned the protection of the rights of children. In 2006, a game production company brought an action against Ecuador for non-compliance with Decision 439, relating to the principles and norms for the trade liberalization of community services. In its judgment, the CJAC examined whether internal rules regulating slot machines violated

the Andean services trade regime. The judgment stated that the right to free access to the gambling market must give way to the right to good health of people and, in particular, children (Proceso 03-AI-2006). Vargas Mendoza (2010) has argued that, in addition to considerations on the value of health, public order and child protection, this case is relevant because the Andean tribunal drew on two techniques of contemporary jurisprudence: a test of reasonableness and a weighting analysis.

Preliminary rulings requested by Peru in relation to the location of slaughterhouses also illustrate how the CJAC addresses human rights issues in its arguments and interpretation. To build its judgment, the Andean tribunal carefully analyzed the relevant regional rules. Its interpretation was that although the overall objective of the legislation was to promote the development of livestock and beef agribusiness in the Andean region, “this objective is related to higher goods such as health and life of people and the protection of the right to a healthy environment and care for the collective rights and public health safety” (Proceso 90-IP-2008).

In all these cases, and especially in *Vintix*, *Asinfar* and the case pertaining to the rights of children, the CJAC has used its interpretive mandate to lean clearly towards the protection of human life and human health in those instances where such concerns have to be balanced against other commercial interests. However, the CJAC is not only concerned with rights hinging on human health. As revealed in the preliminary ruling involving Colombia, the CJAC is also keen to help prevent violations of environmental rights that may adversely affect plants and animals. This is very important because it sends a strong signal to private actors that rights advocates have a reliable regional mechanism (the CJAC) that can be used to reject or mitigate abuses to rights that may result from business operations in Andean countries. The CJAC decides to resolve disputes over the implementation of regional rules with direct reference to human rights issues.

b. The SADC Tribunal

When juxtaposed to the CJAC, there is a clear dearth of human rights litigation before the SADC Tribunal. The few contentious issues brought before the tribunal have been predominantly related to labour and land rights questions,, with the secondary aspect of property rights playing a prominent

role in Zimbabwe. In terms of the issues related to labour rights, which referred mainly to aspects of the unlawful termination of employment, the SADC Tribunal did not adopt a clear approach of siding consistently with the employees. In its *dictum* in *Mtingwi v SADC Secretariat* (Case No. SADC (T) 1/2007, at 15), the tribunal was at pains to reject the claims of a plaintiff who demanded costs for the wrongful termination of a contract due to pending criminal charges in Malawi. The tribunal ruled in favour of the SADC Secretariat, accepting the argument that the claimant was not entitled to any compensation under the circumstances. In another case, the tribunal adopted an approach that was adverse to the interests of the secretariat. This was the *Kanyama* ruling, in which the tribunal adjudged (leaning on the concept of justice) that the Secretariat had to explore the lawful contractual extension of the claimant's employment by a period of four years. In order to reverse the damage suffered by the respondent, the employer was ordered to make good the costs of the claimant (Case No. SADC (T) 05/2009).³

In the landmark case involving the late Zimbabwean white farmer Mike Campbell, the tribunal adjudicated in favour of Campbell and claimants. It ruled that the action of the government of Zimbabwe, in confiscating the landed property of the claimants, was tantamount to acting in violation of the SADC Treaty that (Case No. SADC (T) Case No. 2/2007, at 57-58),⁴ amongst other purposes, seeks to protect the rights of SADC citizens, including their property rights. The Campbell saga epitomized a deeper problem in Zimbabwe that harks back to 1979, when the government of the United Kingdom decided in the Lancaster Agreements that it would regularly pay the government in Harare in exchange or as consideration for the white landowners to maintain their industrial concerns. Subsequently, as the British government fell short in its promised payments, president Mugabe decided to lean on a constitutional amendment (2004 Amendment 17) to seize the farms

3 See also Case No. SADC (T) 07/2009 and Case No. SADC (T) 02/2009, at 2 and 6.

4 Other land cases pitting the Government of Zimbabwe against farmers and in which the Government has been ordered to refrain from evicting title holders from their landed property include: Case No. SADC (T) 2/2008, Case No. SADC (T) 04/20008, Case No. SADC (T) 06/20008, Case No. SADC (T) 7/2008, Case No. SADC (T) 07/2008.

that were owned predominantly by white farmers. What irked many in the international community was the fact that Mugabe was using the land issue as a pretext to settle political grievances, all the more so as the confiscated property often went to cronies of the ruling party (ZANU PF), who could not tend to the land as had been the case when the agricultural fields were predominantly in the control of the white farmers.

In the example of the Campbell case, one of the dispossessed white farmers and other claimants leaned on SADC Treaty rules to make a claim against the Mugabe government for expropriating their property. Initially, the claimant filed motions in Zimbabwean courts when his Mount Carmel property (purchased in 1974) was seized. Not pacified by the ruling of the courts in Zimbabwe, the claimant sought the services of the SADC Tribunal. The tribunal ruled that the actions of the government of Harare were in direct violation of Articles 4 and 6 of the SADC Treaty. The tribunal found that the government's actions could not be objectively justified and that they amounted to crass and brazen acts of racial discrimination. The entire land reform programme that Mugabe had championed was brought into question. It then ruled that the claimants were entitled to compensation from Robert Mugabe's government. Following the *dictum*, the tribunal transmitted the ruling to the Summit for consideration and implementation. When this was done, in 2009, the Summit adopted an approach of least political resistance by basically stripping the tribunal of its powers and suspending its activities. This also took place subsequently to a declaration by the government of Zimbabwe that it would not respect the ruling of the SADC Tribunal. This, of course, raised the question of the competence and powers of the regional court, especially when faced with a charged political reality.

It could be argued that the judges were not politically savvy or sensitive enough to understand how unsettling their ruling would be. Southern Africa is a region that is still marked by strong political ties amongst the rulers, who, not more than thirty years ago, were still linked by the strong bonds of the liberation struggles and who are not ready to delegate their political sovereignty to unelected judges who may not be attuned to or steeped in the sensitive historical details that underpin the political realities of the

region today. Therefore, it is not surprising that Mugabe simply dismissed the work of the tribunal as a sham and rejected the validity of its rulings (Case No. SADC (T) 01/2010, at 3; and Case No. SADC (T) 03/2009).

The SADC is faced with difficult issues, as exposed by the Zimbabwean land reform challenges. Its leaders have to confront the choice of whether to adhere strictly to the rule of law as ordained in the SADC Treaty and rules or simply to back one of their peers to pacify historical expediencies. Even if there has been resistance by the governments in the SADC to adopt a Bill of Rights (Ruppel 2012), the Campbell case provided a good opportunity for SADC leaders to project their regional system as one based on the rule of law. They failed to do this and, as Ruppel argues, the Campbell case “became a benchmark of the SADC Tribunal’s key role in the integration of legal and institutional systems in its region of jurisdiction” (Ruppel 2012). However, the leaders missed the opportunity to highlight this situation.

Another important SADC case pertained to the rights of private sector operators within the SADC. In the *Bach case*, the issue was that customs control officers of the Democratic Republic of Congo impounded the applicant’s truck without justification. The claimant brought the matter before the SADC Tribunal and requested damages worth 2 million US dollars. He adduced evidence to corroborate the fact that he could not avail himself of national remedies, highlighting that the DRC officials had requested bribes. On various issues raised by the case, the SADC Tribunal leaned on its own *stare decisis*, especially in the Campbell ruling and found *inter alia*:

Clearly, there is evidence supported by documents that the Applicant tried to utilize the legal system of the Respondent to have its truck and trailer released but was unsuccessful. It even tried to use the diplomatic channels available but was equally unsuccessful. It was clearly unable to proceed under the domestic legal system of the Respondent. In *Mike Campbell (PVT) Ltd v The Republic of Zimbabwe* SADC (T) 2/2007, the Tribunal observed: [...] 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 [...] These are circumstances that make the requirement of exhaustion of local remedies

meaningless, in which case the individual can lodge a case with the international tribunal. (Case No. SADC (T) 14/2008, at 4-7)

The Tribunal ruled in favour of the applicant and demanded that due costs be paid to the applicant business operator. The ruling of the tribunal here is very important because it is a fundamental departure from common practice and the basis which many state parties often use to justify the dismissal of non-compliance actions before regional courts. Here, the tribunal was actually making a robust case that, in those instances where national remedies are worthless and less than effective, the exhaustion argument can be waived.

The SADC Tribunal went through a baptism of fire in the Campbell decision. One of the crucial *faux pas* made by the judges was to overplay their hand in a charged political context. Given the history of the region and the fact that the tribunal is still very young, it would have been better for the SADC Tribunal to mainly focus, at this initial stage of its existence, on technical matters that directly relate to free trade in the region. In adopting the confrontational approach and attracting the wrath of political masters, the baby has been thrown out with the bathwater. One of the reasons behind the CJAC's success is that it has mainly addressed technical trade matters pertaining to intellectual property. Both courts reveal sympathies to those whose rights are trampled upon but one has been more direct because it has used its mandate to address human rights concerns in ways that initially seemed detached from human rights matters. To be fair, the *décalage* in outcome could be attributed to the lack of awareness of private parties in the SADC about how to use their tribunal tactfully. That said, the SADC Tribunal could have acted *sua moto* in specific instances to address technical elements of the SADC Treaty without necessarily being seized by litigants while avoiding the wrath of political masters.

5. Analysis in the Variance of the Scope of Action for the Tribunals

Based on these observations, we may assert that there are some similar features between the achievements of the SADC and the CAN in terms of human rights adjudication. Both are institutions that were initially created with the objective of fostering commerce between the state parties. Over time, their

mandates have broadened and been interpreted creatively to address further questions pertaining to human rights. One main difference between SADC law and CAN community law is that there is no principle of direct effect that is observable under SADC norms. States still tend to incorporate regional norms through specific legislation. This explains some of the differences that can be identified between the two bodies. Another important difference is that while the CAN has developed a strong caseload in the area of intellectual property, the major cases in the SADC concern landed property rights. This again reflects the specific historical contexts of some SADC States such as Namibia, South Africa and Zimbabwe, where the white minority populations have historically owned a disproportionately significant portion of all arable land. Even with the demise of apartheid in South Africa and the end of the liberation struggles and triumph of majority rule in countries such as Namibia and Zimbabwe, the majority black populations still believe that inequalities in land distribution remain in existence.

The dissimilarities can be further approached from four perspectives including: the scope of human rights covered by each of the regional tribunals; the *locus standi* or standing of individuals before the tribunals; the added value of the regional tribunals as such; and the restrictive role of politics for the tribunals. In both instances, the drafters of the founding texts for the CAN and the SADC had very limited ambitions when they alluded to human rights in the treaties. Given their particular histories, states in both regions sought to reflect the specific needs of their citizens in terms of political and civil rights. Less emphasis was placed on economic and social rights. However, over the years, these rights have been interpreted broadly to also encompass the second generation of human rights.

In terms of *locus standi*, individuals can bring cases in both tribunals. This means that they can have recourse to the regional tribunals in the event of rights violation. The remedies developed in the CAN are actions for non-compliance and nullification actions. These are not denominated as such under the SADC legal system, but the class actions brought against the state of Zimbabwe in the Campbell cases were tantamount to actions in view of reversing Zimbabwe's non-compliance under its SADC Treaty obligations in terms of respect for human rights.

The added value of the tribunals is that they can serve as appellate jurisdictions in those cases where national adjudicative avenues have been exhausted. Certainly, the CJAC and the SADC Tribunal are new players in terms of the protection of human rights. Moreover, in addition to the provision of advisory opinions, the regional tribunals can also institute proceedings *sua motu* (on their own accord). However, these judicial bodies face certain problems. The first is one of awareness. For the most part, citizens of both regions often tend to be unaware of the existence of the regional courts. In a way, the courts are seen as detached and distant. Outreach steps could be useful in this respect and the bar associations, both at the national and regional levels, could also play an important role in this regard. The second challenge is that of resources. Running regional courts is similar to running other regional entities. Human resources needs are often acute. Identifying qualified staff for the regional bench is a process that can take time. The third problem is that there are many established human rights bodies both in the Americas and in Africa that have already developed strong reputations in the protection of human rights. As such, the respective human rights courts and commissions in both regions have more credibility on human rights matters and this tends to dampen any enthusiasm that potential complainants may have to bring their cases before tribunals that were initially created mainly to supervise trade liberalization agreements.

Finally, the issue of political interference remains pervasive. The restrictive role of politics is still a thorny issue. It relates to the fact that the political rulers are adept at and prepared to side-line judicial rulings of the regional courts and tribunals whenever it pleases them. In other words, the action of regional courts is linked to national politics. This has been a major concern in the SADC with the suspension of its tribunal, while the Andean regional integration organization has never been characterized by the political homogeneity of its members.

Conclusions

Taking these observations into account, are there any areas where there can realistically be cross-fertilization in the experiences of the two regional adjudicative bodies? In terms of shared insights, there are aspects relating to intellectual property rights protection as upheld in the CAN that can be useful

for the SADC. This is particularly true since the SADC is one of the regions that has been plagued by the virus causing AIDS and other diseases. Intellectual property norms can often be interpreted in ways that restrict access to affordable medicines and vaccines that can be used to deal with these health problems. The direct interpretive of the CAN courts could provide insight for future SADC Tribunal judges. In terms of insights for CAN, the nature of the political overreach that has jeopardized the functioning of the SADC Tribunal is a route that CAN leaders would do well to avoid if the rule of law is to retain its hallowed meaning in the region.

Substantively, and in terms of caseloads, the cases that have been brought before the CJAC outweigh those of the SADC Tribunal and tend to involve matters that clearly impinge on socio-economic rights, including intellectual property rights. While politics plays a vital role in the selection of judges in both courts, there is greater political interference in the case of the SADC. It is therefore not surprising that the SADC Tribunal's activities have been suspended by the region's leaders pending a re-negotiation of the tribunal's protocol. Given the circumstances that led to the suspension of the court, it is hard to foresee how a re-negotiated protocol would not dilute any possible leverage that the tribunal could hope to have in terms of independence. In a way, this is disappointing because SADC States face real challenges in the areas of health and the environment and it would have been useful to have a strong regional court that can address trans-border questions rather than having to turn to the ICJ or the WTO dispute settlement body whenever territorial or trade-related claims are made. In this respect, we argue that those working on a re-negotiated SADC Tribunal protocol could draw inspiration from the workings of the CJAC to assess why the Andean court has had such a rich caseload and how it balances its tasks against political forces in a region traditionally dominated by leaders with very strong personalities.

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