

**AN APPRAISAL OF THE EFFECTIVENESS OF THE COMMON MARKET
FOR EASTERN AND SOUTHERN AFRICA (COMESA) COURT OF JUSTICE
AS A TRADE DISPUTE SETTLEMENT BODY**

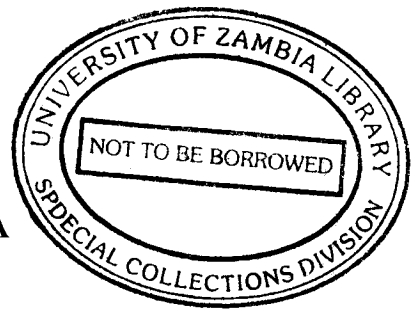
BY

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A dissertation submitted to the School of Law of the University of Zambia in partial fulfilment of the requirements for the award of the Degree of Bachelor of Laws (LLB).

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December, 2005.



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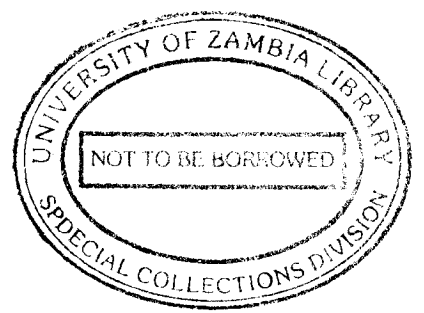
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Supervisor:
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AND THAT IT IS A PRODUCT OF MY INGENUITY AND THAT DUE ACKNOWLEDGEMENT HAS BEEN GIVEN WHERE OTHER SCHOLAR'S WORKS HAVE BEEN USED OR CITED. I TRULY BELIEVE THIS RESEARCH HAS NOT BEEN PREVIOUSLY PRESENTED IN THE SCHOOL FOR ACADEMIC PURPOSES.

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DATE: *07/12/05*

DEDICATION

I wish to dedicate this work to my family, namely my parents, Mr and Mrs Mapani, my sister Mercy Mapani, my brother Paul Mapani, my nephew Michael Busiku and my cousins Sundu and Chakale Sikananu, who have supported and encouraged me from the time I decided to pursue legal studies. I also dedicate it to the love of my life, my fiancé, Myranda Lutempo, who has always been there for me.

ACKNOWLEDGEMENTS

I wish to express my gratitude to all those who helped me in one-way or another during the production of this Essay. In particular, I wish to thank my supervisor, Dr. F. Ng'andu for his invaluable guidance. Thanks also go to the University of Zambia School of Law for the legal knowledge they imparted in me, without which this appraisal would not have been possible. I am also indebted to the COMESA Court registry, particularly Mr. Nkokesha, for the material and all the assistance I was rendered. In the same light, I wish to extend thanks to all those institutions and individuals who responded to my questionnaires. I am also grateful to all my classmates and friends for the support they availed me. In particular, I wish to express gratitude to Kandeke Cyrus, whose computer I used to type this work. Above all else, I wish to thank the Lord Jesus Christ for the life he has given me which enabled me to undertake the study.

ABSTRACT

The study aimed at appraising the effectiveness of the COMESA Court of Justice with regard to its role of resolving trade disputes. The Court was established under the 1994 COMESA Treaty to interpret and resolve all disputes arising from the interpretation and application of the COMESA Treaty. It was modelled after the European Court of Justice. But despite it having been operational for over 4 years, trade disputes among COMESA member states have persisted. It is in view of this that the study sought to ascertain the effectiveness of the Court. The study revealed a lack of confidence in the Court. There is ostensible reluctance to refer matters to the Court. The lack of confidence has resulted in the Court not being considered a priority. This was manifest in the erratic funding to the Court resulting in it having only one permanent member of staff and operating on *ad hoc* basis. The situation is exacerbated by the fact that the preoccupation of the COMESA Secretariat seems to be deepening economic integration. This, unfortunately, suggests a lack of appreciation at the Secretariat of the critical role that the Court could play even in the integration process itself. In as far as referring matters to the Court is concerned, however, the Secretary General is frustrated by unnecessary procedural requirements. Further, there is lack of awareness about the Court's existence in the private sector. Equally, a number of persons that could be instrumental in making the Court active lack standing before the Court. These include Non-Governmental Organisations, associations and groups of individuals. On the other hand, though natural and legal persons can sue, they are not themselves amenable to the Court. The Court's effectiveness is also hampered by the fact it was tailored towards government-controlled economies. This, however, is no longer the case as almost all COMESA member states have implemented privatisation programmes. Unfortunately, unlike the European Court of Justice, the COMESA Court has not been reformed to bring it in line with modern economic trends. Further, the Treaty was poorly drafted. It has a lot of 'grey' areas, omissions, contradictions and unnecessary requirements. There are many provisions in the Treaty that the Court will have to interpret. It would appear, nonetheless, that judges enjoy too many discretionary powers which obviously import uncertainty. On a positive note, however, the Court has highly qualified judges and is fairly independent. In addition, the law applicable is fairly certain. In conclusion, it was evident that the Court could be very instrumental in building confidence in COMESA as an institution and therefore needs to be supported.

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2. Charter of the United Nations (1948)
3. World Trade Organisation Charter (1994)
4. Vienna Convention on the law of Treaties
5. World Trade Organization - Annex on the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) (1994)
6. African Charter on Human and Peoples Rights (1981)
7. Rome Treaty (1957)
8. European Convention for the Protection of Human Rights
9. Order 53 of the Rules of the Supreme Court of England
10. Arbitration rules of the COMESA Court of Justice
11. Rules of the COMESA Court of Justice

TABLE OF CASES

1. Royal Aquarium and Summer and Winter Garden Society Limited v Parkinson (1892) 1 QB 431
2. Civil Service Unions v Minister of the Civil Service (1984) 3 ALL ER, at 950-1
3. Fred M'membe and Bright Mwape v Speaker of the National Assembly (1996) HCJ (Unreported)
4. Maxwell Mwamba and Stora Solomon Mbuji v Attorney General SCZ Judgment No. 10 of 1993
5. Miyanda v Handahu SCZ Judgment No 6 of 1994
6. Michael Chilufya Sata v Post Newspaper Limited and Printpak Z (Ltd) 1993/HP/1395
7. Kabeta Muleya v Erastus Mwencha and COMESA Ref No. 2/2002
8. Kabeta Muleya v COMESA Reference No. 1 of 2003
9. Rules of Court of the Court of Justice of the Common Market for Eastern and Southern Africa
12. Miller v Minister of Pensions (1947) 2 ALL ER, 372, 373

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Chapter 1

1.0 INTRODUCTION

1.1 Statement of Problem

It is axiomatic that whilst good laws are desirable, they amount to very little, if any, if they are not availed the requisite legal effect. Cognisant of this fact, member states of the Common Market for Eastern and Southern Africa (hereinafter referred to as 'COMESA' or 'the common market') established, among other organs of COMESA, a Court of Justice (hereinafter referred to as 'the COMESA Court' or 'the Court') to, *inter alia*, interpret and resolve all disputes arising from the implementation of the COMESA Treaty of 1994 and its protocols. Invariably, given COMESA's overriding objective of promoting trade among member states, disputes of a trade nature were expected to be dominant¹. Accordingly, the preoccupation of the court, as envisaged by the member states, ought to be resolution of trade disputes. Essentially, therefore, the COMESA Court is a trade dispute settlement body.

But despite the Court having been operational for almost four years now, the COMESA region is still littered with a myriad of unresolved trade disputes². Among these is the dispute between Kenya and Zambia concerning palm-cooking oil from the former³. This dispute has been ongoing for over two years. Zambia contends that the said cooking oil, which originally comes from South Asia, does not qualify as a COMESA originating product under COMESA rules of origin. There has also been a dispute over entry of Zambian sugar into the Kenyan market. Similarly, trade disputes between Zambia and Zimbabwe have persisted. The Zambian business community has consistently accused Zimbabwean authorities of employing non-tariff barriers. In addition, Zimbabwean firms have been accused of dumping their products on the Zambian market. In fact, slightly over two years ago, these disagreements almost reached crisis point, forcing the Zambian government to ban the importation of selected products from Zimbabwe. A full-blown confrontation was only averted by hysterical negotiations by the two governments.

¹ COMESA is a regional trading organization comprised of: Angola, Burundi, Comoros, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Democratic Republic of Congo and Zimbabwe.

² Although the court was established with the other organs of COMESA in 1994, it only commenced operations in 2001.

³ This is according to officials in the Ministry of Commerce, Trade and Industry is mandated to promote trade and industrial development. The officials also cited other disputes.

Obviously, the disputes Zambia has had with Kenya and Zimbabwe, among other countries, are just but a tiny fraction of the trade disputes among the 19 COMESA member states⁴. According to trade experts at the Zambian Ministry of Commerce, Trade and Industry (MCTI), almost all COMESA member states are embroiled in some trade dispute of some sort. Apparently, as economic integration deepens and the battle for export markets intensifies, trade disputes are poised to swell and metamorphose.

Surprisingly, there appears to be no correlation between the rise in trade disputes among COMESA member states and the volume of disputes handled by the Court. Most, if not all of the major trade disputes, have not even been referred to the Court. Put bluntly, the Court has resolved no single trade dispute since inception. Paradoxically, this has been against the background that, for majority of disputes, there has been no solution in sight. Under the circumstances, it is inescapable that there has been a derailment somewhere. Naturally, the question that arises is that of whether the COMESA Court is an effective trade dispute resolution body and whether is in a position to face up to imminent challenges. It is precisely these questions that this paper endervours to answer. The thesis of this paper is that the Court is indeed ineffective or at least perceived so.

1.2. Aims and objectives

Specifically, the study enquires into whether the Court possesses the attributes of an effective dispute settlement body. It is essentially a SWOT (Strengths, Weaknesses, Opportunities and Threats) analysis of the COMESA Court. A comparative analysis with other international courts of law and processes for resolving disputes is undertaken. The assessment, however, is largely from the point of view and context of Zambia's political, social and economic realities. Ultimately, the study aims at proposing, if necessary, ways of strengthening the Court in resolving trade disputes.

⁴ For example, there have also been trade disputes between Zambia and Kenya concerning milk; Zambia and Malawi concerning 'Maheu' drink; and Zambia Egypt over air conditioners, among others.

1.3 Methodology

The paper primarily analyses the law under which the Court is constituted and the law it applies. Therefore, the paper mainly analyses the COMESA Treaty, its protocols and the rules of the COMESA Court. To this end, the study enquires into, *inter alia*, procedures of the Court, its powers, jurisdiction, independence and impartiality, *locus standi* before the Court and how its judgments are enforced. In aid of this analysis, a questionnaire was circulated to relevant local business associations representing the interests of both small and large scale companies, government agencies and selected exporters to the COMESA region reported to have encountered difficulties. The questionnaire was intended to solicit their views on the effectiveness of the Court and ways of strengthening it. A copy of this questionnaire is annexed to this paper as Appendix II. The questionnaire was supplemented by personal interviews and review of information bulletins published by the COMESA Court registry.

1.4 Literature review

It would appear from the material available during this study that neither COMESA nor any other organisation, at least in Zambia, has evaluated the effectiveness of the Court. The COMESA Secretariat (hereinafter referred to as 'the Secretariat') seems to have been preoccupied with deepening economic integration amongst COMESA member states. Almost all COMESA publications perused were concerned with how best to attain full integration as expeditiously as possible. Apparently, emphasis has been on economic as opposed to legal matters. In as far as legal matters are concerned, attention appears only to have been directed at enacting laws to facilitate the integration process. Only an article entitled 'The Lawyer and the Challenges of Economic Integration' by one, Simon E. Kulusika, published in the *Zambian Law Journal* of 2000, appears to have come close to assessing the Court⁵. But even this article, as the title suggests, only looked at the challenges of a lawyer in the COMESA integration process. More than anything else, it highlighted and argued the case for lawyers to be appreciated and engaged in the COMESA integration process to the extent that other professions, particularly economists, have been. In fact, by so arguing, Kulusika was also conceding that focus has been on economic at the expense of legal matters.

⁵ Vol 32

1.5 Significance of the Study

The significance of this study ought to be viewed in the broader context of COMESA's noble objective of promoting trade. According to A. N. Agrawal Kundan Lal⁶, one of the foremost benefits of trade, particularly international trade, is creation of wealth as a result of an expanded market. The classical economist, Adam Smith, first propounded this concept in what has come to be known as 'vent for surplus' argument⁷. In the words of Adam Smith, 'trade gives a value to their superfluities by exchanging them for something else which may satisfy a part of their wants and increase their enjoyment'. His argument proceeded along the lines that an extended market enables a country to utilise surplus labour and other resources, which ordinarily would be idle.

Accordingly, international trade which COMESA is intended to foster is indispensable to the region's economic development. Professor Sachs J.D., a renowned economist, and Warner A.M., for example, in an article published in Volume 6 of the Journal of African Economics entitled 'Determinants of Slow Growth in Africa', attributed much of Africa's underdevelopment to low trade⁸. The potential inherent in trade to raise the standards of living was also acknowledged by member countries of the World Trade Organisation (WTO) in the preamble to the organisation's Charter. One might add that international trade is also critical in fostering international peace.

It should be beyond question, therefore, that COMESA is central to breaking the squalor of poverty prevalent in the sub-region. It should also be beyond challenge that the COMESA Court is indispensable to the effectiveness of COMESA itself. It is often said that 'a rule that is not enforced is not any better than the paper on which it is written'. Obviously, COMESA rules are no exception to this observation, and it is in this light that the COMESA Court becomes cardinal. Undoubtedly, all COMESA agreements would be futile if not enforced. Evidently, a non-functioning or ineffective dispute resolution system would stifle interest in

⁶In his book, *Economics of Development and Planning*, 2nd Edition, Vikas Publishing House, Pvt Ltd (1992), pp 33.1

⁷ *ibid*, 33.2

⁸ No.3, October 1997, pp 335 - 376

COMESA and thereby put the existence of COMESA itself in serious jeopardy. As a matter of fact, this threat cannot be more real for COMESA, given that its member states have multiple options to membership in COMESA. Not only are they all members of the World Trade Organisation (WTO), majority of its members also belong to the Southern African Development Conference (SADC), another major regional trading body. There are also smaller regional trading groupings like the Southern African Customs Union (SACU), Indian Ocean Commission (IOC), East African Cooperation Commission (AEC) and the Inter-governmental Authority on Development (IGAD)⁹.

The implication is that unless membership in COMESA generates unique added benefits, member countries are likely to reconsider their membership in COMESA. The Republic of Tanzania, for example, withdrew from COMESA, opting for SADC instead¹⁰. Namibia and Seychelles have also made known their intentions to quit the organization¹¹. Kulusika also noted the need for added value. He observed thus, 'If one tries to seek explanation for the decision of some member states of COMESA which have withdrawn from the economic-political organization, one may be surprised to see that the main explanation for such withdraw may be lack of added value. All states that have terminated their membership in COMESA have cited lack of benefits or duplication of functions (in relation to SADC) as justification for leaving COMESA'.¹²

Clearly, COMESA is becoming a lame dark organization gasping for confidence building measures. There is some plausibility in asserting that COMESA risks becoming a shell of its former self. According to Kulusika, 'the survival of COMESA will depend on whether the critical issues of benefits and gains will be addressed successfully'¹³. And as earlier alluded to, one avenue for addressing these issues and building confidence is certainly the COMESA Court.

⁹ Source: Ministry of Commerce, Trade and Industry

¹⁰ Mozambique and Lesotho also withdrew from COMESA.

¹¹ This is according to the Ministry of Commerce, Trade and Industry (MCTI),

¹² Simon E. Kulusika, *The Lawyer and the Challenges of Economic Integration*, *Zambian Law Journal*, Vol 32, 2000, pp23

¹³ *ibid*

Chapter 2

2.0 THE SYSTEM OF COURTS OF LAW: Theory, Law and Practice

As a prelude to the commentary, evaluation and analysis of the COMESA Court of Justice in the next chapter, it is proposed in this chapter to look at the history, purpose and functions of courts of law and the attributes of an effective court system.

2.1 Historical background of the Court system

The current system of courts of law is a relic of the common law of England, from which its roots could be traced. The year 1066 appears to be the watershed date in the history of the common law. This was the year when the Duke of Normandy conquered England and set in motion a chain of events which culminated in legal traditions called the 'common law'. The king introduced a system of land ownership called 'feudalism' which was based on a social hierarchy which had at the top, the king, who owned all land in England. Below the king were land owning nobles called 'tenants in chief' who owned land in form of a grant on behalf of the king. They, in turn, would lend the land to others. At the bottom were land owning 'freemen'. Given this system, it was inevitable for disputes to arise between the various layers. Disputes did in fact arise, making it incumbent upon the king to intervene. Whenever the king stopped at a location to hear disputes, he was said to 'hold court'. Originally, therefore, the term 'court' meant, among other things, the sovereign's place¹⁴.

2.2 What amounts to a Court of law

The concept and definition of a court of law has however undergone significant modification since the era of feudalism. The term 'court' has come to be applicable to a variety of scenarios and purposes. It assumes a different meaning depending on the subject matter and context in which it is employed. In law, a court can now perform a diversity of functions. It is almost impossible to exhaustively categorise all that the term court has come to encompass. It follows that an undertaking to formulate an all-embracing definition of a 'court' is one in futility.

¹⁴ Harlsbury Laws of England, Vol 10, 4th ed, pg 313, paras 701

This, notwithstanding, it becomes necessary sometimes to establish whether a given tribunal is a court or not, because, as will be seen in more detail later, certain powers, privileges and status attach to courts of law. The House of Lords in England was confronted with a similar challenge in the case of *Royal Aquarium and Summer and Winter Garden Society Limited v Parkinson*.¹⁵ The issue was whether the tribunal in question was a court, in which case everything uttered during proceedings was absolutely privileged i.e. whether there was immunity for defamatory statements. Lord Fry noted the difficulties associated with defining a court and stated thus:

‘I do not desire to attempt any definition of a ‘court’. It is obvious that, according to our law, a court may perform various functions. Parliament is a court. It’s duties as a whole are deliberative and legislative, the duties of a part of it only are judicial. It is nevertheless a court. There are many other courts which, though not courts of justice, are nevertheless courts according to law. There are, for example, courts of investigation like the coroners’s court. In my judgment, therefore, the existence of immunity claimed (that defamatory statements made in proceedings before a ‘court ‘ are absolutely privileged) does not depend on the question whether the subject matter of consideration is a court of justice, but whether it is a court in law’.

The Zambian High Court was also faced with a similar challenge in the case of *Fred M’membe and Bright Mwape v Speaker of the National Assembly*¹⁶. The two appellants in this case asked the High Court to order their release from prison where Parliament committed them indefinitely for alleged contempt of Parliament. They argued, *inter alia*, that the Zambian Parliament, unlike its British counterpart, was not a court, hence it had no power to commit someone to prison for contempt. The thrust of their argument was that the Zambian Parliament does not discharge judicial or quasi-judicial functions. Judge Kabazo Chanda, as he then was, concurred with the appellants and stated thus:

‘My view is that our parliament is not a court of law or a court in any judicial sense because, unlike its counterpart in Britain, it does not carry out judicial functions. The British Parliament is called the highest court in the land because of the ‘House of Lords’ component’.

In spite of the impossibility in formulating a holistic definition of a court, some principle features of courts of law could be distilled from the brief history and the two authorities cited above. Firstly, a court primarily performs judicial functions i.e. resolution of disputes.

¹⁵ (1892) 1 QB 431 @ p 446, 447

¹⁶ (1996) HCJ (Unreported)

According to Dr. Mulela Margaret Munalula, disputes are resolved through a process called adjudication¹⁷. In the words of Charles Chatterjee, 'the term 'dispute' in law, stands for a 'justiceable dispute', that is, a dispute that is concerned with the resolution of legal issues.¹⁸

According to the learned authors of Volume 10 of the Harlbury Laws of England, the term 'court' has acquired the meaning of 'a place where justice is administered' and has come to mean 'the person who exercises judicial functions under authority derived directly or indirectly from the sovereign'¹⁹. Courts, they further submit, are tribunals which exercise jurisdiction over persons by reason of the sanction of the law, and not merely by reason of voluntary admission to their jurisdiction. The legal backing, they contend, is what differentiates courts from such other tribunals as those established by social clubs, which, although they may exercise judicial functions, they are not sanctioned by law. In sum, therefore, a court is a place where justice is administered²⁰. Ideally, the courts should be the 'fountain of justice'. Justice entails upholding of rights and the punishment of wrongs by the law²¹. The Greek Philosopher, Aristotle, defined justice as that which is equal, lawful and fair. But as Professor Sir John Smith noted, justice can be very elusive given that the judicial system does not necessarily set out to discover the truth²². Moreover, the question of whether 'adequate justice' has been done would seem to be subject to the subjective determination of individuals.

In an attempt to ensure that dispensation of justice is not a myth but reality; that courts remain the 'fountain of justice', a number of safeguards, which will be elaborated upon later, have been built in the court system. Minimum universally accepted standards have been developed. For instance, one cannot be a judge in his case. More importantly, it would appear, has been the desire to ensure that courts command due regard and respect. It is well

¹⁷In her book entitled LEGAL PROCESS: Zambian cases, legislation and commentaries,(UNZA Press) 2004 pp 13

¹⁸ In an article entitled The Arbitration between American MNFG and Trading Inc and the Republic of Zaire, Journal of International Arbitration, pp 40

¹⁹ 4th Edition, pp 313, Paras 701

²⁰ Leslie Rutherford and Sheila Bone, Osborn's Concise Law Dictionary, 8th Edition, (Universal Law Publishing Co. Pvt. Ltd) (Reprint 2001)pp 95

²¹ *ibid*, pp190

²² Criminal Evidence, pp 1

settled that justice should not only be done, but also seen to be done. Obviously, unless they hold them in high esteem, the public would be reluctant to run to the courts for resolution of serious disputes.

2.3 Categories of Courts of law

It is obvious from Lord Fry's dictum in the *Royal Aquarium* case that there are different categories of courts of law. They include courts of appellate and those of original jurisdiction. In the former, cases are generally brought on appeal, where as in the latter; matters are tried therein for the first time. For purposes of this paper, probably the most relevant distinction is that between international and municipal courts. International courts are mainly concerned with disputes between international legal persons. They essentially interpret international law²³. Conversely, municipal courts are concerned with interpretation of the internal law of nations. It follows that municipal courts essentially resolve disputes among subjects of the national legal system, namely natural and artificial (juristic) legal persons. Suffice to merely indicate, however, that both municipal and international courts of law are founded on similar principles and concepts of dispensing justice.

2.4 Judicial Settlement and Alternative Dispute Resolution (ADRs)

Judicial settlement of disputes is just but one of the ways of settling disputes. Ideally, parties to a dispute should only proceed to court after attempts to settle the matter *ex-curia* (out of court), have failed. These other methods of settling disputes, conflicts and cases outside the formal litigation process have come to be characterized as alternative dispute resolution mechanisms (ADR's). According to Amelia Pio Young, in an article published in Volume 32 of the *Zambia Law Journal* of 2000 entitled, 'Alternative Dispute Resolution and its place in the *Zambian Judicial System*', ADR procedures include: negotiations, mediation, conciliation, arbitration, mini-trial or executive tribunal, structured settlement conference, 'med-lab' and expert evaluation or non binding appraisals. Arbitration and mediation are the most prominent'.

²³ Article 38 of the Statute of the International Court of Justice (ICJ) is universally acknowledged to be an authoritative enumeration of international law. Pursuant to this article, international law consists of international conventions (treaties), international customs, general principles of law recognized by civilized nations and decisions and writings of eminent jurists as subsidiary sources of law.

Mediation involves a third party neutral, whether one person or more, who acts as a facilitator to assist in resolving a dispute between two or more parties. The mediator(s) assists the disputing parties in communicating their positions and exploring possible solutions²⁴. Arbitration, on the other hand, is a process for the determination of disputes by adjudicators chosen by the parties to the dispute, and who are empowered to render a decision²⁵. According to Amelio, this process is by and large voluntary, in which parties submit to a neutral person for a decision²⁶.

Evidently, arbitration is akin to adjudication in courts of law. In adjudicatory dispute resolution, the third party neutral, a judge, adjudicates or makes a decision. It is the basis of the legal system that when a case is submitted to the court, someone rather than the parties should make the decision²⁷. Unlike in other alternative dispute resolution mechanisms, the decision of the arbitrator, like that of a court, is legally binding. Both arbitration and judicial settlement provide for the settlement of disputes over the legal rights of the parties on the basis of established law (unless the parties agree otherwise)²⁸. The distinction between the two lies in the nature of the adjudicatory body.

There are a number of benefits to be derived from the use of ADRs²⁹. Firstly, ADRs decongest the court system, thereby enhancing the court system's efficiency. Secondly, unlike the court process, they are likely to provide clearer time frames within which matters are to be concluded. Moreover, because of their informality, they are faster than judicial settlement. Thirdly, they enable the parties to be in greater control of the process. Active participation of the parties gives birth to a number of advantages, one being the likelihood of greater justice being done. This partly flows from the flexibility inherent in ADRs. Fourthly,

²⁴ Amelia Pio Young, Alternative Dispute Resolution and its place in the Zambian Judicial System, Zambia Law Journal, Vol 32, 2000, pp 80

²⁵ *ibid*, pp79

²⁶ *ibid*

²⁷ *ibid*, pp 92

²⁸ Phillipe Sands and Pierre Klein, Bowett's Law of International Institutions, 5th Edition, (Sweet and Maxwell) (2001) pp 347

²⁹ Amelia Pio Young entitled, Alternative Dispute Resolution and its place in the Zambian Judicial System, Zambia Law Journal, Vol 32, 2000, pp 83

arising from the greater participation of the parties also is that ADR's are likely to lead to a win-win situation. Fifthly, because the process is done in private and in a non-combative manner, parties are likely to preserve and maintain prior relations.

The temptation should be resisted, however, to view ADR's as a replacement or reformation of the law, or indeed as being in competition with the judicial process. They should, instead, be seen as complementary to the judicial process. The two co-exist. Both ADRs and judicial settlement have their rightful place. According to the learned author of 'O. Hood Phillip's Constitutional and Administrative law', courts of law are appropriate for decisions of purely legal rights³⁰. It may be worth adding, in this respect, that despite that arbitration does involve settlement of legal rights as well, the courts are the ultimate arbiters in disputes.

2.5 Need for justice to be accessible

Part of the concept of justice is that it should be accessible. Justice should be 'geographically', 'economically' and 'legally' accessible. Economically, the cost of commencing and sustaining an action should not be prohibitive. Geographically, the distance to the courts should not be a hindrance. Obviously, given the improved transport system in the modern era, failure to access justice on account of distance is to a large extent dependent on availability of financial resources. In as far as legality is concerned, the procedures adopted by a legal system should not be such as to frustrate the commencement and sustenance of actions. Of particular importance, it would appear, is the need for a system to provide for the right people to be able to move the court. Similarly, the right people should be amenable to the court.

2.5.1 Locus Standi

The two latter concerns are governed largely by rules dealing with *locus standi* and jurisdiction. Locus standi has to do with who can bring an action before a court of law or, put another way, who has standing before a court of law. An applicant must be one whose rights and interests have been affected in some way. He must have 'sufficient interest' in the matter. The concept of *locus standi* to sue implies a certain nexus between the person suing

³⁰ O. Hood Phillips (Sweet and Maxwell), 6th Edition, pp 576.

and the result of the action. As a general rule, however, whenever there exists a right recognized by the law, there exists also a remedy for any infringement of such right.

The justification for standing lies in the need to limit challenges to genuine cases of grievance and avoid unnecessary interference in the litigation process by those whose objectives are not authentic. Ultimately, these rules are intended to avoid the clogging of the litigation process and wastage of the court's time and resources. In so doing, however, the rules should not unnecessarily prevent citizens from participating in the enforcement of the law. The challenge is to strike a balance between genuine and unmerited cases. The *Zambian Supreme court* summed up this challenge in the case of *Maxwell Mwamba and Stora Solomon Mbozi v Attorney General*³¹ in the following terms:

'However, on the question of locus standi, we have to balance two aspects of the public interest, namely the desirability of encouraging individual citizens to participate actively in the enforcement of the law; and the undesirability of encouraging meddlesome 'Attorney General's' to move the court in matters that do not concern them ...'.

In this case, the applicants who were members of an opposition party challenged the appointment to Cabinet of two Members of Parliament who had previously been investigated for trafficking in illicit drugs. The substance of the case was that by appointing the 2 MP's to ministerial positions, the President acted contrary to Article 44 of the Constitution which required him to perform his duties with dignity and leadership. Clearly, they were not themselves directly affected by the appointment.

2.5.2 Jurisdiction

Jurisdiction on the other hand is concerned with matters that the court can enquire into and who is amenable to the court. It has a bearing on what matters are admissible. The learned authors of Volume 3 of 'Words and Phrases Legally Defined' have defined jurisdiction as meaning 'the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision'³². They add that 'the limits of this authority are imposed by statute, charter or commission under which the court is constituted, and may be extended or restricted by the like means'. They have further submitted that 'the limitation may either be as to the kind and nature of the actions and

³¹ SCZ Judgment No. 10 of 1993

³² (Oversees Revision Edition) by Dr. G. de Walker, Gerald D. Sanagan and Clarence Noel, pp 113.

matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both of these characteristics. 'If no restriction or limit is imposed', they further submit, 'jurisdiction is said to be unlimited'.

It is evident that a comprehensive outline of jurisdiction is far fetched. It suffices, for purposes of this paper, therefore, to merely indicate that jurisdiction may either be compulsory (automatic) or optional; contentious or advisory; substantive or procedural; or simply conciliatory.

2.6 Powers of Courts of law - Remedies

Closely knit with the concepts of *locus standi* and jurisdiction is the question of what powers the court enjoys. Besides the jurisdiction of a court, such powers are reflected largely in the remedies and orders that a court of law can grant. Simply stated, a remedy is a means through which a breach of a right is prevented or redress given³³. Clearly, it is the relief available that ultimately determines whether justice can be done or not. Obviously, unless the rules governing *locus standi* and jurisdiction are complemented by appropriate remedies, they are of not much help. If anything, the whole essence of people going to court is to seek redress or justice through the remedies available.

2.6.1. Public Law grounds and remedies

There are basically two categories of remedies, namely public and private law remedies. Public law remedies are available under public law and arise from infringement of rights protected under public law. Public law is that part of the law that regulates relations between public authorities and individuals. Its main concern is how public authorities acquire and utilize powers vested in them. It includes such areas of the law as administrative law. Actions under public law are commenced by way of judicial review.

³³ Leslie Rutherford and Sheila Bone, Osborn's Concise Law Dictionary, 8th Edition (Universal Law Publishing Co. Pvt. Ltd) (Reprint 2001)pp 285

The prerogative remedies of certiorari, prohibition and mandamus are available under public law. Others are declaration, damages and injunction. Pursuant to Order 53 of the Rules of the Supreme Court of England, certiorari is an order which brings into the High Court, a decision of an inferior court or tribunal or of a public authority, for it to be quashed. Prohibition, on the other hand, is an order restraining an inferior court or tribunal or public authority from acting outside its jurisdiction. As for mandamus, it is an order requiring an inferior court or tribunal or a public official or body of persons charged with a public duty to carry out its judicial or other public duty. A declaration, basically, is a statement of the legal position of the parties and is not a remedy per se. In as far as injunction is concerned, it is an order or decree by which a party to an action is required to do or refrain from doing a particular thing³⁴. It may be interim or permanent. Damages, simply put, are compensation or indemnification for loss suffered by a person following a tort or breach of contract or breach of some statutory duty³⁵.

The House of Lords in England, in the case of *Council of Civil Service Unions v Minister of the Civil Service*,³⁶ rationalised the grounds for judicial review under three principle heads, namely illegality, irrationality and procedural impropriety. The court conceded, however, that further grounds for review, such as 'proportionality', could emerge. In the words of Lord Diplock, by illegality was meant that 'the decision maker must understand the law that regulates his decision making power and give effect to it.' Irrationality, he further explained, applied to 'a decision which was so outrageous in its defiance of logic or acceptable moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it'. Finally, procedural impropriety meant 'failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision'. It also includes failure by an administrative tribunal to observe the procedural rules that are expressly laid down in the legislative instruments by which its jurisdiction is conferred, even though such failure may not involve any denial of natural justice.

³⁴ Leslie Rutherford and Sheila Bone, *Osborn's Concise Law Dictionary*, 8th Edition, (Universal Law Publishing Co. Pvt. Ltd) (Reprint 2001) pp 178

³⁵ *ibid*, pp 105.

³⁶ (1984) 3 ALL ER, at 950-1

2.6.2 Private law grounds and remedies

Private remedies as one would expect, are available under private law. Unlike public law, private law regulates relations between individuals. It includes such areas of the law as the law of contract and torts, family law, employment law and company law, just to mention but a few³⁷. Contrary to public law, actions under private law are commenced by ordinary process. In view of the diversity of categories of private law, there is a wide assortment of remedies available. Obviously, the nature of the remedy depends on the area of law in question. Majority of these remedies are discretionary, however. Only a few, particularly damages, can be claimed as of right. In fact, damages are the primary remedy in private law. They are available in almost all actions, regardless of the law in issue. The other common remedies include injunction, specific performance and restoration. In as far as international law is concerned, common remedies include an order for compliance, retaliation or compensation which is also called reparations.

2.7 Enforcement of judgments

It is critical to have an effective mechanism for enforcement of remedies granted by the court in its judgments. What is true about the value of a good law that is not enforced is also true about a judgment or remedy that remains unenforced. The usual methods of enforcing judgments in municipal courts are issuance of the writ of *feri facias*, a charging order or an application for attachment of debts, earnings or property. At international level, judgments are enforced largely through diplomatic pressure. This may be through international isolation. It may also take the form of interruption of economic relations and severance of diplomatic relations. Only in exceptional cases is force used to secure compliance.³⁸

³⁷ Keith Abbot, Norman Pendlebury and Kevin Wardman, Business Law, 7th Edition, pp 16

³⁸ For example, under Article 94 of the United Nations (U.N.) Charter, if a party to a case before the International Court of Justice (ICJ) fails to perform an obligation upon it under judgment rendered by the court, a party may have recourse to the U. N. Security Council. It is not clear, however, what the Security Council can do. But Security Council has wide powers for maintenance of world peace. Under Article 41, measures employed to effect Security Council decisions include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication and the severance of diplomatic relations. The silence by the charter on what the council can do against A party that fails to comply with a judgment has forced some scholars to argue that use of force can not be used to secure the execution of a judgment

2.8 Interim measures

In certain instances, however, irreparable injustice may be caused to a party to an action by having him to wait for the conclusion of the litigation process before availing him any redress. An example would be an action involving perishable goods. Cognisant of this possibility, common practice has been to provide for 'intermediate', or as they are often referred to, 'interlocutory orders'. An example is an interlocutory injunction obtained in judicial review proceedings pending the determination of the substantive judicial review application, or if the urgency of the matter justifies it, pending the hearing of the leave application. Another is the 'stay of execution'.

2.9 Rules of evidence

The question of how facts are proved in a court of law has serious implications on the dispensation of justice. This area is governed by the law of evidence. In the words of the learned authors of Volume 17 of the Harlbury laws of England, 'evidence is the usual means of proving or disproving a fact or matter in issue. The law of evidence indicates what may properly be introduced by a party (that is, what is admissible) and also what standard of proof is necessary (that is, the quality or quantity of evidence) in any particular case'³⁹. Put simply, the law of evidence governs the means and manner in which a party may substantiate his claim or refuse that of his opponent.

It is cardinal, to start with, that the rules of evidence strive to strike a balance between ensuring that relevant evidence is admissible and irrelevant evidence discarded. Further, appropriate weight ought to be assigned to evidence admitted. Cardinal also is the need to ensure that the burden of proof lies on the appropriate party. Equally, the standard of proof should neither be too high nor too low. In a nutshell, the law should ensure that neither the guilty are acquitted, nor the innocent convicted. In the words of Lord Denning, 'the law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice'⁴⁰.

³⁹ 4th Edition, paras

⁴⁰ *Miller v Minister of Pensions* (1947) 2 ALL ER, 372, 373

But obviously, it is not enough to have appropriate laws governing the adducing of evidence in court without a corresponding mechanism or legal framework for accessing evidence wherever it may lie. In this regard, rules of court should ensure that litigants are able to access the evidence they wish to rely on. The court should be able to *subpoena* competent witnesses to testify and compel those in possession of useful documents to make them available to court.

2.10 Judges

A judge is probably the most critical determinant of how effective a dispute system ends up to be. On account of the enormous discretionary powers, judges are, to a large extent, the embodiment of the justice system. They are synonymous with the court system. As a matter of fact, the words 'judge' and 'court' are often used interchangeably. As was earlier noted for instance, the term 'court' has come to mean, among other things, 'a person who exercises judicial functions under authority derived directly or indirectly from the sovereign'⁴¹. It may be worth pointing out also that judges of country collectively can be referred to as a 'judiciary'⁴².

2.10.1 Functions of judge

As stated earlier, a judge is mandated to perform judicial functions. These are functions in respect of which it is necessary to bring to bear a judicial mind - a mind to determine what is fair and just in respect of matters under consideration. A judge determines questions affecting the rights and duties of persons. These are both questions of law and fact. A question of law is one that hinges on the interpretation of the law. It requires knowledge of the law. Conversely, a question of fact is one dependent on the subjective determination of an individual.

Where the jury system exists, questions of fact are decided by the jury. But even in the absence of a jury system, the practice has been to permit judges to seek the indulgence of experts when deciding certain questions of fact. In as far as questions of law are concerned,

⁴¹ Harlbury Laws of England, Vol 10, 4th ed, pg 313, paras 701

⁴² George Kunda, The Zambian Judiciary in the 21st Century, Zambia Law Journal, Volume 30, 1998, pg

judges are presumed to know the law. Counsel, by reciting cases and statutes, does not adduce evidence as to what the law is, but merely reminds the judge⁴³. The only exception is with regard to foreign law, which is considered a question of fact to be proved by the evidence of experts⁴⁴.

2.10.1.1 'Realist' view of the function of judges

The traditional function of a judge is not to make law, but interpretation of law and its application by rule or discretion to particular cases⁴⁵. It is essentially to uphold the rule of law. 'Law making' is the preserve of the legislature. There appears to be a theory evolving, however, particularly in the United States of America, that since judges have the final say on any piece of legislation, they are the 'law givers'. This philosophy appears to have originated from Mr. Chief Justice Marshall of the U.S. Supreme Court. According to Justice Marshall, 'it is emphatically the province and duty of the judicial department to say what the law is'⁴⁶.

Realists, as proponents of this philosophy are called, fortify their argument by arguing that in any case, some words or provisions in statutes are either vague or ambiguous. Justice Holmes, also a Realist, argued that based on his experience on the US Supreme Court bench, statutes are just but a source of law or as he put it, 'a prediction' of what courts will decide'. He stretched his argument further by contending that judicial decisions are influenced by prejudices which judges share with their fellow men and that it is judges who give life to statutes. Judge Homes also contended that law was not static as stated in the statute, but dynamic as stated by the judges.

It would appear, however, that the Realist theory has failed to find universal favour. True though it may be that judges are influenced in their decisions by their views and prejudices, their role would appear to still be confined to the realm of interpretation i.e. giving effect to

⁴³ Professor Sir John Smith, Criminal Evidence, pp 23.

⁴⁴ *Ibid*,

⁴⁵ O. Hood Phillips, O. Hood Phillip's Constitutional and Administrative Law, 6th Edition 9Sweet and Maxwell) pp

⁴⁶ Professor Carlson Anyangwe, Parliamentary Democracy and Constitutional Democracy, Zambia Law Journal, 1997.

the intentions of the legislature. This was the view of the *Zambian Supreme court* in the case of *Miyanda v Handahu*⁴⁷ in which CJ Ngulube, as he then was, laid down the *Zambian position* in the following unequivocal terms:

‘The fundamental rule of interpretation of all enactments to which all other rules are subordinate is that they should be construed according to the intent of Parliament which passed the law. It is not what the legislature meant to say or what their supposed intentions were, with which the court would be concerned; the court’s duty is to find out the expressed intention of the legislature. When the language is plain and there is nothing to suggest that any words are used in a technical sense or that the context requires a departure from the fundamental rule, there would be no occasion to depart from the ordinary and literal meaning and it would be inadmissible to read into the terms anything else on grounds such as policy, expediency, justice or political expediency, motive of framers and the like..’

The question for determination was whether the appellant, who was employed in a quasi government institution, qualified to contest a Parliamentary election. The Court was invited to decide whether the appellant was a civil servant in which case he could not qualify to contest the said elections.

Based on a cross section of decisions from various jurisdictions, it is submitted that the views expressed by the *Zambian Supreme Court* in the *Handahu case*, are a fair representation of the prevailing universal view on the role of the judiciary. In most, if not all jurisdictions, courts view their role as ‘interpreters’ and not ‘makers’ or ‘givers’ of law. Moreover, a closer analysis of the implications of the Realist theory, casts it in bad light. It seems to defy cardinal tenets of constitutional law. It seems, to say the least, to be anomalous, a misnomer and a misapprehension of the role of judges.

It would appear that were the Realist theory to be accepted, it would more than anything else be an affront on the doctrine of separation of powers and consequently endanger society. It would result in what Professor Anyangwe terms ‘imperial judiciary’⁴⁸. The question would be who to ‘watch the watchman’, since the judiciary would usurp the powers of the legislature. Judges would then enjoy arbitrary powers, and such powers, as the French philosopher Montesqui observed, would be a danger to liberty. Clearly, it would result in ‘tyranny of the judiciary’. In the words of Montesqui, ‘political liberty is to be found only

⁴⁷ SCZ Judgment No 6 of 1994

⁴⁸ *ibid*

where there is no abuse of power. But experience shows that everyone invested with power is liable to abuse it and to carry his authority as far as it will go. To prevent this abuse,' Montesquieu argues, 'it is necessary in the nature of things, that one power should check another power'.

The views expressed by Realists point to a temptation by some judges to stretch their powers. What comes to the fore is the need to help judges not to fall prey to this temptation. The theory underscores the need for checking judicial conduct so as to ensure decisions are not left entirely to the whims and caprices of individual judges.

It would be a misrepresentation, however, if the impression were created that all the arguments advanced by Realists are without merit. It's obvious, for example, that judges, when making decisions, are influenced by their views and prejudices. In fact, this appears to have been acknowledged by the law itself. Certain facts, for example, do not require proof because they are deemed to be within the knowledge of the judge⁴⁹. Such matters are said to be 'judicially noticed'.

2.10.1.2. Judicial Activism

Furthermore, it should be pointed out that 'judicial activism', as promulgated by the realists, can be extremely helpful.⁵⁰ Activist judges, for example, can use the enormous discretionary powers they are invested with to remake the body of law they administer into what they may approve as a shape of greater justice. This, according to Lord Devlin of West Wick, was the view and strength of Lord Denning, a respected English Judge whom Lord Hailsham of St. Marylebone, the High Chancellor, called a legend⁵¹. Judicial Activism can be particularly critical in advancing human rights in a repressive legal regime.

⁴⁹ Professor Sir John Smith, Criminal Evidence, pp 53

⁵⁰ Inspired by the Realist theory, some judges who are not necessary Realists have come to view their role as agents of social change. According to Professor Anyangwe, such judges view their role as that of 'judicial activism'

⁵¹ Forward to the book entitled: Lord Denning: THE JUDGE AND THE LAW, edited by J.L. Jowell and J.P.W.B. Mc Auslan (Sweet and Maxwell)(1984).

In the *Zambian case of Michael Chilufya Sata v Post Newspaper Limited and Printpak Z (Ltd)*⁵², Mr. Chief Justice Mathew Ngulube, as he then was, observed:

‘...the solution lies in the application of the existing law in amore imaginative and innovative way in order to meet the requirements of an open and democratic Zambia’.

In this case, the High Court had to consider whether the law of defamation as it applied, derogated from, *inter alia*, the freedom of the press guaranteed by Article 20 of the constitution and, if so, what modifications were reasonably required to be imported or imposed in order to give effect to the intention of the constitution. The plaintiff, who was at all times a politician and public official holding a ministerial appointment, commenced three suits for defamation against the defendants for publishing in their newspaper, *The Post*, various articles and a cartoon. The defendants pleaded justification and fair comment on matters of public interest. The three actions were consolidated and heard by the Chief Justice. The defendants submitted that because Article 20 of the constitution of 1991 specifically recognized, among others, the principle of freedom of the press, the time had come to modify the common law principles of the law of defamation in their application to plaintiffs who are public officials as to their right of action, the burden and standard of proof and the latitude the press should be permitted to subject public officials to criticism and scrutiny. Whilst sympathising to these views, the Chief Justice, however, felt constrained by the Constitution. His lordship stated:

‘The dilemma is that our constitution attaches equal importance to freedom of the press and the right of reputation, without distinction whether such reputation belongs to a private or public individual’.

This notwithstanding, the Chief Justice still felt that courts could at least interpret the existing law in an ‘imaginative and innovative’ manner. He stated:

‘...the solution lies in the application of the existing law in a more imaginative and innovative way in order to meet the requirements of an open and democratic Zambia.’

He went on to observe:

‘I am also prepared when considering the defense of fair comment on a matter of public interest arising from the conduct of a public official, to be more generous and expansive in its application’.

⁵² 1993/HP/1395

2.10.1.3 Judge made law

It should be noted, equally, that notwithstanding their traditional function, judges, in certain instances, can and are required to make law. Such instances include those where there is a lacuna or ambiguity in the law in which case law making is inevitable. This emanates from the fact that part of the judicial duty of a judge is to decide every case that arises, whether or not the legislative body has supplied a rule of law governing a case⁵³. The law arising there from has come to be termed 'judge made law'.

Though accidental, judge made law has proved to be indispensable to law reform and development. It has contributed to the development of a comprehensive legal regime which is a major attribute of a good legal system. In addition, judge made law avails society the opportunity to benefit from wise, experienced, innovative and courageous judges. Principles such as the 'neighbour principle' which have proved themselves over generations can all be attributed to innovation of judges. As a matter of fact, it is this ability to tread on unexplored territory that makes great judges. Paying tribute to Lord Denning for example, Lord Devlin observed, 'the secret of Lord Denning's attraction for the profession as well as for the general public is, I think, the belief that he opens the door to the law above the law'⁵⁴.

The common practice, however, is for judges to be bound by their previous decisions. This is referred to as the doctrine of *stare decisis* or binding precedence. According to the learned authors of the 7th Edition of Business law, in spite of the inevitable tendency of judges to make law, the doctrine of binding precedence is founded on the view that, it is not the function of a judge to make law, but to decide cases in accordance with existing rules⁵⁵.

2.10.2 Qualities of a good judge

It is obvious from the views of Lord Devlin in his foreword to Lord Denning's farewell that courage and fearlessness are prerequisites to effectiveness as a judge. Clearly, it would be naïve for a judge to expect all his decisions to be met with universal acclaim. If anything, the

⁵³ Arthur T. Vanderbilt, *Studying the Law*, (1958)

⁵⁴ *Lord Denning: THE JUDGE AND THE LAW*, edited by J.L. Jowell and J.P.W.B. Mc Auslan (Sweet and Maxwell)(1984) pp 22

⁵⁵ by Keith Abbot, Norman Pendlebury and Kevin Wardman at pg 20.

losing party will almost always disagree with the court. Unfortunately, in certain cases, even the life of a judge may be in danger from those aggrieved by his decision. It is therefore incumbent upon a judge to whether all these challenges and still be able to diligently discharge his functions. Beyond courage, a good judge ought to have passion for justice, independence, quality and clarity of thought, competence, pleasant personality and sense of humor. Lord Hailsham, the High Chancellor's farewell speech to Lord Denning is instructive. He stated⁵⁶:

“It is given to a few men to become a legend in their life time. There would be few in this country who would deny that Lord Denning is one of these...But, Master of Rolls, we shall miss you. We shall miss your passion for justice, your independence and quality of thought, your liberal mind, your geniality, your unfailing courtesy to colleagues, to counsel, and to litigants in person who, like the poor, are always with us, ...”

Further, a judge needs wisdom and tact not only in the way he decides cases, but also in how he presents his decisions. In paying tribute to Lord Denning as a jurist, A.W.B. Simpson had the following to say⁵⁷:

‘Excellence as a judge requires more, and the virtue required has traditionally been called wisdom. What seems to be involved is the capacity to present the decision in a manner which makes it acceptable and legitimate to all concerned...’

It is also critical for a judge not to allow his judgment to be coloured by his emotions. Of particular importance is the need to suppress the emotion of anger and control temperament. Lord Denning himself was of the view that ‘one thing a judge must never do. He must never lose his temper...’ It may be added that judges need to be men and women of honesty and integrity. For instance, they should not be susceptible to taking bribes. They need moral authority. It goes without saying that any mechanism for appointing judges should be alive to the aforementioned qualities.

2.10.3 Impartiality and independence of judges

Judges are acceptable to the parties because they are, among other reasons (e.g competence), perceived to be impartial and independent. According to George Kunda, no discussion about

⁵⁶In a book entitled: Lord Denning: THE JUDGE AND THE LAW, edited by J.L. Jowell and j.p.w.b. McAuslan (Sweet and Maxwell)(1984) pp 475

⁵⁷ *ibid*, pp441

the courts of law or judiciary is complete without a reference to its independence or autonomy.⁵⁸ He adds that independence and autonomy are interrelated; that autonomy of the judiciary is supposed to strengthen its independence.

The term 'independence of the judiciary' carries two meanings⁵⁹: the independence of the individual judges in the exercise of their functions, and the independence of the judiciary as a whole. The independence of judges in turn is comprised of two essential elements. Firstly, that in making judicial decisions and in exercising other functions, they are subject to no authority but the law. It is well settled that judges should only be influenced, when deciding cases, by the facts and the law applicable. Secondly, that their terms of office and tenure should be adequately secured. According to Shimon Shetreet, 'independence of the judiciary' has normally been thought of as freedom from interference by the executive or legislature in the exercise of judicial functions⁶⁰.

George Kunda echoed this view in his article on the 'Zambian judiciary in the 21st Century'⁶¹. He contended that 'it is universally accepted that to be independent of the executive, a judge must be free from the risk of dismissal by the executive'. He added that his or her salary and other conditions of service also should be safeguarded'. Kunda also contended that to be independent, the judiciary should control its budget.

As a general practice, a judge can only be removed for inability to perform the functions of his office, whether arising from infirmity of body or mind, incompetence or misbehaviors and such judge can only be removed in accordance with a well laid down procedure. Evidently, removal of judges is reserved for extreme cases.

⁵⁸ In an Article entitled The Zambian Judiciary in the 21st Century, published in volume 30 of the Zambia Law Journal of 1998. George Kunda once served as Chairman of the Law Association of Zambia. He is now a State Counsel and at the time of writing his paper was serving as Minister of Justice and Attorney General of the Republic of Zambia.

⁵⁹ Shimon Shetreet, Judges on Trial – A study on the Appointment and Accountability of the English Judiciary, edited by Gordon J. Borrie (1976) pp 17

⁶⁰ *ibid*,

⁶¹ published in volume 30 of the Zambia Law Journal of 1998

2.10.4 Measures to guarantee independence and impartiality of judges

Kunda has further submitted that as part of efforts to guarantee their independence, judges have no obligation to give advice to the executive. Equally, judges are not supposed to participate in public debates because their reputation, integrity and image may be lowered. It may be worth noting with regard to giving advice, however, that the trend, particularly in international systems, has been towards investing the courts with advisory jurisdiction. Such advice, however, is generally restricted to questions of law⁶². It would appear that this trend has been motivated by the desire to lessen violation of the law as opposed to resolving disputes after violation has occurred. It's a prevention measure.

Kunda has also submitted that judicial independence requires that judges should be protected against attacks on their conduct in court⁶³. This, he contends, is secured by two branches of the law, namely granting judges immunity from personal actions in respect of their official actions and the law of contempt. Everything that a judge says in the course of discharging his functions is absolutely privileged⁶⁴. Neither an action for libel nor slander can be sustained. This privilege extends to parties to an action, witnesses, counsel and the jury. The privilege has been conceded on public policy grounds to ensure freedom of speech. Where this privilege is abused, the appropriate remedy is removal from office⁶⁵.

The law of contempt, on the other hand, is intended to strengthen the independence of judges and to ensure that court orders are obeyed and court proceedings are not disrupted⁶⁶. The law attempts to ensure that the course of justice is not impeded by improper comment upon litigation in process or criticism of judges. Contempt of court may be classified either as⁶⁷: i) criminal contempt - consisting of words or acts obstructing, or tending to obstruct or interfere with the administration of justice; or (ii) contempt of procedure, otherwise known as civil

⁶²Under Article 96 of the United Nations (UN) Charter for example, UN organs can only seek advisory opinion on questions of law

⁶³ *ibid*, pp 34

⁶⁴ Salmond and Heuston on the Law of Torts, 20th Edition, (Sweet and Maxwell) Universal Law Publishing Co. Pvt. Ltd, Reprint (2003)

⁶⁵ *ibid*

⁶⁶ Volume 9 of the Harlsbury Laws of England, the 4th Edition

⁶⁷ *ibid*

contempt - consisting of disobedience of the judgments, orders or other process of the court, and involves a private injury.

2.10.5 Mechanisms for checking judges

It is common knowledge that no judicial system is perfect. Judges themselves are only human and fallible, hence capable of error and abusing their authority. Mistakes are thus bound to occur. In acknowledgement of this reality, all systems of justice provide prevention and corrective measures⁶⁸. To start with, as general rule, proceedings of the court should be conducted in accordance with the rules of the court. Further, all cases, both civil and criminal, must be heard in open court, except where the administration of justice would be rendered impracticable by the presence of the public, in which case, the court may sit in camera. In addition, judges are generally required to give reasons for their decisions i.e. *ratio decidendi*.

The primary corrective measure, nonetheless, is appeal⁶⁹. Almost all systems provide for appeal to a superior court with powers to quash such a decision. Usually, appeal is on questions of law or mixed law and fact. It is generally acknowledged, however, that even with the provision for appeal, there is still possibility, albeit tiny, of miscarriage of justice. Consequently, the general practice has been to provide for 'post conviction' remedies, the usual one being 'appeal' to the executive branch as the 'fountain of justice'⁷⁰. In certain jurisdictions, also, the tribunal that made the decision is allowed to review its decision where new evidence surfaces, provided it was not reasonable to have foreseen such evidence. Usually, the right to apply for such review is subject to a given timeframe.

There is also recognition in civilized judicial systems that justice delayed, is justice denied. Delays necessary mean expenses, and so, a lengthy case can lead to such expenses that it is no longer worthwhile for the parties concerned to bring their dispute before the court⁷¹.

⁶⁸ Professor Carlson Anyangwe, Finality and Miscarriage of Justice in criminal law: Post – conviction remedies in common law and civil law jurisdiction, Zambia Law Journal, Volume 30, 1998, pp 52

⁶⁹ *Ibid*, 53

⁷⁰ *ibid*

⁷¹ Amelia Pio Young entitled, Alternative Dispute Resolution and its place in the Zambian Judicial System, Zambia Law Journal, Vol 32, 2000

Besides, in certain cases, delay may render an action irrelevant, merely academic. In light of this, judicial systems generally provide for summary trials for certain matters.

2.11 Main attributes of a good legal system

In conclusion, the main attributes of an effective legal system are, firstly, certainty of the law applicable. The law should not be vague or ambiguous. Subjects of the law should be able to know in advance, what conduct is prohibited. One way of achieving certainty in the law is to have it written. The second attribute is comprehensiveness. The law should as much as possible foresee all potential problems and disputes. Thirdly, the law should be sensitive to social values of the society to which it applies. It should be in consonant with the moral values of society. The fourth is simplicity. Plain, as opposed to technical language, should be used. Equally, long phraseology should be avoided. Fifthly, the system should be flexible. Law must be able to keep up with social dynamics in society. Sixth is accessibility. Justice should be able to be accessed by those who need it. Courts should be located near the community and the litigation process should be affordable. Seventh is the need for justice to be dispensed expeditiously. Where possible, time frames within which matters should be concluded should be set.

Chapter 3

3.0 Commentary, Evaluation and Analysis of the COMESA Court of Justice

3.1. Overview of COMESA organs

The COMESA Court of Justice is an organ of the Common Market for Eastern and Southern Africa (COMESA) established under Article 7 of the 1994 COMESA Treaty. It follows from this that the Court has no international legal personality of its own, but one derived from COMESA as a subject of international law. The other organs of COMESA, also established under Article 7 are: the Authority; the Council; the Committee of Governors of Central Banks; the Intergovernmental Committee (comprising senior civil servants i.e. Permanent Secretaries); the Technical Committee (technocrats or experts); the Secretariat; and the Consultative Committee (includes the private sector). Prominent of these are the Authority, the Council and the Secretariat.

The Authority is the supreme policy organ of the Common Market. It is responsible for the general policy, direction and control of the performance of the executive functions of the Common Market⁷². In exercise of its responsibilities, the Authority is to 'take' or 'give' decisions that are designated by the Treaty of COMESA as 'directions' and 'decisions'.⁷³ The Authority comprises Heads of States and Governments. A chairman elected for an agreed period, usually a year, heads the Authority. The Authority meets annually and may hold extraordinary meetings⁷⁴. Decisions of the Authority are taken by consensus.

The Council is a subordinate organ of the Authority. It is composed of Ministers designated by member states, who are generally Ministers of trade and industry. Its main responsibility is to perform executive functions of the Common Market. It monitors and oversees the functioning and development of COMESA and ensures implementation of agreed policies.⁷⁵ Its responsibilities include making recommendations to the Authority on matters of policy aimed at efficient and harmonious functioning and development of COMESA and giving

⁷² Article 8(2) and (3) of COMESA Treaty

⁷³ Article 8(3) of COMESA Treaty

⁷⁴ Article 8(5) of COMESA Treaty

⁷⁵ Article 9(2)(a) of COMESA Treaty

directions to all the subordinate organs of the Common Market, except the Court, in the exercise of its jurisdiction⁷⁶. The Council also makes regulations, issues directives, takes decisions and gives opinions in accordance with the provisions of the COMESA Treaty.⁷⁷ The regulations of the Council, like decisions and directives of the Authority, are binding on member states. Article 10 (2) which deals with the regulations of the Council provide: 'a regulation shall be binding on all member states in its entirety.' But as Kulusika noted, though this provision would seem to purport to make COMESA regulations automatically applicable in member states, this provision and indeed the entire Treaty, is not clear enough on the question of direct application. It is, at best, ambiguous. Direct applicability would seem to contradict Article 5 (2) under general undertakings which provides that 'each member shall take steps to secure the enactment of and the continuation of such legislation to give effect to the Treaty ...' The latter provision would seem to import the dualist theory of law, where as the former seems to subscribe to the monist. As Kulusika noted, the question of direct applicability of COMESA regulations in COMESA member states is one issue the court will have to resolve quickly⁷⁸. Kulusika observed the following with regard to Article 10(2)⁷⁹:

'This provision is ambiguous. It obscures the legal force of the regulations of the Council as effective implementing measures that enhance the evolution of new norms of conduct for the Common Market. The principle of the supremacy of the CML(Common Market Law) over municipal laws of member states which is closely associated with the principle of direct applicability and direct effect, is seriously undermined by the ambiguity in Article 10 (2) of the Treaty. This, in turn, may raise doubt over the theory of coordination, which aims at *minimizing conflict between CML and domestic laws of member states*'.

The Secretariat is headed by the Secretary General of the Common Market who is appointed by the Authority for a term of five years, subject to reappointment for a further five years⁸⁰. The Secretary General, who is assisted by two Assistant Secretaries General, also appointed

⁷⁶ Article 9(2) (a) and (b) of COMESA Treaty

⁷⁷ Article 9(2) (d) of COMESA Treaty

⁷⁸ Simon E. Kulusika, *The Lawyer and the Challenges of Economic Integration*, *Zambian Law Journal*, Vol 32, 2000 pp32

⁷⁹ Simon E. Kulusika, *The Lawyer and the Challenges of Economic Integration*, *Zambian Law Journal*, Vol 32, 2000, pp 42

⁸⁰ Article 17(1) of COMESA Treaty

by the Authority, is the Chief Executive Officer (CEO) of the Common Market and represents the Common Market in the exercise of its legal personality⁸¹.

3.2 Background and vision of COMESA

COMESA is the predecessor to the Preferential Trading Area for Eastern and Southern Africa (hereinafter referred to as the 'PTA'). The primary purpose of the PTA was to promote cooperation and development in all fields of economic activity, with the aim of raising the standards of living of its people⁸². This goal was to be achieved progressively through the transformation of the PTA into a Common Market and eventually an Economic Community for Eastern and Southern Africa⁸³. It follows that the establishment of COMESA was a step in the path charted under the PTA. As expected, the principles upon which the PTA was founded remain the guide under COMESA. The vision of COMESA remains that of the PTA. The COMESA Treaty envisions a 'fully integrated, internationally competitive regional economic community; a community within which there is economic prosperity as evidenced by high standards of living for its people, political and social stability and peace, and a community within which goods, services, capital and labour are free to move across national borders'⁸⁴.

3.3 The COMESA Court

The COMESA Court is the principle judicial organ of COMESA. It is the predecessor to judicial bodies that existed under the Treaty of the PTA⁸⁵. The Court is the second of its kind in the world after the Court of the European Communities upon which it was modeled⁸⁶. This was affirmed by the Court itself in the case of *Kabeta Muleya v Erastus Mwencha and COMESA*⁸⁷. The court stated,

'...the court may take guidance especially from the rich jurisprudence of the European court of justice. The jurisprudence and the rules of procedure of our court are modeled on those of

⁸¹ Article 17(2) of COMESA Treaty

⁸² Article 3 of COMESA Treaty

⁸³ Article 29 of the Treaty establishing the PTA.

⁸⁴ COMESA Annual Report (2004) – Article 3

⁸⁵ Simon E. Kulusika, *The Lawyer and the Challenges of Economic Integration*, *Zambian Law Journal*, Vol 32, 2000 pp 20.

⁸⁶ See COMESA Information bulletin, February 2004, pp 4

⁸⁷ Ref No. 2/2002

the European Court of Justice. Indeed, the COMESA Court is the second court of its kind in the world after the European Court of Justice’.

But despite having been established in 1994, judges were only appointed in 1998. And as earlier alluded to, it was not until 2000 that the first case was heard. The judges’ tenure of office expired in 2003, however, having been in office for five years.

Since inception, the Court has been housed at the COMESA Secretariat in Lusaka, Zambia. However, pursuant to the Common Market’s principle of evenly spreading its institutions among member states, it has now been decided to relocate the Court to Khartoum, Sudan⁸⁸. This relocation, though driven by noble considerations, would seem to be a set back to majority of member countries with regard to accessing justice. Given that majority of COMESA member states are located south of the equator; the cost of litigating in Khartoum may simply be prohibitive. Besides, air connections to Khartoum would seem to be a challenge. Clearly, cities like Nairobi, Harare and Lusaka itself, are much easier to connect to. Moreover, Arabic, the preeminent language in Khartoum, and the stark variation in culture between Sudanese living in Khartoum, most of whom are Arabic, and the predominantly ‘black’ population of majority of COMESA member states, would seem to exacerbate the problem. Hiring and conversing with a Sudanese lawyer, for example, would be a challenge for most litigants. If anything, Sudan is just recovering from a protracted civil war and will certainly take some time for peace to be firmly established.

3.3.1 Jurisdiction and Function of COMESA court

The general jurisdiction of the Court is to adjudicate upon all matters that may be referred to it under the provisions of the Treaty.⁸⁹ Its primary function is to ensure adherence to law in the interpretation and application of the Treaty⁹⁰. Under Article 28 of the Treaty, the Court also has jurisdiction in disputes regarding the Treaty between the member states where the dispute is submitted to it under a special agreement between the member states concerned. The Court also has jurisdiction to hear and determine any matter arising from an arbitration clause contained in a contract which confers such jurisdiction to which the Common Market

⁸⁸ COMESA Annual Report (2004) pp 38.

⁸⁹ Article 23 of COMESA Treaty

⁹⁰ Article 19 of COMESA Treaty

or any of its institutions is a party. The Court is also empowered to hear disputes between the Common Market and its employees that arise out of the application and interpretation of the Staff Rules and regulations⁹¹.

The Court also has jurisdiction to give advisory opinion to the Authority, Council and member states on questions of law⁹². This is consistent with current global trends and is therefore a positive development. The other positive development closely related to this is the provision for parties to a matter to apply for interpretation of the Court's judgment⁹³. The latter is consistent with Article 57 of the rules of procedure of the European Court of Human Rights. It is difficult to appreciate, however, why the other organs of COMESA are not permitted to seek opinion from the Court. One is inclined to think that the drafters were influenced by the practice under the International Court of Justice where only the General Assembly and the Security Council can seek advisory opinion. This notwithstanding, it is submitted that allowing all organs to seek the Court's opinion would enhance the rule of law and lessen illegality. The Secretariat, for instance, would benefit tremendously.

Given that 'all matters' referred to the Court must be pursuant to the Treaty, it seems to follow that a litigant should be able to point to a specific provision of the Treaty or COMESA protocol, if the claim is to be admissible. This, obviously, brings in an element of certainty in as far as the law applicable is concerned. This sharply contrasts with the African Court system, for example, which has a wide and open-ended source of law from which the court may draw. The negative implication of restricting the sources of law to COMESA instruments, however, is that the quality of justice possible under COMESA is essentially dependant on the quality of COMESA Instruments. It further implies that the scope or jurisdiction of the court is dependent on matters specifically covered by COMESA instruments. But given the broad objectives of the Common Market, which include peace, security and stability among member states and strengthening international relations, 'all

⁹¹ Article 19 of COMESA Treaty

⁹² Article 32(1) of COMESA Treaty

⁹³ Rule 92

matters' would seem to include legal, economic and political matters or matters incidental to attaining COMESA objectives⁹⁴. In other words, the Court's jurisdiction is quite wide.

Besides COMESA Instruments, however, there are a few other secondary sources of law. For instance, in view of the international legal personality of COMESA and the fact that COMESA was established by Treaty, the Court is bound to apply and enforce the law of treaties.⁹⁵ The corollary is that COMESA member states are bound by the principle of good faith embodied in the maxim *pact sunt servanda* which requires parties to a Treaty to perform it in good faith. Similarly, member states and COMESA itself, like all other subjects of international law, are bound by norms of *jus cogens*, that is, norms that have been recognized by the community of civilized states, are irrevocable and to which no derogation is permitted. And because of their international legal personality, member states and the Court are bound by international customary law and general principles of international law. Other secondary sources include implementing measures (regulations, directives, directions and recommendations), decisions and rules of the Court (hereinafter referred to as 'the rules').

3.3.2 Procedures of the COMESA Court

The detailed business of the Court is, subject to the provisions of the Treaty, regulated by the rules of the Court. It is provided under Rule 2 that 'any matter within the jurisdiction of the Court under Treaty shall be commenced, proceeded with and disposed of by the court in accordance with the rules of the court'.

3.3.2.1 Seat of the Court

The Court sits at such places as are decided by the Authority, but may, if it considers it desirable, in particular cases, sit and exercise its functions in any other place within any of the member states⁹⁶. This flexibility, certainly, should be encouraged for it enables the Court to take justice to the victims and therefore makes justice more accessible. It is unclear from

⁹⁴ Simon E. Kulusika, The Lawyer and the Challenges of Economic Integration, *Zambian Law Journal*, Vol 32, 2000 PP 30.

⁹⁵ The Vienna Convention on the Law of Treaties constitutes the principle source of the law on treaties.

⁹⁶ Article 44 of the COMESA Treaty and Rule 17(1)

the Treaty, however, what factors the Court would consider 'desirable' to move the seat. Obviously, it may not be possible to outline every possible ground, and it would perhaps be unwise as well to limit the grounds, but this notwithstanding, some obvious and critical grounds should have been outlined as illustrative of the kind of grounds the court ought to take into account. Obvious ones would seem to include the legal significance of cases, cost of litigation and number of cases in a particular country. Under current provisions, the Court enjoys absolute discretion to decide whatever factors to consider.

3.3.2.2 Commencement of action

Actions are commenced by way of reference filed with the Registrar of the court⁹⁷. This, evidently, contrasts with the common practice of commencing actions by way of a *writ of summons*. The reference should state particulars of the plaintiff, the subject matter of the proceedings and a summary of points of law on which the application is based. It should also state the form of order sought and where appropriate, the nature of any evidence offered in support. English, French and Portuguese are the official languages of the Court⁹⁸. Every party to a reference before the Court is required to be represented by counsel appointed by that party⁹⁹. Pursuant to rule 25, such counsel should be a lawyer entitled to practice before a court of a member state. This measure, it seems, was intended to avoid miscarriages of justice. The side effect, however, is that whoever cannot afford the services of a lawyer has no recourse to the court. Moreover, this provision deprives litigants of the right of choice. It would thus appear that the course of justice would be better served by giving litigants the option to either retaining a lawyer or representing oneself. Furthermore, the choice of lawyers need not be restricted to member states - the rationale for this restriction is difficult to discern. If anything, lawyers from the European Union could be very critical in the development of Common Market Law.

3.3.2.3. Rules of evidence

Under rule 40, the court is empowered to summon witnesses. This, however, is not complemented with the power to compel the production of material which may constitute

⁹⁷ Rule 31 of COMESA Court rules

⁹⁸ Article 43 of the COMESA Treaty

⁹⁹ Article 33 of COMESA Treaty

evidence. In fact, both the Treaty and the rules of the Court are virtually silent on the rules of evidence. Even the standard of proof is not clear. This lack of clarity would appear to have presented the Court with some confusion as well. In an action for libel in the case of *Kabeta Muleya v COMESA*¹⁰⁰, for example, the Court made the following startling statement:

‘...Anyway, the Court is satisfied beyond reasonable doubt that there was publication within and outside Zambia in the print and electronic media of the Press Release complained of by the Applicant’. (Emphasis is author’s). The appellant in this case, an employee of COMESA, had sued the Secretary General for defamation. It is interesting that the court sought to rely on a standard applicable to criminal cases in a civil matter.

3.3.2.4 Trial before the COMESA Court.

In addition, there is no provision for time frames within which the Court should conclude a matter. Neither is there provision for summary trial. Undoubtedly, quick resolution of disputes is of the essence in trade matters. It is on account of this that panels under the WTO dispute settlement system operate under strict deadlines. As a general rule, a panel is required to issue the final report to the parties within 6 months from the date of its composition. In cases of urgency, the panel attempts to issue its reports to the parties within 3 months from the date of composition¹⁰¹. Where a panel cannot issue the report in 6 months; it must complete its deliberations in 9 months¹⁰². As for appellate review proceedings, they must generally be completed within 60 days, and in no case should they take longer than 90 days from the date when the notice of appeal was filed¹⁰³. In addition, several WTO Agreements provide for shorter periods for resolving disputes. The Agreement on Subsidies and Countervailing measures for example, provides for accelerated procedures with several shorter time frames with respect to disputes on prohibited subsidies and actionable subsidies. In the case of prohibited subsidies, the complainant may, if consultations have not led to

¹⁰⁰ Reference No. 1 of 2003 at page 7 of the judgment

¹⁰¹ Article 12.8, World Trade Organisation - Annex on the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)

¹⁰² Article 12.9, World Trade Organisation - Annex on the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)

¹⁰³ Article 17.5, World Trade Organisation - Annex on the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)

mutually agreed solutions, request the establishment of a panel within 30 days¹⁰⁴. Similarly, under the African Court of Justice, a judgment must be delivered within 90 days of completion of deliberations.

The situation under COMESA is complicated by the fact that, unlike most of its counterparts, the COMESA Court is not permanent, but *ad hoc*. Judges, in effect, serve on part time basis. Majority are justices in their countries of origin¹⁰⁵. It follows that the Court only sits at particular times. This is worsened by the fact that the Court only has one permanent staff, the rest being part time. This situation certainly affects the efficiency and effectiveness of the Court. On a positive note however, the Court is empowered, in any case referred to it, to make any interim order or issue any directions which it considers necessary or desirable. These orders and directions have the same effect as decisions of the court¹⁰⁶.

3.3.2.5. ADRs under COMESA

Article 34 (1) provides:

‘Any dispute concerning the interpretation or application of his Treaty or any of the matters referred to the court pursuant to this chapter shall not be subjected to any method of settlement other than those provides for in this Treaty’.

This provision would seem to imply that member states are prohibited from settling disputes by any means other than the Court, unless the dispute is not related to the interpretation or application of the Treaty of COMESA¹⁰⁷. It would thus seem to imply that there is no place for ADRs under COMESA. However, this view seems to contradict Article 29 which provides:

‘Except where the jurisdiction is conferred on the court (COMESA Court) by or under this Treaty, disputes to which the Common Market is a party shall not on that ground along, be excluded from the jurisdiction of ‘national courts’.

Clearly, the latter provision grants municipal courts the power to interpret the Treaty. However, the Treaty has not expressly provided for any ADR’s. This silence, it must be

¹⁰⁴ Article 4.4. of the Subsidies and Countervailing Agreement

¹⁰⁵ For example, the Zambian Chief Justice, Justice Ernest Sakala is one of the judges.

¹⁰⁶ Article 35 of COMESA Treaty

¹⁰⁷ Simon E. Kulusika, The Lawyer and the Challenges of Economic Integration, Zambian Law Journal, Vol 32, 2000 PP 32

stated, is a sharp departure from international practice. Article 95 of the United National Charter for example, expressly permits member states to entrust the resolution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future. Further, Article 33 of the U.N. Charter identifies the traditional mechanisms for resolution of disputes including negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful measures of the parties own choice. Similarly, under the World Trade Organisation (WTO) dispute settlement body, a matter can only be brought to court 60 days after attempts to reconcile and the Director General's intervention have proved futile.

It is worth noting, however, that notwithstanding the lack of express provision for ADRs, friendly settlements are common among member states. Most, if not all-major trade disputes have been resolved through negotiations¹⁰⁸. Compromises are common. It was reported for instance that discussions are ongoing on the dispute between Zambia and Kenya concerning cooking oil. So is the dispute between Kenya and Zambia concerning milk. Similarly, the COMESA secretariat intervened in the dispute between Malawi and Zambia over 'maheu' drink. Nonetheless, since none of these settlements have been challenged, the Court has had no opportunity to pronounce itself on their legality. Until and unless such a time that the Court will interpret these provisions, the legality of friendly settlements will remain in doubt. There seems to be no logical basis however, upon which the settlements should be quashed. It is difficult to imagine that the lawgiver intended to prevent such settlements. If the rationale for only permitting judicial settlement was to ensure compliance with the treaty, one may argue that the better approach would have been to merely require settlements out of court to be approved by the Court.

3.3.2.6 Judgments of the Court

Judgments of the Court, which are majority decisions, are reasoned and delivered in public sessions¹⁰⁹. Both the Treaty and the rules are silent, though, on the need for Court deliberations to be in open court. In spite of this lacuna, practice has been to hold

¹⁰⁸ This is according to sources within Ministry of Commerce, Trade and Industry.

¹⁰⁹ Article 31(1) of the COMESA Treaty

proceedings in open court, except in exceptional cases where administration of justice would be impracticable.

3.3.2.7 Revision and rectification of judgments

Pursuant to rule 88, the Court is empowered to revise its own decision. An application for revision of a judgment can only be made upon the discovery of some fact which might have had a decisive influence had it been known when the judgment was given and which could not, with reasonable diligence, have been discovered before the judgment or on account of some mistake or error on the fact of the record¹¹⁰. In the words of Kulusika, 'the inclusion of a requirement regarding 'some mistake or error on the face of the record' is sensible because it provides an element of fairness as well as flexibility in the adjudication process before the Court of Justice of COMESA'¹¹¹. It may be added that the mere inclusion of a provision for revision is a positive innovation. But as Kulusika further noted, there is no specified period within which a request for revision may be made. Leaving the period open ended, imports uncertainty and as Kulusika noted also, it may create problems for the Common Market, especially in this dynamic social-economic environment. An application for interpretation of a judgment under the African Court, for instance, should be made within 3 years.

Further, without prejudice to the provisions relating to the interpretation of judgments, the Court may, of its own motion or an application by a party made within two weeks after the delivery of judgment, rectify clerical mistakes, errors in calculation and obvious slips in it¹¹². Until early 2005, however, when the Treaty was amended to split the Court into the First Instance and Appellate Divisions, there was no provision for appeal. Accordingly, the decision of the Court was final. Whilst the provision for appeal is a welcome development, there is still no provision for 'post conviction' remedies in case of miscarriage of justice by the Appellate Division. It is not clear what would happen should there be a clear miscarriage of justice. Probably the only recourse available would be to apply, where possible, to other

¹¹⁰ Article 31(3) of the COMESA Treaty

¹¹¹ Simon E. Kulusika, The Lawyer and the Challenges of Economic Integration, *Zambian Law Journal*, Vol 32, 2000, pp 33

¹¹² Rule 59 of the rules of the COMESA Court.

international courts like the International Court of Justice (ICJ) or the Africa Court. One option would have been for the Treaty to make provision for 'appeal' to the Authority.

In the same light, it may be worth pointing out that decisions of the Court on the interpretation of the provisions of the Treaty take precedence over those of national courts. Article 29 (2) provides: 'Decisions of the court on the interpretation of the provisions of this Treaty shall have precedence over decisions of national courts'. It is not clear, however, whether this provision means national courts are bound by decisions of the COMESA Court. In as far as the COMESA Court itself is concerned, it would appear that like is the practice under the International Court of Justice (ICJ), the doctrine of binding precedence is non applicable. Apparently, both the Treaty and rules are silent on this question. It would not be surprising, however, to see the Court adopt the practice of making reference to its previous decisions as has become the practice at the ICJ.

3.3.2.8. Enforcement of judgments

Judgments of the Court are binding from the date of delivery¹¹³. Any order or decision of the Court in any reference or matter is to be enforced in the same manner as a judgment¹¹⁴. Where the Court finds that a party has defaulted in implementing the Court's judgment, order or decision or otherwise defied it, the Court may impose on that party a financial penalty. Under Article 34(4) of the Treaty, the Court may prescribe such sanctions as it shall consider necessary to be imposed against a party who defaults in implementing the decision of the Court. The nature of the sanction seems to have been left to the subjective determination of judges. A better approach, it would appear, would be to give some guidance to the judges. If anything, given that judges are not trade experts per se, they may not be fully alive to the implications of a given sanction and therefore not know what remedy is appropriate in a given case. Moreover, it seems to be consistent with common sense to allow member states to have a say on what sanctions should be available. In fact, most international instruments expressly spell out such sanctions. Under the World Trade Organisation for example, the

¹¹³ Rule 58(1)

¹¹⁴ Rule 58(3)

sanctions are clearly spelled out as being compliance, retaliation and reparation. Similarly, the UN Charter does spell out the remedies.

The execution of a judgment of the Court which imposes a pecuniary obligation on a person is governed by rules of civil procedure in force in the member state in which the execution is to take place¹¹⁵. As will be seen when discussing the ramifications of the requirement to exhaust domestic remedies before references by persons can be admissible, the manifest danger in basing remedies on domestic civil law is the likelihood of injustice, particularly where the rules in the said country are unfavorable to the plaintiff. Moreover, this provision would seem to introduce some uncertainty. Equally, the diversity in the rules of civil procedure among member states may pose a serious challenge to the Court when it comes to implementation and supervision.

3.3.3 Locus Standi before COMESA court

Only member states, legal and natural persons, employees of COMESA and third parties against COMESA or its institutions and the Secretary General have standing before the Court¹¹⁶.

3.3.3.1 Reference by member states

A member country can sue another member state or the Council, where it has allegedly failed to fulfill an obligation under the Treaty or has infringed a provision of the Treaty¹¹⁷. A state can also challenge the legality of any act, regulation, directive or decision on grounds that such act, regulation, directive or decision is *ultra vires* or unlawful or constitutes an infringement of the provisions of the Treaty or any rule of law relating to its application, or amounts to a misuse or abuse of power. Apparently, such a state need not have been affected by the violation of the Treaty. Put another way, it need not have 'interest' in the matter. It seems to be sufficient that the Treaty has been violated. There appears to be a tacit assumption that it is in the interest of all member states that the Treaty is not violated. The

¹¹⁵ Article (40) Treaty of COMESA

¹¹⁶ Articles 24, 25 and 26 of COMESA Treaty.

¹¹⁷ Article 24(1) of COMESA Treaty

danger, perhaps, is that it leaves open the possibility of multiple actions especially where claims may be conflicting, in which case a joinder may not be feasible.

3.3.3.2 Reference by legal and natural persons

Any person (legal and natural) resident in a member state may refer for the determination of the Court, the legality of any act, regulation, directive or decision of the Council or of a member state on grounds that such act, directive, decision or regulation is unlawful or an infringement of the provisions of the Treaty¹¹⁸. This provision has a proviso, however, thus:

‘Provided that where the matter for determination relates to any act, regulation, directive or decision by a member state, such person shall not refer the matter for determination under this Article unless he has first exhausted local remedies in the national courts or tribunal’

The need to exhaust domestic remedies would seem to have a chilling effect on the ability of persons to bring actions. It is difficult to understand why a litigant should first seek domestic law remedies when the law in issue is peculiar to COMESA. Unlike Human Rights law which is universal, the law contained in COMESA instruments is not. Unless the remedies being referred to are those domesticated from Common Market Law, suitable remedies are unlikely to be available. Hence, it is likely to be unfair to the successful litigant. Moreover, reference to domestic remedies imports a degree of uncertainty given that, invariably, remedies differ from one state to another. Therefore, business people would not know what remedies may be available should there be a breach. To say the least, the requirement to exhaust domestic remedies seems to be an unnecessary complication. One wonders why the plaintiff should not just apply for remedies available under the COMESA Treaty straight away.

3.3.3.3 References by the Secretary General

Under Article 25 (1), the Secretary General is empowered, where he considers that a member state has failed to fulfill an obligation under the Treaty or has infringed a provision of the Treaty, to submit his findings to the member state concerned to enable that member to submit its observation on the findings. Where such member state does not submit its observation to

¹¹⁸ Article 26 of COMESA Treaty

the SG within two months, the SG is required to refer the matter to the Bureau of the Council, which then decides whether the SG should refer the matter the court immediately, or be referred to the Council¹¹⁹. The rationale for seeking Council approval is also difficult to discern. Other than the need to ensure that political considerations are fully taken care off, it is difficult to see why this approval should be sought. If anything, the Bureau is not made up of legal experts.

There is no doubt that this requirement frustrates the Secretary General who by virtue of his mandate and positioning could play a leading role in bringing matters before the Court. Undoubtedly, the Secretary General receives more complaints than anybody else. As a matter of fact, this appears to have been noted by the drafters of the Treaty also, who, in Article 36, vested in the Secretary General the power to intervene in cases by way of submitting evidence supporting or opposing the argument of a party to the case. In fact, one would have expected the Treaty to compel the Secretary General to refer to the Court, all complaints received, to avoid rampant allegations of bias by the COMESA Secretariat.

3.3.3.4 References by COMESA employees

Employees of COMESA have standing in matters arising out of the application and interpretation of the rules and regulations of the secretariat. Of the five or so cases handled by the Court so far, references arising from the interpretation of Staff rules have been in the majority.

3.3.4 Observations From Provisions Governing Standing

3.3.4.1 Amenability of the Authority

Ironically, the Authority is not amenable to the Court's jurisdiction. None of these Articles makes provision for suing the Authority. The question then is what happens when the Authority is in breach of the Treaty. The corollary of this silence would be that the Authority is above the law. Unfortunately, this would throw the Treaty in limbo since the organisation's

¹¹⁹ Under Article 2 of the Treaty, the Bureau is defined as meaning 'the Chairman, Vice Chairman and Rapporteur elected in accordance with the Rules of Procedure of the meetings of the Council.

supreme body would be able to do whatever it wills. Essentially, it would mean the end of the rule of law under COMESA. It goes without saying therefore that this omission is a serious anomaly. It may raise fears, particularly with prospecting foreign investors.

3.3.4.2 Amenability of legal and artificial persons

Equally, although legal and natural persons can sue, they are not themselves amenable to the Court's jurisdiction. The prevailing view at the time the Treaty was agreed seems to have been that only state parties and organs of COMESA were capable of violating the COMESA Treaty. Apparently, the Treaty was agreed at a time when majority of members states were pursuing national control economic policies, under which the means of production were in the hands of the state. Clearly, this is no longer the case. It is a commonplace observation that following massive privatisation of state companies, the means of production in majority of COMESA member states are now in private hands. It goes without saying, therefore, that persons, be it natural or juristic, have acquired the capacity to violate the Treaty. Similarly, Non Government Organisations (NGOs) have come to acquire enormous power and influence.

Given that the COMESA Treaty is an agreement under public international law, one is also inclined to think that drafters could also have been labouring under the traditional view that only state parties and to a lesser extent international institutions are subjects of international law. Two points of view characterized the traditional theory, the first being that individuals are not subjects of international law and secondly that if they are, they are not full subjects but 'secondary subjects. It is now well settled, particularly in the area of Human Rights, that individuals are subjects of international law¹²⁰. Other than being able to sue, individual are now also answerable for international mayhem.

¹²⁰ According to Phillipe Sands and Piere Klein in the 5th Edition of their book published in 2001, entitled 'Bowett's Law of International Institutions', at page 339, the first permanent institution to provide for the possibility of individual to bring proceedings against a state was the European Commission on Human Rights established in 1950. Although individual individuals did not originally have the right to bring claims to the European Court of Human Rights, practice evolved to make this possible. In 1998, the Commission was dispensed with altogether and victims given direct, formal rights to access the new European Court of Human Rights. This model is followed in other regions e.g. Africa and America.

3.3.4.3 Need for groups of individuals and Non Governmental Organisations to have standing

Whilst an individual can bring an action, groups of individuals, associations and Non Governmental Organisations are not permitted to do so. It is a notorious fact that given the poor economic fortunes in the COMESA region, few companies can solely shoulder litigation. International disputes are by nature expensive for they usually require gathering evidence across borders. Moreover, trade disputes rarely affect a single player in the market. Dumping of a product like tea, for example, would not only affect all local tea producers, but also producers of substitutes like coffee, cocoa. Accordingly, even financially capable companies would be reluctant to shoulder the cost of litigation single handedly. Business Associations and development oriented Non Governmental Organisations are therefore better placed to bring such actions. Article 25 of the *European Convention for the Protection of Human Rights*, for example, provides for the right to petition to individuals, groups of individuals and Non Governmental Organisations claiming to be victims of a violation of the convention. Phillipe Sands and Pierre Klein have argued, that ‘a more remarkable feature in the EU (European Court) system is the grant of right, albeit limited, of challenge to private persons and entities’¹²¹.

3.3.4.4 Admissibility Requirements

Whilst the question of who has standing before the court appears to have been clearly addressed, the question of admissibility requirements lacks similar clarity. Both the Treaty and the rules are equivocal on the requirements for admissibility of claims. As was earlier alluded to, it is not clear for instance whether it is sufficient that a person is merely a resident in order to bring an action or one needs to demonstrate some ‘interest’ in the matter. Under rule 30 titled ‘originals and pleadings’, for example, litigants, besides furnishing the Court with copies of originals translated in specified language, among other formalities, are only required to annex thereto, documents relied on in support. The only semblance of a requirement to have ‘interest’ is perhaps under rule 87 which deals with third party proceedings. An application initiating third party proceedings should show how the judgment

¹²¹ Bowett’s Law of International Institutions, 5th Edition, (Sweet and Maxwell) 2001

is prejudicial to their rights¹²². But even this provision would seem to imply that the interest of the third party is not necessarily in the matter being contested, but the effect that its outcome would have on them. Under the World Trade Organisation (WTO) dispute settlement system for example, third parties can only participate if they demonstrate a ‘substantial trade interest’¹²³. Equally, under the *European Convention for the Protection of Human Rights*, the plaintiff must be a victim of the alleged violation himself; he may not submit a petition in *abstracto* concerning a national law or governmental practice which concerns other private citizens.

3.3.4.5 Grounds for commencing an action

Prima facie, it would appear from the provisions governing references to the Court that ‘illegality’ is the only ground upon which an action could be founded. Apparently, the Treaty has not expressly provided for other grounds. It would appear from the various provisions, however, that drafters did envisage other grounds. For example, Article 26 provides with regard to actions brought by persons, thus: ‘Any person who is resident in a member state may refer for.....determination by the court the legality of any act, regulation, directive or decision.....on ground that such act, directive, decision or regulation is unlawful or an infringement of the provisions of this Treaty’. (Emphasis is author’s) Evidently, by ‘unlawful’, this provision is not referring to one arising from the interpretation of the Treaty i.e. not illegality. This view would seem to be reinforced by the general jurisdiction of the Court provided for under Article 19 thus: ‘...ensure adherence to law in the interpretation and application of the Treaty’ (Emphasis is author’s). The use of the word ‘application’ would seem to import administrative law grounds of ‘irrationality’ and ‘procedural impropriety’. It would appear that the drafters intended the Court to have an administrative law structure. If anything, this view seems to be reinforced by the various provisions of the Treaty to which the Court is expected to give effect. Administrative powers appear to be incidental or implied in the functions of the Court.

¹²² Rule 87(1)(b)(ii)

¹²³ Article 10.2

It is difficult to conceive, for instance, how the Court could enforce the obligation on states to ‘secure the enactment of and the continuation of such legislation to give effect to the Treaty’ under Article 5(2) in the absence of administrative law remedies. Without the power to issue an order of certiorari, this provision would be ineffective. Similarly, what could the Court do without the power to issue an order of certiorari or prohibition where the Secretary General violates or is clearly about to violate Article 17(5) of the Treaty which requires him to give due regard to the principle of equal opportunities and equitable distribution of opportunities. Certainly, certiorari should be available to quash any such act in violation of the Treaty. In fact, without certiorari, it would be difficult to see how all violations of the Treaty would be redressed.

It is this paper’s submission, therefore, that both public and private law grounds and remedies are available under the COMESA Court. As a matter of fact, according to W. Hartley Clarke, the European Court of Justice upon which the COMESA court is modeled, is patterned after the administrative court of France, the Council of state¹²⁴. This said, to avoid any doubt, however, both private and public law remedies are better of being expressly outlined.

3.3.5 Composition of the Court

As a consequence of the amendment to Article 20(1) of the Treaty which split the court into a First Instance and an Appellate Division, the court now comprises a total of 12 judges from an initial 7 judges. Five of these are appellate judges¹²⁵. Judges are elected by the Committee of Ministers of Justice and Attorney General’s and appointed by the Authority for a renewable period of five and three years, respectively¹²⁶. The judge with the highest votes is elected President of the Court. The Judge President directs the judicial business and the administration of the court, and unless he designates another judge to do so, he presides at its hearings and deliberations¹²⁷.

W. Hartle Clarke, *Politics of the Common Market* ,(Prentice – Hall, inc) (1967)

¹²⁵ The system for the appointment of judges is such that it ensures at least two and three judges in the appellate division and court of first instance, respectively, to come from a common law/civil jurisdiction.

¹²⁶ Article 20(1) of COMESA Treaty – Following the splitting of the Court, a new system has been introduced in which those with the most votes serve for 5 years and the rest for three years.

¹²⁷ Rule 5(1)

Judges are chosen from among persons of impartiality and independence who fulfill the conditions required for holding high judicial office in their countries of domicile or who are jurists of recognised competence¹²⁸. However, no two or more judges can at anytime be nationals of the same member state. It is not clear, however, whether it is open to a member state to nominate a non-national for appointment as a judge. So far, no external judge has been appointed. It is equally not clear what measure is applied to gauge impartiality and independence. The practice, it seems, has been to appoint all those nominated by member states. Undoubtedly, nominations are preceded by behind-the-scenes negotiations and ‘gentleman’s agreements’ regarding which nations should nominate. The practice has been to nominate University law Professors and serving judges.

3.3.5.1 Independence and impartiality of COMESA judges

Surprisingly, the Treaty does not make it clear, as has become common international practice that though appointed by their governments, judges serve in their individual capacities. This, notwithstanding, given that the power to nominate lies entirely in the hands of the executive branch of each member state, expecting a judge to be completely independent of the country of origin may be expecting too much. Solace, perhaps, can be found in the relatively long tenure of office of 5 years. In the words of W. Hartley Clark when he was discussing the independence of judges at the European Court of Justice, ‘fixing the term at 6 years does not give government’s political influence over individual judges. They cannot pressure a judge by threatening not to nominate him for another term’¹²⁹. The premise of his argument is that where a term is relatively long, a second term would not be very enticing to most judges. It follows that the three-year tenure introduced under COMESA is anomalous. But it ought to be noted that a longer term is only effective for judges who have reached the apex of their careers and/or in old age.

A judge who is directly or indirectly interested in a case before the Court is required to immediately report the nature of his interest to the President, and if in the opinion of the President, the Judge’s interest is prejudicial, he shall make a report to the Authority and the

¹²⁸ Article 20(2) of COMESA Treaty

¹²⁹ In his book *Politics of the Common Market*, (Prentice – Hall, inc) (1967) pp

Authority shall appoint a temporary judge to act only in the place of the interested judge¹³⁰. If it is the President directly or indirectly interested in a case before the court, he shall, if he considers that the nature of his interest is such that it would be prejudicial for him to take part in the case, make a report to the Authority which shall appoint a temporary President to act as President for that case only.

Clearly, the President's powers are excessive. It is entirely left to his absolute subjective determination to decide what is prejudicial and what is not. The Treaty has not even attempted to guide the President. And where he is the one interested, he is both the accused and the judge. Moreover, the Authority, it seems, merely rubber stamps the President's decision as contained in his report. The better approach would seem to be to let the entire bench decide whether any of the colleague's interest, including that of the President, is prejudicial. This is critical given that, unlike in national courts, judges in international courts, most certainly, have vested interest. They obviously want the interests of their countries to be safeguarded. It is for this reason that in some international courts, judges are not allowed to hear cases to which their countries are a party. In fact, it would seem that it is in recognition of this vested interest that the COMESA Treaty itself does not allow any state to have more than one judge at a given time. The possibility of bias by the President cannot therefore be ruled out.

3.3.5.2 Independence of the COMESA Court

The Court is 'independent' from all the other organs of COMESA. Unlike other subordinate organs of COMESA, it is not bound by the directives and decisions of the Authority and those of the Council. There is a qualification, however, that the Court is not bound 'in the exercise of its jurisdiction', meaning the independence of the court is not absolute. It is not clear, nonetheless, why this qualification was felt necessary. Neither is it clear what these matters outside its jurisdiction, are. One can only speculate that these are non-judicial matters such as administrative matters. This view would seem to be reinforced by Article 9(2)(f) which gives the Council power to consider and approve the Court's budget. This, unfortunately, has the tendency of eroding the Court's autonomy and independence. It avails

¹³⁰ Article 22(4) of COMESA Treaty

the Council the opportunity to frustrate and blackmail the Court. Evidently, it is at variance with standard practice. It violates the doctrine of separation of powers.

3.3.5.3 Removal of COMES judges

The President of the Court or a judge cannot be removed from office except by the Authority for stated misbehavior or inability to perform the functions of his office due to infirmity of mind or body or due to any other specialized cause¹³¹. Further, the President and the judges are immune from legal action for any act or omission committed in the discharge of their functions under the Treaty¹³².

¹³¹ Article 22(1) of COMESA Treaty

¹³² Article 39 of COMESA Treaty

Chapter 4

4.0 Conclusion and Recommendations

This paper would certainly be incomplete if it did not pronounce itself on the effectiveness of Court, with regard to its critical function of resolving trade dispute. It would appear from the preceding analysis that the Court is indeed ineffective. Despite it having been operational for almost four years, it has not resolved any trade disputes. This is in sharp contrast with the European Court of Justice which has been handling, on average, over 100 cases a year. By 2001, the European Court had handled a total of over 9000 cases. In 1997 alone, 445 new cases were recorded.¹³³ Even taking into account the disparity in awareness and literacy levels between the European Union and COMESA region, the difference is appalling. It can neither be explained nor justified.

4.1 Weaknesses

A number of factors could be assigned for this ineffectiveness. It seems, to start with, member states themselves do not consider the Court a priority. It was the only COMESA organ, for instance, that took over 6 years after coming into being before becoming operational. This lack of prioritisation is also manifest in lack of resources. It was until early this year when they had to nominate new judges to the Court that majority of COMESA member states settled their financial arrears¹³⁴. As a result of this erratic funding, the Court only has one permanent staff. Member states do not even seem to be concerned with the fact that the Court is *ad hoc*, hence likely to delay the dispensation of justice. Clearly, if the Court was considered a priority, an effort would have been made to make it effective. At least a study would have been commissioned to establish the shortcomings. Other than the introduction of an appellate division early this year (2005), no effort, whatsoever, has been made to improve the Court's effectiveness. Focus appears to have been directed solely at deepening economic integration. But even then, it shows a lack of appreciation of the significant and critical role that the Court could play even in the integration process itself.

¹³³ Phillipe Sands and Pierre Klein, Bowett's Law of International Institutions, 5th Edition, (Sweet and Maxwell) (2001) pp 404

¹³⁴ Source – Ministry of Commerce, Trade and Industry

Furthermore, the private sector appears not to be aware of the Court's existence. Two of the small-scale organisations interviewed for example, expressed ignorance about the Court's existence. It points to a lack of publicity. It would appear also that member states themselves do not have confidence in the Court. How else, then, could one explain the preference for negotiations over judicial settlement even where such negotiations have reached a dead end or have been ongoing for a long time with no solution in sight.

The weaknesses emanate from the fact that the Court was conceived for an economic environment different from the one it finds itself operating under. At the time of its formation, the state was the key economic player in majority if not all member states, whereas in the current dispensation, the private sector has taken over. This problem has been exacerbated by the lack of interest by member states as a consequence of which there have been no reforms to keep the Court in tandem with the current social economic dynamics. Hence, though initially modeled on the European Court of Justice, the COMESA Court is very different from the present European Court of Justice, which has recorded many changes, especially in the last 10 years.

Other weaknesses simply emanate from the way the Court is structured. For instance, there is neither provision for time frames for resolving cases nor for summary trials. The drafting of the Treaty has equally weakened the Court. It is equivocal, ambiguous and contradictory on many issues. There are many 'gray' areas which require the Court's clarification. It is not expressly clear, for instance, what the grounds and remedies available are. Similarly, there is ambiguity on whether alternative dispute settlement schemes are available under COMESA and, if so, which ones they are. In addition, judges appear to have too many discretionary powers which import some degree of uncertainty. The sanctions for defaulting on a judgment, for example, are entirely left to the subjective determination of judges. Further, some of the requirements are unnecessary, prohibitive and outdated. A case in point is the mandatory requirement to exhaust local remedies before submitting references to the Court. So is the mandatory requirement to be represented by counsel, which may be prohibitive.

Ineffectiveness of the Court could also be attributed to the fact that the Secretariat, which could play a leading role by presenting cases before the Court, is riddled with ‘irrelevant’ procedural requirements. The authority of the court also appears to be diluted by the fact that the Authority is not bound by the Court. The Court’s independence, equally, appears to be compromised by the fact that its budget is subject to Council approval.

4.2 Strengths

It would be a misrepresentation, however, if the impression were created that the Court has no strengths whatsoever. There is, for instance, a reasonable degree of certainty as to what the law applicable is. Further, judges are relatively of highly competence. In addition, unlike most other international courts like the International Court of Justice which have optional jurisdiction, the COMESA Court has compulsory jurisdiction. It is sufficient that parties to a matter reside in the COMESA region. In addition, unlike the WTO dispute settlement system, there is provision for reimbursement of legal costs to the successful litigant. Further, the Court is able to revise and rectify erroneous decisions.

4.3 Recommendations

In view of the weaknesses of the COMESA Court outlined above, the following measures are recommended to make it more effective in resolving trade disputes:

1. The decision to relocate the court to Khartoum, Sudan, should be reversed. The seat of the court should be maintained in Lusaka. Alternatively, it should be relocated to a more centrally located and easily accessible city. In addition, the Court should be made permanent as opposed to *ad hoc*.
2. Article 32 of the COMESA Treaty should be amended to allow all the other 6 organs of COMESA to seek the Court’s advisory opinion on any question of law.
3. Article 20 of the COMESA Treaty should be amended to make it clear that though nominated by member states, judges serve in their individual capacities. In addition, it should be clarified whether a nation can nominate a non-national to be appointed judge.
4. The requirement to exhaust domestic remedies before in individual can bring an action under Article 26 of the COMESA Treaty should be dispensed with.

5. The question of whether a judge's interest in a case is prejudicial, under Article 22 of the COMESA Treaty, should be decided by the entire bench, as opposed to the President alone.
6. The Treaty should expressly state whether alternative dispute settlement mechanisms are applicable and, if so, which ones.
7. The COMESA Court registry should enhance sensitization among member governments and the private sector on the significance and role that the Court could play in fostering economic integration.
8. Article 25(2) of the COMESA Treaty should be amended to enable the Secretary General to refer matters to the court without the approval of the Bureau of the Council. Further, the Secretary should be compelled to refer to the court all disputes brought to his attention, to avoid allegations of bias.
9. The Treaty should make persons, (natural and juristic), Non Governmental Organisations (NGO) and the Authority amenable to the court.
10. Article 26 of the COMESA Treaty should be amended to allow groups of individuals, associations and Non Governmental Organisations to have standing before the Court.
11. The Treaty and rules of the Court should clarify the question of admissibility or standing i.e. whether 'sufficient interest' is required.
12. Article 33 of the COMESA Treaty should be amended to dispense with the mandatory requirement to be represented by counsel. Litigants should be allowed to represent themselves, if they so wish. To facilitate this, rules of court should be simplified, further. On the other hand, litigants should be allowed to hire a lawyer from anywhere in the world, particularly the European Union.
13. Rule 17(1) should be amended to give a guide on what factors should be taken into account by the Court when deciding whether to sit in a given place. In addition, the Court should be allowed to sit in various locations in member states.
14. Time frames for concluding matters should be provided. Further, there should be provision for summary trial for certain matters.
15. To ensure consistency in Court decisions, provision should be made for the doctrine of *stare decisis*. Similarly, Article 29(2) of the COMESA Treaty should be amended to clarify whether COMESA court decisions are binding on national courts.

16. The Treaty should expressly state the grounds upon which an action can be brought and the corresponding remedies.
17. The Treaty should give a guide as to what sanctions are envisaged under Article 40 of the COMESA Treaty. Further, the COMESA Court should come up with rules of civil procedure regarding enforcement of pecuniary obligations as opposed to relying on those of member states.
18. The newly introduced three year tenure for judges should be done away with. All judges should be appointed for a five year period.
19. Post conviction remedies should be provided for.
20. The Treaty or indeed the rules, should specify what rules of evidence are applicable.

APPENDIX I

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**THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW**

QUESTIONNAIRE

This questionnaire is part of the study on the effectiveness of the Common Market for Eastern and Southern Africa (COMESA) Court of Justice vis-a-vis its role as a trade dispute resolution body. The study report will be submitted in partial fulfillment of requirements for the award of the Bachelor of Laws Degree of the University of Zambia. All information collected will be treated as confidential. For any clarification, contact the undersigned on 097-477201.

Mapani Christopher

1. Name:.....
 Designation:.....
 Organisation:.....
 Economic activity:.....

2. What mechanisms, if any, are available for resolution of trade disputes in COMESA?
 a).....
 b).....
 c).....
 d).....
 e).....

3. What major trade disputes, if any, has Zambia had with other COMESA member states and how have they been resolved?
 a)

 b)

 c)

 d)

 e)

4. i) What is your opinion on the effectiveness of the mechanisms for resolving trade disputes in COMESA?

- ii) How best can trade disputes in COMESA be resolved?

5. i) Are you aware of the COMESA Court of Justice?.....
 ii) If your answer to (i) is Yes, how did you come to know about it?.....

.....

iii) Briefly, what do you know about the functions of the COMESA Court?...
.....

6. (i) What, if any, could be some of the weaknesses of the COMESA Court vis-à-vis its role as a trade dispute resolution body?

- a)
- b)
- c)
- d)

(ii) What, if any, could be the strengths of the COMESA Court vis-à-vis its role as a trade dispute settlement body?

- a)
- b)
- c)
- d)

7. What could be the reasons for the apparent few trade disputes that have been referred to and handled by the COMESA Court?

.....
.....

8. i) What is your overall assessment of the effectiveness of the COMESA Court with regard to resolution of trade disputes?

.....
.....

ii) How can the COMESA Court be strengthened?

.....
.....

9. What lessons, if any, can be learnt from other trade disputes settlement bodies like the WTO and SADC?

.....
.....
.....
.....

10. Any other comments on the COMESA Court?

.....
.....

Thank you