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Regional economic integration agreements and investor protection in Africa – the case of SADC
Why institutional overlap may be necessary in certain cases

Andreas R. Ziegler*

This paper examines the role of human rights instruments and regional integration instruments as well as their potential for overlap when it comes to the protection of foreign investors. As an example it analyses the Southern African Development Community (SADC) as well as the use of its Tribunal by private parties. As a case study it focuses on the decision by the SADC Tribunal of 28 November 2008 in the Case Mike Campbell [PVT] Limited and others. v. Zimbabwe.

This paper analyses first the results in this case and the action taken by the SADC Member States with regard to the potential overlap of legal regimes - in particular the protection of property and (foreign) investors in the region through human rights instruments and BITs. It compares the role of the SADC tribunal in this particular situation to the one of investor-state arbitration by comparing the SADC Tribunal decision to the the parallel case of Bernardus Henricus Funnekotter and Others v. Republic of Zimbabwe, (ICSID Case No. ARB/05/6) of 22 April 2009 – a traditional investor-State arbitral award and the attempts by several foreign investors to obtain diplomatic protection from their home States.

The paper concludes that the SADC tribunal has the potential to strengthen the rule of law and and the protection of property rights in the region. It thereby could contribute to an improvement of the legal environment. The paper concludes that the parallel availability of human rights mechanisms and BITs in this context would be comparable to the situation currently found in Europe with regard to the ECHR and BITs. The intention of the analysis provided for in paper is to be not only useful for the SADC framework, but also for problems of overlap and legal shortcomings in other regional fora, be it NAFTA, the EU, MERCOSUR, ASEAN or the ANDEAN Community and in the increasing number of bilateral free trade (and investment) agreements currently under negotiation.

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REGIONAL ECONOMIC INTEGRATION AGREEMENTS AND INVESTOR PROTECTION IN AFRICA – THE CASE OF SADC

WHY INSTITUTIONAL OVERLAP MAY BE NECESSARY IN CETRTAIN CASES

(SIMULTANEOUSLY A DISCUSSION OF *MIKE CAMPBELL [PVT] LIMITED AND OTHERS.* V. *ZIMBABWE*, OF 28 NOVEMBER 2008 AND *BERNARDUS HENRICUS FUNNEKOTTER AND OTHERS* V. *REPUBLIC OF ZIMBABWE*, (ICSID CASE NO. ARB/05/6) OF 22 APRIL 2009)

Andreas R. Ziegler *

Abstract

This paper examines the role of human rights instruments and regional integration instruments as well as their potential for overlap when it comes to the protection of foreign investors. As an example it analyses the Southern African Development Community (SADC) as well as the use of its Tribunal by private parties. As a case study it focuses on the decision by the SADC Tribunal of 28 November 2008 in the Case *Mike Campbell [PVT] Limited and others.* v. *Zimbabwe*.

This paper analyses first the results in this case and the action taken by the SADC Member States with regard to the potential overlap of legal regimes - in particular the protection of property and (foreign) investors in the region through human rights instruments and BITs. It compares the role of the SADC tribunal in this particular situation to the one of investor-state arbitration by comparing the SADC Tribunal decision to the the parallel case of *Bernardus Henricus Funnekotter and Others* v. *Republic of Zimbabwe*, (ICSID Case No. ARB/05/6) of 22 April 2009 – a traditional investor-State arbitral award and the attempts by several foreign investors to obtain diplomatic protection from their home States.

The paper concludes that the SADC tribunal has the potential to strengthen the rule of law and and the protection of property rights in the region. It thereby could contribute to an improvement of the legal environment. The paper concludes that the parallel availability of human rights mechanisms and BITs in this context would be comparable to the situation currently found in Europe with regard to the ECHR and BITs. The intention of the analysis provided for in paper is to be not only useful for the SADC framework, but also for problems of overlap and legal shortcomings in other regional fora, be it NAFTA, the EU, MERCOSUR, ASEAN or the ANDEAN Community and in the increasing number of bilateral free trade (and investment) agreements currently under negotiation.

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Key words: International law, foreign investment, expropriations, regional integration, Southern African Development Community, overlapping jurisdictions, forum shopping, Zimbabwe, SADC Tribunal

Introduction

Starting in 2000, the Government of Zimbabwe has expropriated a number of land-owners. It was usually held that this was only due to the fact that they were white and thus did not fit into the current policy of the Government to favour black ownership of agricultural land.[1] In March 2008, in a consolidated case (Mike Campbell (Pvt) Ltd and others. v. Zimbabwe), 79 applicants challenged the legality of these measures before the Southern African Development Community Tribunal (hereinafter: SADC Tribunal): they considered the compulsory acquisition by the Zimbabwean Government an unlawful expropriation that was not in conformity with the legal standards provided for under the Treaty establishing the Southern African Development Community (hereinafter: SADC). On 28 November 2008, the Tribunal held that the acquisition of the agricultural lands by the Zimbabwean government were illegal as they were discriminating (based on race) and were not accompanied by adequate compensation.[2]

Legal Foundations of the Measures

The new policy regarding the so-called "compulsory acquisition" of agricultural land was originally based on Amendment 16 of the Constitution of the Republic of Zimbabwe, adopted by Parliament on 19 April 2000.[3] This original legal basis was completed by another amendment (Amendment 17) on 14 September 2005. Both texts authorized the taking of white-owned farmlands without compensation.[4]

In particular following, the insertion of Section 3 of Amendment No. 16, the relevant part of the Constitution read as follows:

> 16A Agricultural land acquired for resettlement

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1 See Memory Dube, Land reform in Zimbabwe - context, process, legal and constitutional issues and implications for the SADC region, in: Monitoring regional integration in Southern Africa, vol. 8, 2008, 303-341.

2 See SADC Tribunal, Main Decision of .28 November 2008 in *Mike Campbell (Pvt) Ltd and Others* v *Republic of Zimbabwe* (Case no 2 of 2007), page 17 ff: for a detailed analysis of the facts and the legal findings of the SADC Tribunal see Dunia Prince Zongwe, The Contribution of Campbell v. Zimbabwe to the Foreign Investment Law on Expropriations, Namibia Law Journal, vol. 2, no. 1, 2010 also as CLPE Research Paper no. 50/2009, available at SSRN: http://ssrn.com/abstract=1516564

3 Constitution of Zimbabwe Amendment No. 16, Act 5 of 2000. [hereinafter Amendment 16], available atwww.parlzim.gov.zw/cms/.../ZimbabweConstitution.pdf .

4 Constitution of Zimbabwe Amendment No. 17, Act 5 of 2005. [hereinafter Amendment 17], equally available at www.parlzim.gov.zw/cms/.../ZimbabweConstitution.pdf.

(1) In regard to the compulsory acquisition of agricultural land for the resettlement of people in accordance with a programme of land reform, the following factors shall be regarded as of ultimate and overriding importance —

(a) under colonial domination the people of Zimbabwe were unjustifiably dispossessed of their land and other resources without compensation;

(b) the people consequently took up arms in order to regain their land and political sovereignty, and this ultimately resulted in the Independence of Zimbabwe in 1980;

(c) the people of Zimbabwe must be enabled to reassert their rights and regain ownership of their land;and accordingly—

(i) the former colonial power has an obligation to pay compensation for agricultural land compulsorily acquired for resettlement, through an adequate fund established for the purpose; and

(ii) if the former colonial power fails to pay compensation through such a fund, the Government of Zimbabwe has no obligation to pay compensation for agricultural land compulsorily acquired for resettlement.

(2) In view of the overriding considerations set out in subsection (1), where agricultural land is acquired compulsorily for the resettlement of people in accordance with a programme of land reform, the following factors shall be taken into account in the assessment of any compensation that may be payable —

(a) the history of the ownership, use and occupation of the land;

(b) the price paid for the land when it was last acquired;

(c) the cost or value of improvements on the land;

(d) the current use to which the land and any improvements on it are being put;

(e) any investment which the State or the acquiring authority may have made which improved or enhanced the value of the land and any improvements on it;

(f) the resources available to the acquiring authority in implementing the programme of land reform;

(g) any financial constraints that necessitate the payment of compensation in instalments over a period of time; and

(h) any other relevant factor that may be specified in an Act of Parliament.

Furthermore through Section 4 of the Amendment No. 17, Article 23 of the Constitution (Protection from discrimination on the grounds of race, etc.) was amended with an additional exception from its general application that reads as follows:

(3) Nothing contained in any law shall be held to be in contravention of subsection (1)(a) to the extent that the law in question relates to any of the following matter —

[...]

(g) the implementation of affirmative action programmes for the protection or advancement of persons or classes of persons who have been previously disadvantaged by unfair discrimination.

In addition, Amendment 17 of 2005 effectively vests the ownership of agricultural lands compulsorily acquired under Section 16B (2) (a) (i) and (ii) in Republic of Zimbabwe and ousts the jurisdiction of the courts to entertain any challenge concerning such acquisitions.[5]

The South African Development Community (SADC)

The Southern African Development Community (hereinafter: SADC) was established in 1992 as a successor to the original Southern African Development Coordination Conference (hereinafter: SADCC). The latter had been formed in Lusaka, Zambia on April 01, 1980 through the so-called Lusaka Declaration (Southern Africa: Towards Economic Liberation).[6]

The original members were the so-called "Frontline States" (FLS) a group of countries in Southern Africa that tried to overcome its dependency on South Africa and its apartheid regime of the time. The goal was first and foremost the political liberation of Southern Africa and the end of apartheid.

Already in May 1979 consultations had been held between Ministers of Foreign Affairs and Ministers responsible for Economic Development from Angola, Botswana, Lesotho, Mozambique, Swaziland, United Republic of Tanzania and Zambia in Gaborone, Botswana. Subsequently a meeting was held in Arusha, Tanzania in July 1979 which later led to the establishment of SADCC.

On August 17, 1992, at their Summit held in Windhoek, Namibia, the Heads of State and Government of the SADCC States signed the "SADC Treaty and Declaration" that transformed the SADCC into the SADC.[7] The objective also shifted to promote economic integration following the independence of the rest of the Southern African countries. Currently the SADC has 15 members. In addition to the original SADCC States they are: the Democratic Republic of Congo (DRC), Malawi, Mauritius, Namibia, the Seychelles, South Africa, Swaziland, and Zimbabwe. According to the SADC web page they have currently a common population of 257.7 Million inhabitants and a Gross

5 See also the findings of the SADC Tribunal, Main Decision of .28 November 2008 in *Mike Campbell (Pvt) Ltd and Others* v *Republic of Zimbabwe* (Case no 2 of 2007), at page 12.

6 For details see Gabriël Oosthuizen, The Southern African Development Community: The organisation, its history, policies and prospects. Institute for Global Dialogue: Midrand, South Africa, 2006 and Luís Bernando Nunes Mexia Castelo Branco, Das razões políticas da SADCC às razões económicas da SADC, Lisboa (Univ. Lusíada), 1997.

7 The texts are available at: http://www.sadc.int/index/browse/page/119,

Domestic Product (GDP) of 471.1 Billion US$. The headquarters of SADC are located in Gabarone (Botswana).[8]

In order to foster economic integration, in 1996 the SADC Members signed a Protocol aiming at the creation of a free trade zone among them. This Protocol only entered into force in 2000. In a political decision of 2003 (Regional Indicative Strategic Development Plan; RISDP) the members agreed in addition to fully implement the the free trade zone by 2008 and to create a customs union by 2010 and a common market by 2015. Ultimate goal would be an Economic Union by 2016 and the introduction of a common currency by 2018.[9]

The SADC Tribunal

The SADC Tribunal, according to Article 9 of the SACD Treaty of 1992, is one of eight common institutions.[10] It's basic role and purpose can be found in Article 16 of the SADC Treaty[11]:

> ARTICLE 16 THE TRIBUNAL
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> 1. The Tribunal shall be constituted to ensure adherence to and the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it.
> 2. The composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed in a Protocol adopted by the Summit.
> 3. Members of the Tribunal shall be appointed for a specified period.
> 4. The Tribunal shall give advisory opinions on such matters as the Summit or the Council may refer to it.
> 5. The decisions of the Tribunal shall be final and binding.

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8 The document is available at http://www.sadc.int/fta.

9 Text available at: http://www.sadc.int/index/browse/page/104

10 Namely, the Summit of Heads of State & Government, SADC Tribunal, Council of Ministers, Organ on Politics, Defence and Security Cooperation, Sectoral/Cluster Ministerial Committees, SADC Secretariat, Standing Committee of Senior Officials, and SADC National Committees. See also Oliver C. Ruppel and Francois X. Bangamwabo, The SADC Tribunal: A Legal Analysis of its Mandate and Role in Regional Integration, in: Monitoring Regional Integration in Southern Africa Yearbook 2008 (Namibian Economic Policy Research Unit 2008, 7.

11 There exist other more specific dispute settlement provision, e.g. regarding trade within SADC under the Southern African Development Community Protocol on Trade, Annex VI, at http://www.sadc.int/documents/trade/annex6.doc; see Joost Pauwelyn, Going Global or Regional or Both? Dispute Settlement in the South African Development Community (SADC) and Overlaps with Other Jurisdictions, in particular that of the WTO, Minnesota Journal of Global Trade, vol. 1, 2004; available online at SSRN: http://ssrn.com/abstract=478041.

The details regarding the functions and the organization of the Tribunal are laid down in the Protocol on Tribunal in the Southern African Development Community. In line with Article 4 (4) of the Protocol, the first members of this permanent Court were appointed by the Summit of Heads of State or Government, the Supreme Policy Institution of SADC, during its Summit of Heads of State or Government held in Gaborone, Botswana on 18th August 2005. The inauguration of the Tribunal and the swearing in of the Members took place on 18th November 2005 in Windhoek, Namibia.

The Role of the SADC Tribunal in Case 2/2007

The Case *Mike Campbell (Pvt) Ltd and Others* v *Republic of Zimbabwe* (Case no 2 of 2007) was the second case registered with the Tribunal.[12]

The access by natural persons to the Court – apart from staff cases – is governed by Articles 14 and 15 of the Protocol:

> ARTICLE 14 BASIS OF JURISDICTION
>
> The Tribunal shall have jurisdiction over all disputes and all applications referred to it in accordance with the Treaty and this Protocol which relate to:
> (a) the interpretation and application of the Treaty;
> (b) the interpretation, application or validity of the Protocols, all subsidiary instruments adopted within the framework of the Community, and acts of the institutions of the Community;
> (c) all matters specifically provided for in any other agreements that States may conclude among themselves or within the community and which confer jurisdiction on the Tribunal.
>
> ARTICLE 15 SCOPE OF JURISDICTION
>
> 1. The Tribunal shall have jurisdiction over disputes between States, and between natural or legal persons and States.
> 2. No natural or legal 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.
> 3. Where a dispute is referred to the Tribunal by any party the consent of other parties to the dispute shall not be required.

It should be noted that the claimants had also launched proceedings in the domestic court system of Zimbabwe - but ultimately lost their case before the Zimbabwean Supreme Court. The Court came

12 All cases and related documents are available on the home page of the Tribunal at: http://www.sadc-tribunal.org/pages/decisions.htm.

to the conclusion that the compulsory acquisition of the farmland in Zimbabwe did not constitute "racial discrimination" as the text of the applicable law made no reference to race or colour. Furthermore, the domestic law was considered a sufficient legal basis for the taking of the property without compensation. [13]

Investor Protection by the SADC Tribunal ?

Already before the decision by the South African Supreme Court was handed down (22 January 2008), the claimant had filed on 11 October 2007 a complaint with the SADC Tribunal (in Case *Mike Campbell (Pvt) Ltd and Others* v *Republic of Zimbabwe* (Case no 2 of 2007), simultaneously asking for interim measures to protect him and his property. The SADC Tribunal granted the interim measures in a rather summary decision on 13 December 2007 based on the finding that the claimants had *prima facie* a case and postponed the decision on the admissibility for the main proceedings.[14]

The most surprising part of the Campbell Case was the fact that the claimants managed to find a substantive guarantee available to them under the SADC Treaty to be protected by the SADC Tribunal. The substantive provisions invoked by the claimants were found in Article 4 of the Treaty, which reads:

> ARTICLE 4 PRINCIPLES
>
> SADC and its Member States shall act in accordance with the following principles:
>
> a. sovereign equality of all Member States;
> b. solidarity, peace and security;
> c. human rights, democracy and the rule of law;
> d. equity, balance and mutual benefit; and
> e. peaceful settlement of disputes.

Although this Article seems rather general and speaks only of principles, the SADC Tribunal interpreted it as meaning that:

> "SADC as a collectivity and as individual member States are under a legal obligation to respect and protect human rights of SADC citizens. They also have to ensure that there is democracy and the rule of law within the region. The matter before the Tribunal

13 Supreme Court of Zimbabwe, *Mike Campbell (Pvt) Ltd. and Another v Minister of National Security Responsible for Land, Land Reform and Resettlement* (124/06) [2008] ZWSC 1 (22 January 2008); decision made available by the Southern African Legal Information Institute at: http://www.saflii.org/zw/cases/ZWSC/2008/1.html.

14 See SADC Tribunal, Interim Ruling of 13 December 2007 in *Mike Campbell (Pvt) Ltd and Others* v *Republic of Zimbabwe* (Case no 2 of 2007).

involves an agricultural land, which the applicants allege that it has been acquired and that their property rights over that piece of land have thereby been infringed. This is a matter that requires interpretation and application of the Treaty thus conferring jurisdiction on the Tribunal."[15]

In its final decision[16] the Tribunal also referred to Article 6 of the Treaty which requires:

ARTICLE 6 GENERAL UNDERTAKINGS

1. Member States undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and shall refrain from taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty.
2. SADC and Member States shall not discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture, ill health, disability, or such other ground as may be determined by the Summit. [...]

Thereby the Tribunal interpreted Article 4 as importing the right to property into the SADC Treaty as they considered the later a natural element of "human rights, democracy and the rule of law" as referred to in Article 4 of the SADC Treaty. Thereby the SADC Tribunal adopted the role of a human rights court – a role that does not appear in such clarity under the SADC Treaty and even the Protocol establishing the Tribunal, maybe with the exception of the prohibition to discriminate contained in Article 6(2) of the SADC Treaty.[17] This human rights dimension is increased by the

15 SADC Tribunal, Interim Ruling of 13 December 2007 in *Mike Campbell (Pvt) Ltd and Others* v *Republic of Zimbabwe* (Case no 2 of 2007), page 3.

16 See SADC Tribunal, Main Decision of 28 November 2008 in *Mike Campbell (Pvt) Ltd and Others* v *Republic of Zimbabwe* (Case no 2 of 2007), page 26.

17 See, however, Admark Moyo, Defending human rights and the rule of law by the SADC Tribunal, African human rights law journal, vol. 9, no. 2, 2009, 590-614 and Oliver Christian Ruppel, The SADC Tribunal, regional integration and human rights, Recht in Afrika, vol. 12, no.2., 2009, 213-238.

important references to the Statutes[18] and Decisions[19] by other regional human rights courts in the final judgement in Case 2/2007.[20]

This interpretation was of course not undisputed, Zimbabwe had in its pleadings argued that the SADC Treaty "only sets out the principles and objectives of SADC. It does not set out the standards against which actions of Member States can be assessed." Furthermore Zimbabwe contended that the Tribunal "cannot borrow these standards from other Treaties as this would amount to legislating on behalf of SADC Member States." As there is no implementing Protocol with regard to Article 4 of the SADC Treaty, Zimbabwe regarded the statement of the SADC Tribunal that it had jurisdiction to hear an case that involved the violation of human rights as *ultra vires*.[21]

The Tribunal held according to Article 21 (b) of the "Protocol of the Tribunal and the Rules of Procedure thereof" that it was enjoined to develop its own jurisprudence and also to do so "having regard to applicable treaties, general principles and rules of public international law", According to the Tribunal this "settles the question whether the Tribunal can look elsewhere to find answers where it appears that the Treaty is silent."[22]

The Tribunal held it to be "settled law" that the rule of law – as contained in Article 4 of the SADC Treaty – should be read as including the "at least two fundamental rights, namely, the right of access to the courts and the right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation."[23]

The Tribunal came to the conclusion that the applicants "had been deprived of their agricultural lands without having had the right of access to the courts and the right to a fair hearing, which are

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18 With regard to the obligation to exhaust local remedies as mentioned in Article 14 of the Protocol relating to the SADC Tribunal, refers to Article 26 of the European Convention on Human Rights and Article 50 of the African Charter of Human and Peoples' Rights. See SADC Tribunal, Main Decision of .28 November 2008 in *Mike Campbell (Pvt) Ltd and Others* v *Republic of Zimbabwe* (Case no 2 of 2007), page 17 ff..

19 Among others, the Tribunal referred to the ECHR cases of Golder v UK (1975) and Philis v. Greece (1991) and the Inter-American Court of Human Rights' Advisory Opinion OC-9/87 of 6 October 1987 at page 28 ff.

20 Regarding the choice of a "human rights approach" as opposed to an "investment approach" see also Dunia Prince Zongwe, The Contribution of Campbell v. Zimbabwe to the Foreign Investment Law on Expropriations, Namibia Law Journal, vol. 2, no. 1, 2010; also published as CLPE Research Paper no. 50/2009, available at SSRN: http://ssrn.com/abstract=1516564, p. 4 as well as Lonius Ndlovu, Following the NAFTA Star - SADC land reform and investment protection after the Campbell litigation, Law, Democracy and Development (Journal of the Faculty of Law at the University of the Western Cape), vol. 15, 2011, available online at: http://www.ldd.org.za/images/stories/Ready_for_publication/nafta.pdf.

21 See SADC Tribunal, Main Decision of 28 October 2008 in *Mike Campbell (Pvt) Ltd and Others* v *Republic of Zimbabwe* (Case no 2 of 2007), page 23 ff.

22 *Id.*, page 25.

23 *Id.*, page 26.

essential elements of the rule of law, and that accordingly Article 4 (c) of the SADC Treaty had been breached".[24]

Similarly the Tribunal came to the conclusion that racial discrimination was "outlawed" by international law as well as Art. 6 (2) of the SADC Treaty. The Tribunal referred, inter alia to Art. 1(3) of the UN Charter, Article 2 of the UN Declaration of Human Rights ,Article 2 (1) of the International Covenant on Civil and Political Rights and Article 2 (2) of the International Covenant on Economic, Social and Cultural Rights and the he Convention on the Elimination of All Forms of Racial Discrimination. The Tribunal held that is was of particular importance that Zimbabwe had acceded to both Covenants, the African Charter and the Convention on the Elimination of All Forms of Racial Discrimination. [25] In order to define "racial discrimination", the Tribunal again made abundant use of decisions and recommendations of international bodies under various treaty regimes. Ultimately, the Tribunal held that the measures by Zimbabwe constitute de fact discrimination against white farmers based on race in violation of Article 6 (2) SADC Treaty although the the Constitutional amendments did not openly refer to white farmer as main target group.[26]

A particularly interesting statement can be found at page 53 of the decision:

> "We wish to observe here that if: (a) the criteria adopted by the Respondent in relation to the land reform programme had not been arbitrary but reasonable and objective; (b) fair compensation was paid in respect of the expropriated lands, and (c) the lands expropriated were indeed distributed to poor, landless and other disadvantaged and marginalized individuals or groups, rendering the purpose of the programme legitimate, the differential treatment afforded to the Applicants would not constitute racial discrimination."

With regard to the duty to pay compensation in case of expropriation, the Tribunal held that this duty was undisputed by the Parties as being part of (the applicable) international law. The Tribunal therefore concluded that "fair compensation is due and payable to the Applicants by the Respondent in respect of their expropriated lands." Furthermore Zimbabwe was directed to take all necessary measures, to protect the possession, occupation and ownership of the lands of the Applicants, and to pay fair compensation, on or before 30 June 2009, to the applicants.[27]

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24 *Id.*, Page 41.

25 *Id.*, Page 47.

26 *Id.*, Page 52 f.

27 *Id.*, Page 56.

Problems regarding the Enforcement of SADC Tribunal Decisions within SADC

While the SADC judgement in Campbell came to many as a surprise[28] and was welcomed as a landmark case and therefore a major stepping-stone in improving the "Rule of Law" and the economic environment in Southern Africa[29], the decisions seems to have overburdened the system.[30]

Already on 30 June 2008 the original applicants filed another claim with the SADC Tribunal seeking in substance, a declaration to the effect that Zimbabwe was in breach and contempt of the orders of the Tribunal in its decision in Case 2/2007 of 13 December. The Tribunal came to the conclusion that, indeed Zimbabwe had not honoured its obligation to refrain from further compulsory acquisition of the plaintiffs' property.[31] As foreseen by the Article 32 (5) of the Protocol on Tribunal in the Southern African Development Community, the Tribunal reported its finding to the Summit – SADC's highest organ.[32]

The Summit of SADC (composed of heads of state and government of the Member States) decided on on 17 August 2010 "that a review of the role functions and terms [sic] of reference of the SADC Tribunal should be undertaken and concluded within 6 months."[33] According to an opinion submitted by a group of legal and human rights organizations, the SADC Summit effectively suspended the Tribunal, as it failed to renew the tenure of five judges and failed to appoint new ones, leaving the Tribunal improperly constituted in violation of the Tribunal's Protocol.[34] It was generally considered that this was a political reaction to Zimbabwe's challenge to the legality of the

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28 See for example the press coverage in http://www.newzimbabwe.com/pages/farm75.19086.html.

29 See Oliver Christian Ruppel, The Southern African Development Community (SADC) and its Tribunal - Reflexions on a Regional Economic Communities potential impact on human rights protection, in: Verfassung und Recht in Übersee, vol. 42 no. 2, 2009, 173-186

30 See Anna van der Vleuten, Explaining the enforcement of democracy by regional organizations - Comparing EU, Mercosur and SADC, Journal of common market studies, vol. 48, no. 3, 2010, 737-758.

31 SADC Tribunal, Case No. 11/08 *Mike Campbell (PVT) Limited and others* v. *The Republic Of Zimbabwe.*

32 See also M. C. C. Mkandawire, The SADC Tribunal perspective on enforcement of judgments, Commonwealth law bulletin, vol. 36, no. 3, 2010, 567-573.

33 See Communiqué of the 30th Jubilee Summit of SADC Heads of State and Government of 18 October 2010., available at:http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=12314&tid=15559.

34 In addition, new proceedings (including certain of them relating to Zimbabwe's land policy) were effectively prevented from going forwards, see Solomon T. Ebobrah,, Is the SADC Tribunal under judicial siege in Zimbabwe?- Reflections on Etheredge v. Minister of State for National Security Responsible for Lands, Land Reform and Resettlement and Another, in: The comparative and international law journal of Southern Africa, vol. 43, no. a, 2010, 81-92.

Tribunal after the decision in the Campbell Case.[35] In a joint statement the International Commission of Jurists (ICJ) and the Southern African Development Community Lawyers Association (SADC LA) Africa Programme have expressed their "Concern at the Review of the SADC Tribunal as the Subregional Court of Justice."[36] During their summit on 20 May 2011 the Heads of State and Government of the SADC members, however, have extended the suspension of the Tribunal's activity for 12 months in order to further study the issue.

In the meantime SADC seems to have commissioned a report with regard to the functioning of the Tribunal; a draft of the report entitled "*Review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal",* written by *Lorand Bartels* in his role as a Consultant with WTI Advisors, seems to have been released on 14 February 2011. According to undocumented information disseminated on the internet[37], it seems to recommended, among other things, the following:

- SADC Member States should ensure that they give the force of law to SADC law by amending national law;
- Member States should consider amending the SADC Treaty to state that SADC law is supreme over national law, including constitutional law;
- the Tribunal should be given power to determine its own Rules of Procedure;
- the Tribunal's Protocol should be amended to provide that membership and rights of Member States may be suspended, with the Summit taking account of the possible consequences of suspension; and
- the Tribunal should be able to order remedies (including fines) for non-compliance.

Such recommendations remind, obviously of the factors that have made the European Court of Justice so successful in the the framework of economic integration in Europe.[38]

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35 See the analysis by the South African Litigation Centre, published under the title "SALC in the News: SADC Tribunal in limbo" on 11 November 2011 on its home page at http://www.southernafricalitigationcentre.org/news/2010/11/521

36 See joint statement at: http://www.icj.org/dwn/database/Statement-SADCreview-19052011.pdf

37 See Luke Eric Peterson, Fate of international tribunal to be debated by Southern African heads of state; Jurisdiction over investment and human rights disputes at issue, Investment Arbitration Reporter of 13 May 2011 as well as Luke Eric Peterson, Analysis: Consultant's draft report on SADC tribunal contains much of interest for international disputes specialists, Investment Arbitration Reporter of 13 May 2011.

38 See, for example, Miguel Poiares Maduro, We the Court, Oxford, Hart, 1998. See also Anna van der Vleuten, Explaining the enforcement of democracy by regional organizations - Comparing EU, Mercosur and SADC, Journal of common market studies, vol. 48, no.3, 2010, 737-758.

Lack of Enforcement by Domestic Tribunals

While the SADC Summit's inactivity regarding the enforcement of the decisions by the Tribunals led to the suspension and review of the functions of the Tribunal, domestic courts were equally unwilling to enforce the decision in the Campbell Case in view of the political and legal challenges.

It came certainly at no surprise that the courts in Zimbabwe rejected the request to enforce the SADC Tribunal decision in the Campbell Case. As a matter of fact in a Decision of .26 January 2010 the High Court of Zimbabwe declined the application to register the SADC decision for purposes of enforcement.[39] Judge Patel of the High Court held in this decision that although the SADC Tribunal had been properly constituted and had jurisdiction to hear Campbell's case[40], its decision could not be registered as it was contrary to public policy (*ordre public*).[41] According to this High Court Decision, the Supreme Court of Zimbabwe had confirmed the constitutionality of the land reform program, and registering the SADC Tribunal's judgement in Zimbabwe would undermine the Supreme Court's authority: Furthermore, as the SADC Tribunal decision was in contradiction to the Constitution as in force (Section 16B of the Constitution as introduced by Amendment 17 in 2005)[42] the Court felt bound by the Constitution as supreme law of the land.[43]

Overlap with the Investment Law Approach

It is obvious from the language used by the SADC Tribunal that in the area of expropriation the procedural rights and the right to property is closely intertwined with the notion of investment and the concepts found in bilateral investment treaties (BITs). This is not new, as the very origin of BITs can be trace back to the better protection of "property rights of foreigners"[44] Equally the refusal by

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39 High Court of Zimbabwe (PATEL J), *Gramara (PRIVATE) Limited and Colin Bailie Cloete* v. *Government of the Republic of Zimbabwe and Attorney-General of Zimbabwe and Norman Kapanga* (Intervener), Opposed Application, Harare, 24 November 2009 and 26 January 2010, available at: http://www.kubatana.net/docs/landr/high_court_patel_gramara_goz_100126.pdf

40 The decisions holds: "[S]uch enforcement is governed by the rules of civil procedure for the registration and enforcement of foreign judgments."

41 It seems that in his report, Lorand Bartels seems to suggest that one could interpret the SADC Treaty and the Protocol on Tribunals as obliging Members to comply with SADC law and SADC tribunal decisions just as it is the case under the ICSDI Convention or the Treaty on European Union; see Luke Eric Peterson, Analysis: Consultant's draft report on SADC tribunal contains much of interest for international disputes specialists, Investment Arbitration Reporter of 13 May 2011.

42 See above.

43 See on enforcement of judgements within SADC in general, i.e. not with respect to SADC Tribunal judgements: André E. A. M. Thomashausen, The enforcement and recognition of judgments and other forms of legal cooperation in the SADC, The comparative and international law journal of Southern Africa, vol. 35, no.1, 2002, 26-37.

44 See on the reasons for the conclusion of the first modern BIT between Pakistan and Germany Andreas R. Ziegler, Multilateraler Investitionsschutz im Wirtschaftsrecht (Multilateral Investment Protection and International

the Courts of Zimbabwe to register the judgement of the SADC Tribunal reminds of the eternal discussion regarding the enforcement of awards and judgement in investment cases.

It is however particularly interesting in view of the fact that SADC has the intention to promote and protect investments within the region.[45] However, the respective treaty has not yet entered into force.[46] In this context, the use of the SADC tribunal of the "Rule of law" and human rights is particularly noteworthy.[47] It is therefore certainly interesting to compare the outcome of the Campbell Case to the traditional means of protection of foreign investors. As a matter of fact, several foreign individuals concerned by Zimbabwe's measures have taken action:

- First, not surprisingly several cases have been reported where foreign owners of land in Zimbabwe asked their home States for diplomatic protection.[48] In certain cases this seems to have led to discussion between Zimbabwe and the Governments concerned, In other cases Governments seem to have rejected such claims for foreign policy reasons. The most famous case in this respect is probably the inactivity by the South African Government to grant diplomatic protection to … as it led to a decision by the South African Supreme Court condemning this inactivity.[49] In two judgements the Court held that "the failure of the [South African Government] to rationally, appropriately and in good faith consider , decide and deal with the applicant's application for diplomatic protection in respect of the violation of hi s rights by the Government of . Zimbabwe is inconsistent with the Constitution , 1996 . and invalid. [...] It is declared that the applicant has the right to diplomatic protection from the respondent s in respect of the violation of his rights by the Government of Zimbabwe." It should be noted, however, that as in most States this only means that the Government cannot

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Economic Law), in: Dirk Ehlers und Hans-Michael Wolffgang (ed.), Rechtsfragen internationaler Investitionen, Recht und Wirtschaft, Frankfurt a. M., 2009, 63-80.

45 See Daniela Zampini, Developing a balanced framework for Foreign Direct Investment in SADC - a decent work perspective, in: Monitoring regional integration in Southern Africa, vol. 8, 2008, 94-119.

46 The Bilateral Agreement for the Promotion and Reciprocal Protection of Investments (BIPPA) was signed in Harare on 27 November 2009 but will only become binding after reciprocal exchange of notifications to the effect that constitutional requirements for entry into force have been complied with. The BIPPA therefore has not come into force for want of such notifications at this time.

47 This approach is also used by Lonius Ndlovu, Following the NAFTA Star: SADC land reform and investment protection after the Campbell litigation, Law, Democracy & Development (Journal of the Faculty of Law at the University of the Western Cape), vol. 15, 2011, online at: http://www.ldd.org.za/images/stories/Ready_for_publication/nafta.pdf.

48 Besides the South African case reported here, e.g. the German Government has taken up the case of Mr von Pezold and others; see http://www.cfuzim.org/index.php?option=com_content&view=article&id=1229:german-investor-in-zimbabwe-vows-to-press-case-against-land-seizure&catid=93:the-courts&Itemid=92.

49 High Court of South Africa, Crawford Lindsay von Abo v. Government of the Republic of South Africa and others 2009 2 SA 526 (TPD) and Case no. 3106/07 Crawford Lindsay von Abo v. Government of the Republic of South Africa and others, Judgement of 5 February 2010.

simply ignore requests for diplomatic protection but must provide a reasonable justification why it declines to grant such protection - which will normally be for foreign policy reasons.[50]

- Zimbabwe's measures have also led to investor-State dispute settlement proceedings governed by a BIT. While several foreign investors and Governments seem to have analysed the availability of such instruments to the facts described, the only published arbitral award so far seems to be a decision under the BIT between the Netherlands and Zimbabwe[51]. However, several other cases seem under way.[52]

Investor-State Dispute Settlement regarding Zimbabwe's Policy

In a decision *Bernardus Henricus Funnekotter and Others* v. *Republic of Zimbabwe*, (ICSID Case No. ARB/05/6) of 22 April 2009[53] an arbitral tribunal constituted under the Rules of the International Centre for Settlement of Investment Disputes (ICSID)[54] came to the conclusion that Zimbabwe had violated its obligations under Article 6 (c) of the BIT, namely to provide "just compensation" in case of expropriation.[55]

The claimants in this arbitration were able to use the investor-State dispute settlement procedure under the BIT between the Netherlands and Zimbabwe as they were of Dutch nationality. The Agreement contains a relatively typical provision on expropriation in so far as it provides:

> [n]either Contracting Party shall subject nationals of the other Contracting Party to any measures depriving them, directly or indirectly, of their investments unless the following conditions are complied with:

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50 See e.g. Andreas R. Ziegler, Introduction au droit international public, Bern 2006, § 567.

51 Agreement on Encouragement and Reciprocal Protection of Investments Between the Republic of Zimbabwe and the Kingdom of the Netherlands, Dec. 11, 1996.

52 For example the Case under the BIT Germany-Zimbabwe regarding *Bernhard von Pezold and others* v. *Republic of Zimbabwe* (ICSID Case No. ARB/10/15) and the case under the BIT Switzerland-Zimbabwe *Border Timbers Ltd. v. Zimbabwe*, ICSID Case No. ARB/10/25 as reported on the ICSID home page.

53 The award has been made available in International Legal Materials, vol. 48, 2009, p. 760. and online at: http://ita.law.uvic.ca/.

54 On ICSID see Kryvoi, Yaraslau, International Centre for Settlement of Investment Disputes (ICSID) (2010). Kluwer Law International, 2010. Available at SSRN: http://ssrn.com/abstract=1449363 and Christoph Schreuer, et al., The ICSID Convention, Cambridge, Cambridge Univ. Press, 2010.

55 See also Ben Love, Introductory Note to the International Centre for Settlement of Investment Disputes: Funnekotter **a**nd others v. Republic Of Zimbabwe, International Legal Materials, vol. 48, 2009, p. 760 and Cornelia Glinz, The International Centre for Settlement of Investment Disputes - Funnekotter and others v. Republic of Zimbabwe, case no. Arb/05/6 - a test case for commercial farmers in Zimbabwe or: how ICSID can fill the gap in the protection of human rights violated by a lawless state like Zimbabwe, in: Verfassung und Recht in Übersee, vol. 43, no. 3, 2010, 369-380.

a) the measures are taken in the public interest and under due process of law;
b) the measures are not discriminatory or contrary to any undertaking which the former Contracting Party may have given;
c) the measures are accompanied by provision of just compensation. Such compensation shall represent the genuine value of the investments affected and shall, in order to be effective for the claimants, be paid and made transferable, without delay, to the country designated by the claimants concerned and in the currency of the country of which the claimants are nationals or in any free convertible currency accepted by the claimants. The genuine value of the investments shall include, but not exclusively, the net asset value thereof as certified by an independent firm of auditors.

As the conditions in the Article were considered to be cumulative, the Arbitral Tribunal was able to avoid the slightly more complex question regarding the public purpose and the respect for the due process of law under letter (a) as well as the discriminatory character of the land takings in Zimbabwe (letter b). [56]

With regard to the payment of compensation Zimbabwe was not able to convince the Arbitral Tribunal that if the claimants had asked for it before the responsible domestic authorities it would have be3en granted. The actions by the Zimbabwean Government prior to the proceedings as well as the language used in the Constitutional amendment did not allow for such a conclusion and the BIT did not require claimants to exhaust local remedies.[57]

When Zimbabwe tried to invoke the state of necessity[58] to justify its actions, the Arbitral Tribunal was open to allowing such an argument with reference to customary international law and the case law of the International Court of Justice – but ultimately saw not link between the situation in Zimbabwe at the time and the refusal to calculate and pay compensation to the concerned farmers.[59] As a consequence the Arbitral Tribunal concluded that Zimbabwe had breached Article 6(c) of the BIT between the Netherlands and Zimbabwe as it had not paid the compensation required under this article. This violation was considered such as to give a right to damages to be paid by Zimbabwe to the investors that had brought the claim.

Under the ICSID Convention – which was used as the forum for the Funnekotter Case – the final award is binding and enforceable, No further actions - as available under the ICSID Convention

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56 § 98 of the Award.

57 § 100 and 101 of the Award.

58 See on this aspect of the award Robert D. Sloane, On the Use and Abuse of Necessity in the Law of State Responsibility, American Journal of International Law, Forthcoming; and Boston Univ. School of Law Working Paper No. 11-16, available at SSRN: http://ssrn.com/abstract=1797926.

59 § 106 of the Award.

(like annulment proceedings and the like) seem to have been introduced by Zimbabwe. The plaintiffs, however, seem to have sought enforcement of their award already in foreign jurisdictions, including the United States[60], although enforcement may suffer from all the normal difficulties that petitioners normally face when trying to enforce arbitral awards against States..

Different venues – different outcomes

The comparison of the Campbell Judgement by the SADC Tribunal and the Funnekotter arbitral award are interesting for several reason:

In some respect, they show a lot of common ground when it comes to the lawfulness of an expropriation. In both cases the compulsory taking of land was considered against the rule of law.

Technically, however, the ICSID Arbitral Tribunal spoke only of the absence of proper compensation as due under the applicable BIT, while the SADC Tribunal focused on the issues of due process of law and discrimination. This is due to the different legal basis for the two mechanisms and ultimately judicial economy and the choice by both instances to avoid certain questions.

For the individuals concerned, however, the main difference seems to be at the enforcement stage. While the ICSID award must be honoured by any ICSID State, including Zimbabwe itself, under the ICSID Convention, as currently ratified by 147 States[61], the Courts in Zimbabwe seem to be reluctant to enforce SADC Tribunal judgements. While one can argue that the obligation under the SADC Convention and the Protocol on the Tribunal are identical or comparable to those under the ICSDI Convention, the political context seems to make adherence to such a principle in the region difficult at this time.

Human Rights Instruments v. BITs

It is, admittedly not the first time, that Government measures relating to expropriation and the treatment of property overlap.[62] The concepts developed with regard to the right to the right to property and the guarantees for (foreign) investors have always had a common foundation and in those regions where an effective system for the protection of the right to property at the international level exists, this has always been accepted by the respective bodies and in the literature. When it comes to arbitrary and discriminatory Government actions, BITs can thus in

60 See New York Southern District Court, Funnekotter et al v. Republic of Zimbabwe, (Foley Square), Case no.: 1:09-cv-08168-CM, filed on 24 September 2009, referred to at http://www.freecourtdockets.com/docketsummaries/Funnekotter-v-Republic-of-Zimbabwe-1-09-cv-08168-New-York-Southern-Federal-District-Court-Docket-Case-Summary-83069.htm.

61 See the updated information in this respect at: http://icsid.worldbank.org.

62 See in general Theo R. G. van Banning,, The human right to property, Antwerpen, Intersentia,2002.

certain cases play an important role although they certainly cannot replace the domestic and regional protection of human rights through strong specialized instruments and institutions.[63]

The most important example in this respect is certainly the case-law of the European Court on Human Rights regarding the "Right to Property" as contained in Article 1 of the the (First) Protocol of 20 March 1952 to the European Convention on Human Rights (ECHR) of 4 November 1950[64] but also in view of the due process of law regarding "civil rights" under Article 6 ECHR. In this respect a certain convergence of the concepts has resulted - although a more detailed analysis seems to suggest remarkable differences, e.g. regarding the concept of "property" as opposed to an "investment".[65] This seems to be due to the different structures and wording of BITs and human rights instruments, which then lead normally to different questions. According to *Christoph Schreuer* and Ursula Kriebaum this may be explained also by the lack of dialogue between two legal communities:

> "Perhaps the most important reason for this divergence in legal development is the isolation in which the two fields of specialization operate. Notwithstanding evident similarities, there is little interaction and cross citation between decision makers and scholars in the two fields. This in turn is part of a broader phenomenon of fragmentation in international law. Increasing specialization has led to epistemic sub-communities with their own specialized terminologies which barely communicate with each other. Ideas and concepts from one field of international law are virtually unknown in another. Well-tested solutions adopted in one field are absent from another.
>
> Initiatives to bridge the gaps between these areas of specialization are entirely feasible. They would have to start with advanced legal education, for instance courses co-taught

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63 See Cornelia Glinz, The International Centre for Settlement of Investment Disputes - Funnekotter and others v. Republic of Zimbabwe, case no. Arb/05/6 - a test case for commercial farmers in Zimbabwe or: how ICSID can fill the gap in the protection of human rights violated by a lawless state like Zimbabwe, in: Verfassung und Recht in Übersee, vol. 43, no. 3, 2010, p. 369-380.

64 The text of the respective Article in the ECHR makes reference to international law and thus to the developments of the customary concepts: Article 1"Protection of property" reads: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law." See Aida Grgić, Zvonimir Mataga, Matija Longar and Ana Vilfan, The right to property under the European Convention on Human Rights -A guide to the implementation of the European Convention on Human Rights and its protocols, Human rights handbooks, no. 10, 2007; Jan-Peter Loof, (ed.),The right to property, Maastricht, Shaker, 2000 and Irmgard Marboe, Compensation in International Investment Law and Arbitration, in: Andrea Bjorklund, Ian A. Laird and Sergey Ripinsky (eds.), Investment Treaty Law: Current Issues, 2009, 29 at 38.

65 See e.g. Christoph Schreuer and Ursula Kriebaum, The concept of property in human rights law and international investment law., Human rights, democracy and the rule of law, 2007, 743-762 and Alexander J. Belohlavek, ECHR: 'Investment Protection – Adieu...!' Czech Yearbook of International Law, vol. 1, 2010, 332-340 also available at SSRN: http://ssrn.com/abstract=1723717

by specialists in different yet related fields. Other possibilities are seminars for practitioners that straddle different fields and go beyond a description by specialists of their own areas of specialization. Finally, research projects that bring together the best parts of the experience of different fields may help to close the growing abyss between different fiefdoms within international law."[66]

Despite the absence of judicial dialogue, the main concepts are certainly comparable and should not be considered as creating a lack of coherence in international law. While the substantive standards thus certainly do converge and the respective jurisprudence under the ECHR and BITs may – hopefully or potentially - influence each other, the existence of the ECHR has not led to the disappearance of investment treaties and related arbitral awards in the European context.[67] In particular, the advantages associated with arbitration as such and the fact that often local remedies need not be exhausted under intra-European BITs may be the main factors to make investor-State arbitration popular among foreign investors.

Conclusion

The SACD Tribunal as established in 1992 was not originally conceived as a human rights court not as a tribunal for investor-State claims. Through its decision rendered in the Case *Mike Campbell [PVT] Limited And Others* v. *Zimbabwe* of 28 November 2008, however, its has shown the potential it has to promote on the one hand side the protection of human rights, democracy and the rule of law and at the same time – though the inclusion of of property rights and due process of law into these concepts, for investment-related activities. It seems that this development was not fully anticipated by all SADC members and the future will show whether they will allow the tribunal to play this role. Current proposals regarding the future of this tribunal go even further by giving it a a role and instruments that do not only remind of the European Court of Human Rights but even of the much more far-reaching role of the Court of Justice in the framework of the European Union. These are obviously very ambitious proposals.

At the same time the use made of the SADC Treaty by the SADC Tribunal could be a major chance to enhance the rule of law and human rights protection in the region. At the same time, if the Court

66 Christoph Schreuer and Ursula Kriebaum, The concept of property in human rights law and international investment law, in Stephan Breitenmoser et al. (eds.), Liber Amicorum Luzius Wildhaber - Human rights, democracy and the rule of law, 2007, 743-762 at 761-2.

67 See in this respect the equally telling "parallel" cases regarding the treatment of Yukos, its management and its shareholders by Russia in the proceedings before the European Court of Human Rights (Application no. 14902/04 Oao Neftyanaya Kompaniya Yukos v. Russia, Decision as to the Admissibility of 29 January 2009), in investor-State arbitration under the Energy Charter Treaty (Yukos Universal Ltd. [UK – Isle of Man] v. Russian Federation, Case registered on 3 February 2005, Interim Award on Jurisdiction and Admissibility of 30 November 2009). See Chiara Giorgetti, The Yukos Interim Awards on Jurisdiction and Admissibility Confirms Provisional Application of Energy Charter Treaty, ASIL Insights, vol. 14, issue23, 3 August 2010.

were allowed to protect also business and investors I may be helpful in fostering confidence among investors and constitute an interesting alternative to the use of investor-State arbitration. Even in this case – as it can be shown for the European Court of Human Rights - there remain important differences that may make one or the other venue available and a preferred option. But on the whole, in an environment where the rule of law and legal protection against arbitrary Government measures and business-hindering practices is still weak the existence of various venues has more positive effects than negative effects. Here as in other instances, the threats stemming from forum shopping, parallel proceedings and incoherent case-law are small in comparison to the chance to create an environment in which the "rule of law"and the adjudication of disputes become more common and thereby also help to shape a culture of human rights and due process of law.