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Guest editor  
Professor Retselisitsoe Phooko

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# Recalibrating Private Parties’ *Locus Standi* and Access to Dispute Resolution under the SADC and AfCFTA Regimes

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## Abstract

Article 20 of the African Continental Free Trade Area (AfCFTA) Agreement establishes a Dispute Settlement Mechanism (DSM) to resolve disputes between State Parties. However, it omits to confer access or *locus standi* to natural and legal persons. Although the Protocol on Tribunal in the Southern African Development Community SADC of 2000 initially granted standing to non-state actors to litigate against member states, the position was altered in the immediate aftermath of the Tribunal’s determination in the dispute between Mike Campbell and the Republic of Zimbabwe. Consequently, the common denominator between the AfCFTA and the SADC dispute settlement architecture is their exclusion of private parties. The paper contends that such a blanket exclusion of private parties is regressive, particularly given the universal recognition of their fundamental role in shaping the jurisprudence of international and community law. Denial of access to private parties is inconsistent with the contemporary best practices that obtain in other African RECs, such as the Common Market for Eastern and Southern Africa (COMESA) and East African Community (EAC), which duly recognise the vital role

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*that private parties' access plays in the delivery of justice and deepening of integration initiatives. The paper advocates extending access to private parties. It also interrogates the role of non-state actors and the ramifications of their lack of standing before the SADC and AfCFTA dispute settlement regimes. The aim is to inform integration policy makers on appropriate practical reforms.*

**Keywords:** Private parties; access to justice; *locus standi*; regional economic communities; dispute settlement framework; SADC; AfCFTA

## 1 INTRODUCTION

In March 2018, 44 of the 55 African Union (AU) members met in Kigali, Rwanda, to conclude a landmark pact aimed at transforming intra-African trade relations.<sup>1</sup> The Agreement Establishing the African Continental Free Trade Area (AfCFTA Agreement) entered into force in May 2019. Trading under the AfCFTA was officially launched on 1 January 2021.<sup>2</sup> If fully actualised, the AfCFTA will cover 54 countries (the largest of any regional trade bloc), creating a market encompassing over 1.2 billion people.<sup>3</sup> This is the latest effort by African States to create a single continental market for goods, services, and the movement of persons, and, through it, the AU seeks to deepen prospects for regional integration.<sup>4</sup> Ultimately, the AfCFTA is an important stepping-stone toward the actualisation of the African Economic Community (AEC).<sup>5</sup>

An essential feature of the AfCFTA is the Protocol on Dispute Settlement, which establishes the rules and procedures for resolving disputes between state parties.<sup>6</sup> The AfCFTA Dispute Settlement Mechanism (AfCFTA-DSM) is a central element of the AfCFTA as it provides security and predictability to the regional trading system.<sup>7</sup> Accordingly, the AfCFTA-DSM has the potential to enhance the integrity and efficiency of the whole AfCFTA trading system.<sup>8</sup> However, the AfCFTA DSM omits to confer direct access or *locus standi* to non-state actors,

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1 Viljoen “African Union (AU)”, in Wolfrum (ed) *The Max Planck Encyclopaedia of Public International Law* (2011) [www.mepepil.com](http://www.mepepil.com) (accessed 20-09-2024). The initial implementation was scheduled to commence in mid-2020; however, the coronavirus pandemic temporarily derailed the plan and rescheduled it for 2021.

2 *Ibid.*

3 Luke “Making the Case for the African Continental Free Trade Area” <https://www.afronomicslaw.org/2019/01/12/making-the-case-for-the-african-continental-free-trade-area-2/> (accessed 15-06-2024). Currently, 54 signatories and 34 countries have met their domestic requirements for ratifying the Agreement.

4 Preamble: AfCFTA Agreement (2018).

5 Akinkugbe “Dispute Settlement under the African Continental Free Trade Area” 2019 *AJICL* 138.

6 Article 20 AfCFTA establishes a Dispute Settlement Mechanism, the Protocol on Rules and Procedures on the Settlement of Disputes (“the AfCFTA DSM Protocol”; “Protocol”) and a Dispute Settlement Body (“DSB”) for resolving disputes within the AfCFTA.

7 Article 4 AfCFTA-DSM Protocol.

8 Akinkugbe, “Dispute Settlement under the African Continental Free Trade Area” in Fabri (ed) *Max Planck Encyclopaedia of International Procedural Law* (2021) 58.

natural and legal persons.<sup>9</sup>

The Southern Africa Development Community (SADC)<sup>10</sup> comprises 16 member states<sup>11</sup> and was established in terms of the Treaty of the SADC, signed by the heads of state or government of the respective member states in 1992.<sup>12</sup> The treaty creates several institutions<sup>13</sup> for the implementation of the SADC Treaty, including the SADC Tribunal.<sup>14</sup> Pursuant to Article 16(1)<sup>15</sup> of the Protocol on Tribunal in the SADC (2000),<sup>16</sup> the SADC Tribunal was established to interpret the SADC Treaty, to protect the interests and rights of SADC member states and their citizens, and to develop community jurisprudence, having regard to applicable treaties, general principles, and rules of public international law.<sup>17</sup>

The Protocol on the Tribunal in the SADC (2000) allowed individuals and corporations of the Community to institute cases against a member state.<sup>18</sup> However, the SADC Tribunal's decision against Zimbabwe's controversial land reform policy in *Mike Campbell (Pvt) Ltd v The Republic of Zimbabwe (Campbell case)*<sup>19</sup> heralded the Tribunal's functional demise through a raft of Summit resolutions that tactfully reduced it to a lame-duck judicial institution.<sup>20</sup> The Summit of Heads of State and Government of the SADC initially suspended the Tribunal in

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- 9 Article 5 of the Protocol on the Rules and Procedures on the Settlement of Disputes establishes the DSB whilst the subsequent provisions thereto stipulate elaborate dispute settlement procedures and mechanisms; Art 3 of the Protocol on the Rules and Procedures on the Settlement of Disputes envisages state parties as having the right of access to the DSB for settlement of their rights and obligations.
- 10 For a detailed discussion of the historical background of SADC, the key institutions of SADC and their powers and competences, the legal and constitutional status of SADC and the relationship between SADC and the AU see Moyo *Towards a Supranational Order for Southern Africa: A Discussion of the Key Institutions of the Southern African Development Community (SADC)* LLM-thesis, University of Oslo (2008) accessible <http://de.scientificcommons.org/khulekani> (accessed 28-09-2024). See also Ndulo "African Integration Schemes: A Case Study of the Southern African Development Community (SADC)" 1999 *AYB IL* 3–30. This article gives a detailed overview of the SADC legal order and provides some insight into SADC's approach to regional integration in comparison to the EU.
- 11 SADC comprises the following member states: Angola, Botswana, Comoros, Democratic Republic of Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Seychelles, Tanzania, Zambia, and Zimbabwe with a population in the region of 370 million.
- 12 The Treaty of the Southern African Development Community was signed at Windhoek, Namibia, on 17 Aug 1992 and amended at Blantyre, Malawi, in Aug 2001. The Treaty entered into force on 30 Sept 1993.
- 13 Article 9(1) (a–h) of the SADC Treaty.
- 14 *Ibid.*
- 15 Article 16(1) of the SADC Treaty stipulates that: "the Tribunal shall be constituted to ensure adherence to and the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it."
- 16 Protocol on the Tribunal and the Rules of Procedure (SADC Protocol) (adopted by Summit on 7<sup>th</sup> August 2000).
- 17 Ruppel "The Southern African Development Community (SADC) and its Tribunal: Reflections on a Regional Economic Communities' Potential Impact on Human Rights Protection" 2009 *Verfassung und Recht in Übersee* 181.
- 18 Article 15 of the SADC Treaty.
- 19 SADC (T) 02/2007. See Chigara "What should a Re-constituted Southern African Development Community (SADC) Tribunal be Mindful of to Succeed" 2012 *Nordic JIL* 350.
- 20 For detailed analyses of the Tribunal's jurisprudence, Ebobrah "Human Rights Developments in African Sub-regional Economic Communities during 2012" 2013 *AHRLJ* 178; Nkhata "The Role of Regional Economic Communities in Protecting and Promoting Human Rights in Africa: Reflecting on the Human Rights Mandate of the Tribunal of the Southern African Development Community" 2012 *AJICL* 87; Saurombe "An Analysis and Exposition of Dispute Settlement Forum Shopping for Southern African Development Community Member States in the Light of the Suspension of the SADC Tribunal" 2011 *SAMercLJ* 392.

August 2010,<sup>21</sup> before effectively disbanding it in August 2012.<sup>22</sup> On 18 August 2014, the SADC Summit adopted a new protocol for the SADC Tribunal — the Protocol on the Tribunal in the Southern African Development Community.<sup>23</sup> If this protocol does eventually come into force, the Tribunal shall be formally reduced to an inter-state dispute resolution forum without access to private parties.<sup>24</sup>

The common denominator between the AfCFTA and SADC DSM is that both exclude private parties' participation by denying them *locus standi*. Further, neither provides a forum for resolving disputes between private parties. This article challenges the conventional view that states are the only relevant actors in international trade, particularly in dispute settlement. Private entities invariably engage in the actual trade in goods, services, and investments across the continent, and it is their commercial interaction that eventually gives rise to trade-related disputes.<sup>25</sup> Therefore, they have a crucial role to play in economic integration, not least in ensuring the implementation of community trade facilitation laws.<sup>26</sup>

The article proceeds as follows. Section 2 examines the interrelationship between the concepts of *locus standi*, jurisdiction, and access to justice. Section 3 provides a brief narrative of the evolution of private parties' access globally. Section 4 explores the state of private parties' access before three African RECs, namely the East African Community (EAC), SADC and Common Market for Eastern and Southern Africa (COMESA), for comparative analyses because of the overlapping memberships with some SADC member states.<sup>27</sup> It evaluates the treaty provisions regulating private parties' access and how judicial bodies have practically applied the same through a review of international and municipal case law. Thereafter, in section 5, the paper explores the substantive merits and benefits of private parties' access. Section 6 outlines procedural tools for effective regulation and control of access to the DSB of AfCFTA and SADC. In conclusion, the paper posits that the jurisdiction of the AfCFTA and SADC judicial organs must be expanded to accommodate private parties' access to and enforcement of

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21 The actual decision was not worded as a suspension, although the impact was in effect the same. The Summit decided not to reappoint judges whose term of office would expire in August 2010 pending the review of the role, responsibilities and terms of reference of the Tribunal by the Committee of Ministers of Justice/ Attorneys-General as mandated by the Summit. It also decided that Members of the Tribunal would remain in office pending the said review, but that the Tribunal should not entertain new cases until such time that an extraordinary meeting of the Summit would decide on the legal status and roles and responsibilities of the Tribunal.

22 Of the Summit's series of decisions on the Tribunal beginning Aug 2010, the last and most decisive was taken at the Aug 2012 Maputo Summit where the Summit, per para 24 of its resolutions, "considered the Report of Ministers of Justice/ Attorneys-General and the observations by the Council of Ministers and resolved that a new Protocol on the Tribunal should be negotiated and that its mandate should be confined to interpretation of the SADC Treaty and Protocols related to disputes between Member States." See [http://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/Communique\\_32nd\\_Summit\\_of\\_Heads\\_of\\_States.pdf](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/Communique_32nd_Summit_of_Heads_of_States.pdf) (accessed 26-09-2024).

23 See Erasmus "The New Protocol for the SADC Tribunal: Jurisdictional Changes and Implications for SADC Community Law" 2015 *tralac* <https://www.tralac.org/publications/article/6900-the-new-protocol-for-the-sadc-tribunal-jurisdictionalchanges-and-implications-for-sadc-community-law.html> (accessed 15-11-2024).

24 Article 33 of the new Tribunal Protocol.

25 Onyema "Reimagining the Framework for Resolving Intra-African Commercial Disputes in the Context of the African Continental Free Trade Area Agreement" 2019 *World Trade Rev* 1–23.

26 Oppong *Legal Aspects of Economic Integration in Africa* 1 ed (2011) 164.

27 Tanzania is a member state of both SADC and EAC whilst Eswatini, Malawi, Zambia and Zimbabwe belong to both SADC and COMESA.

rights, as is the case with COMESA and EAC.

## 2 INTER-PLAY BETWEEN THE CONCEPTS OF *LOCUS STANDI* AND ACCESS TO JUSTICE

The concepts of standing, access to justice, and jurisdiction are intertwined.<sup>28</sup> A liberal and generous definition of *locus standi* or “standing or title to sue” precipitates wider access to justice.<sup>29</sup> In practice, rules governing *locus standi* are “often amorphous, intellectually inconsistent and unnecessarily complex.”<sup>30</sup> *Locus standi* may be defined as the right to have a court adjudicate an issue brought before it by proceedings initiated by an individual, legal person, or body.<sup>31</sup> Access to justice conveys different meanings depending on the context.<sup>32</sup> In summary, access to justice refers to the right to seek an effective remedy before an independent and impartial tribunal.<sup>33</sup>

The presence or lack of *locus standi* is central to determining a party’s access to an adjudicatory tribunal. Primacy of the question of *locus standi* entails that before the judicial organ can delve into the substance of any dispute, it must initially satisfy itself that the party who has moved it is clothed with the requisite interest to set in motion the judicial machinery. Therefore, *locus standi* is intimately related to any discourse of access to justice at both municipal and international levels. A liberal and generous conceptualisation of *locus standi* equally yields a broader and enhanced access to justice and legal remedies.

The treaty regimes of COMESA and EAC grant *locus standi* to natural and legal persons to initiate actions or references before them, as stipulated in the respective treaties.<sup>34</sup> Issues of *locus standi* tend to arise when a Respondent State claims that a private party is not entitled to bring a claim for want of legal interest in the subject matter of the dispute<sup>35</sup> or due to pending proceedings in municipal courts.<sup>36</sup>

## 3 EVOLUTION OF PRIVATE PARTIES’ ACCESS TO INTERNATIONAL DISPUTE SETTLEMENT BODIES

Historically, international dispute bodies denied private parties access.<sup>37</sup> Traditionally, investors relied on their home countries to protect their foreign interests through diplomatic and other inter-state means.<sup>38</sup> Gradually, the role of private parties has become prominent globally, primarily due to the influence of the European Community, which espoused their access to the European Court of Justice.<sup>39</sup> The North American Free Trade Agreement<sup>40</sup> (NAFTA) was

28 Richard-Clarke “Access to Justice: Accessibility” 2011 *LIM* 159.

29 Francesco “The Rights of Access to Justice under Customary International Law” in Francesco (ed) *Access to Justice as a Human Right* (2007) 4.

30 Stein “The Theoretical Bases of *Locus Standi*” in Stein (ed) *Locus Standi* (1979).

31 *Ibid.*

32 Francesco *Access to Justice* 6.

33 Richard-Clarke 2011 *LIM* 159.

34 COMESA Treaty Art 26; EAC Treaty Art 30.

35 Oppong *Legal Aspects* 164.

36 See *Coastal Aquaculture v Republic of Kenya* Reference No. 3 of 2001

37 *Ibid.*

38 Vicuna “Individuals and Non-state Entities before the International Courts and Tribunals” [http://www.mpil.de/files/pdf1/mpunyb\\_orrego\\_vicuna\\_5.pdf](http://www.mpil.de/files/pdf1/mpunyb_orrego_vicuna_5.pdf) (accessed 23-09-2024) 53.

39 Albors-Lloris *Private Parties in European Community Law: Challenging Community Measures* 1 ed (1996) 30.

40 North American Free Trade Agreement, Can-Mex-US, 17 Dec 1992, 32 *ILM* 289 (1993).

amongst the early trendsetters by envisaging investor-to-state dispute settlement under the Chapter 11 mechanism, which was extensively utilised, as at least 60 notices of arbitration and several arbitral awards were issued during the life of the now-defunct NAFTA.

However, the AfCFTA-DSM is modelled after the World Trade Organisation Dispute Settlement Understanding (WTO-DSU).<sup>41</sup> This is not the first time an African trade dispute mechanism has been modelled on the WTO.<sup>42</sup> The Tripartite Free Trade Area Agreement (TFTA) between three regional economic communities in Africa, namely COMESA, EAC and SADC, which preceded the AfCFTA, is also based on the WTO model.<sup>43</sup>

At the international level, the General Agreement on Tariffs and Trade (GATT) 1947 omitted to grant access to private parties.<sup>44</sup> Notwithstanding reforms following the Uruguay Round of trade negotiations between 1986 and 1994, access to the WTO DSU remained limited to Member States, excluding individuals.<sup>45</sup> Yet WTO can and does affect private parties through the rules it promulgates.<sup>46</sup> For instance, where a member state is held to be in violation of a WTO obligation but is unable to immediately rectify the violation because it is “impracticable”, it may offer compensation to the winning party. If the parties disagree on a mutually acceptable level of compensation, the losing party may face retaliatory measures, such as surcharge tariffs.<sup>47</sup> This creates trade barriers that affect private businesses and other economic actors.<sup>48</sup>

Additionally, WTO rules eliminating specific quotas can directly affect the structure of production and employment in a particular state, thereby affecting its residents.<sup>49</sup> WTO Agreements may also indirectly place obligations on private parties.<sup>50</sup> Article 13 of the Agreement on Sanitary and Phytosanitary Measures (SPS) is a peremptory provision that mandates member states to take reasonable measures to ensure that non-governmental entities within their territories comply with the SPS Agreement.<sup>51</sup> Therefore, this provision imposes on private parties, through the state, an obligation to ensure compliance with the SPS Agreement.<sup>52</sup>

It is noteworthy that under the WTO DSU, individuals enjoy indirect access through industry associations that lobby their Governments to initiate proceedings in respect of any violations

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41 See Gathii “Evaluating the Dispute Settlement Mechanism of the African Continental Free Trade Agreement” <http://www.afronomicslaw.org/2019/04/10/evaluatingthe-dispute-settlement-mechanism-of-the-african-continental-free-trade-agreement/> (accessed 27-05-2025); Alter “The Global Spread of European Style International Courts” 2012 *West Eur Politics* 135–154.

42 For an analysis of the SADC Trade Tribunal and its overlap with the WTO dispute settlement system, see Pauwelyn “Going Global, Regional, or Both? Dispute Settlement in the Southern African Development Community (SADC) and Overlaps with the WTO and other Jurisdictions” 2004 *Minn J Global Trade* 231–304.

43 Article 30 of the Tripartite Free Trade Agreement.

44 Articles XXII and XXIII.

45 Trade Policy Training Centre in Africa, “Use of WTO Dispute Settlement System by LDCs and LICs” (2013) <http://new.trapca.org/wp-content/uploads/2016/04/TWP1304-Use-of-the-WTO-Dispute-Settlement-System-by-LDCs-and-LICs.pdf> (accessed 03-09-2024).

46 Charnovitz “Economic and Social Actors in the World Trade Organisation” 2001 *JICL* 261.

47 Articles 22.1 and 22.2

48 Alemanno “Private Party Access and WTO Dispute Settlement System” Cornell Law Library (2004) [http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1000&context=lps\\_clac](http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1000&context=lps_clac) (accessed 14-09-2024)

49 Charnovitz 2001 *JICL* 259.

50 *Ibid* 261.

51 Agreement on the Application of Sanitary and Phytosanitary Measures, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A 1867 UNTS 493 (SPS Agreement).

52 A similar indirect obligation is also placed on private parties in the Agreement on Technical Barriers to Trade. Art 3(1) of the Agreement on Technical Barriers to Trade, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A 1868 UNTS 120; Charnovitz 2001 *JICL* 260.

of WTO obligations by other Member States for pursuit before the WTO DSU.<sup>53</sup> In the *EC–Bananas* case<sup>54</sup> the Appellate Body (AB) of the WTO DSU allowed the use of private legal counsel and held that there was nothing in the WTO Agreement, the WTO DSU procedures or the AB procedures that specified who could represent Governments. The AB of the DSU has also held that each member state has a right to attach *amicus curiae* briefs from non-governmental sources to its own submissions, thereby allowing it to represent the interests of non-state parties in trade disputes.<sup>55</sup> The WTO DSU first allowed NGOs to participate in the *Shrimp/Turtle* dispute.<sup>56</sup>

#### 4 STATUS OF PRIVATE PARTIES' LOCUS STANDI UNDER THE TREATY REGIMES OF COMESA, EAC AND SADC

In sharp contrast to the position under the WTO, the African regional economic communities (RECs) have granted private parties access before their courts. Notably, these RECs are amongst the 8 recognised by the African Union to facilitate regional economic integration. The COMESA Treaty granted access to natural and legal persons in 1991;<sup>57</sup> the EAC Treaty, which is more recent than the COMESA Treaty, granted them access in 1999;<sup>58</sup> and the SADC Treaty initially granted access through a protocol to its existing Treaty in 2000.<sup>59</sup>

Curiously, the DSBs of the three RECs lack jurisdiction to determine disputes involving private parties. This was confirmed in the case of *Malawi Mobile Limited v The Government of Malawi and Malawi Communications Regulatory Authority (MACRA)*<sup>60</sup> where the First Instance Division (FID) of the COMESA Court of Justice (CCOJ) upheld a preliminary application to remove MACRA as a party on the ground that it is not a member state and therefore it could not be cited as a Respondent. Lack of jurisdiction over disputes between private parties appears to be a glaring omission, as community law inherently involves both state and private commercial activities. A separate dispute settlement system exclusively for private parties under the WTO has also been proposed.<sup>61</sup> Notwithstanding this, the prospects of private parties' access to the DSBs of the three RECs have been progressively strengthened. Judicial tribunals of the three RECs do allow private parties' access, subject to varying preconditions.<sup>62</sup>

##### 4.1 The COMESA Court of Justice

Historically, there has been reluctance to grant private parties access to international tribunals, and the DSBs of the three RECs have been no different in this regard.<sup>63</sup> The CCOJ granted individuals access to lodge references before it in 1991, under Articles 26 and 27 of the COMESA

53 Trade Policy Training Centre in Africa “Use of WTO Dispute Settlement System”

54 WTO *European Communities-Regime for the Importation, Sale and Distribution of Bananas: Complaint by the United States, Report of the Panel* (WT/DS27/R/USA May 22, 1997) [https://www.wto.org/english/tratop\\_e/dispu\\_e/27rhnd.pdf](https://www.wto.org/english/tratop_e/dispu_e/27rhnd.pdf) (accessed 07-10-2024).

55 De Brabandere “NGOs and the Public Interest: The Legality and Rationale of Amicus Curiae Interventions in International Economic and Investment Disputes” *CJIL* 2011 <http://chicagounbound.uchicago.edu/cjil/vol12/iss1/5> (accessed 15-09-2024).

56 WTO *United States: Import Prohibition of Certain Shrimp and Shrimp Products* (WT/DS58/R May 15, 1998).

57 Article 26 of the Treaty.

58 Article 30 of the Treaty.

59 Article 14 of the Protocol.

60 Reference No. 1 of 2012.

61 Vicuna “Individuals and Non State Entities” 2001.

62 Article 26 COMESA Treaty; Art 30 of EAC Treaty; Art 15(2) of the SADC Protocol.

63 Onoria “*Locus Standi* of Individuals and Non-State Entities Before Regional Economic Integration Judicial Bodies in Africa” 2010 *AJICL* 143.

Treaty. Private parties' access before the CCOJ was confirmed in the case of *Polytol Paints and Adhesives Manufacturers Co. Ltd v The Republic of Mauritius*.<sup>64</sup> The CCOJ dismissed the Respondent State's preliminary objection to the effect that the Applicant and legal persons generally lack *locus standi* to enforce Treaty provisions, and it proceeded to assume jurisdiction.

Under Article 26 of the COMESA Treaty, access by natural and legal persons is limited to claims about unlawful acts and infringement of Treaty provisions. This was confirmed in the recent case of *The Government of Malawi v Malawi Mobile Ltd*,<sup>65</sup> where the Government of Malawi challenged the Court's jurisdiction to hear the reference lodged by Malawi Mobile Limited. One of the grounds for the jurisdictional objection was that the subject matter of the reference did not relate to a violation of any Treaty provision as required by Article 26 of the COMESA Treaty; hence, the Applicant lacked *locus standi* before the Court. The Reference, premised on the alleged unlawful termination of the mobile licence agreement and illegal interference with its termination, was found to lack a basis under Treaty law and was consequently dismissed.

Individuals under the COMESA Treaty also have standing before the Court in employment disputes. These disputes pertain to the terms and conditions of employment of individual employees of COMESA organs.<sup>66</sup> The CCOJ confirmed its jurisdiction to make determinations in cases involving labour-related matters in the case of *Eastern and Southern African Trade and Development Bank v Yvonne Nyagamukenga*.<sup>67</sup> The majority of disputes before the CCOJ have been employment-related rather than trade-related.

It is noteworthy that under both the COMESA and the EAC Treaties, *locus standi* is granted to residents of the Common Market and the Community, respectively. Therefore, references can be lodged by individuals who are not necessarily citizens of the Member States, as applicants need only be residents of the Common Market or the Community.<sup>68</sup> Individuals' access is, however, subject to the general international law principle of exhaustion of local remedies.

In the case of *Republic of Kenya v Coastal Aquaculture*,<sup>69</sup> the CCOJ dismissed the Reference because the Applicant had not satisfied the admissibility criterion of exhaustion of domestic remedies. However, it agreed that private individuals had standing before the Court. On the other hand, the CCOJ in the case of *Polytol Paints and Adhesives Manufacturers Co. Ltd v The Republic of Mauritius*<sup>70</sup> the CCOJ took a more relaxed approach and held that even though the Applicant had not exhausted all administrative remedies that were available in Mauritius, the rule of exhaustion of domestic remedies could not apply where an Applicant could not get a sufficient remedy from the highest national court. According to Gathi, the Court may have taken a more relaxed approach in the latter case because it was a trade dispute. In contrast, the *Acquaculture* case was a direct challenge to state sovereignty over land acquisition.<sup>71</sup>

In *Itelsoimac v Rwanda Civil Aviation Authority*,<sup>72</sup> the FID of the CCOJ held that the Applicant had not exhausted local remedies. The Court further held that the Applicant needed to provide evidence of the steps he had taken to exhaust the said remedies locally, and of the steps the State

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64 Reference No. 1 of 2012.

65 CCOJ Appeal No. 1 of 2016.

66 Article 27 of the COMESA Treaty.

67 Reference No. 3 of 2009.

68 Onoria 2010 *AJICL* 143.

69 Reference No. 3 of 2001 (2003) 1 EA 271.

70 Reference No. 1 of 2012.

71 Ghathii "Sub-Regional Court or Employment Tribunal, The Legacy and Legitimacy of the COMESA Court of Justice" 2015 [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2611362](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2611362) (accessed 14-10-2024).

72 Reference No.1 of 2009.

had taken to prevent him from availing himself of such remedies.

The requirement to exhaust local remedies is, however, only in respect of references presented against Member States and not Organs of the Common Market.<sup>73</sup> This was confirmed in the recent CCOJ ruling in *Malawi Mobile Limited v COMESA Council of Ministers and COMESA Secretary General*.<sup>74</sup> In this case, the Respondents sought dismissal of the Applicant's reference on the alleged lack of non-exhaustion of local remedies. However, the FID of the CCOJ dismissed the objection. It held that the express terms of the proviso to Article 26 of the COMESA treaty relieve applicants from the burden of exhaustion of domestic remedies in references against the Council of Ministers.

A survey of the CCOJ's decisions clearly reveals acceptance of private parties' right of access as legitimate. However, access by private parties is conditioned upon exhaustion of domestic remedies. Both the SADC and the AfCFTA, however, completely foreclose private parties' access, a position at variance with that under the COMESA Treaty.

#### 4 2 The EAC Court of Justice (EACJ)

The EAC Treaty of 1999 granted individuals direct access under Article 30. Similar to the CCOJ, *locus standi* is given to residents of the Community. As such, individual litigants need not be citizens. *Prima facie*, persons holding temporary and permanent residency permits may have access to the East Africa Community Court of Justice (EACJ). However, the residency requirement has not yet been the subject of contentious litigation under either the EAC or COMESA treaty regimes. The absence of a definition of the term "resident" in the treaty provisions may lead to controversy in the future.<sup>75</sup>

Pursuant to Article 27 of the EAC Treaty, just as in the case with COMESA and SADC, the references lodged by any individuals have to involve the interpretation and application of the Treaty and its instruments. Furthermore, as with individuals before the CCOJ, individual litigants before the EACJ need not demonstrate that they have an interest in the matter that is the subject of the reference. In *Sitenda Sebalu v EAC Secretary General and Attorney General of Uganda*<sup>76</sup> it was held that Article 30 of the EAC Treaty did not require a claimant to show a special right or interest that was infringed and/or damage that was suffered as a consequence of the matter complained of in the Reference. The Court held that it was enough to show that the act complained of infringed a Treaty provision. This is key to ensuring individuals' access, as it also enables them to join as *amici curiae* (friends of the court). In the case of *East African Law Society and Others v Secretary General of EAC*<sup>77</sup> the EACJ held that the members of the bar had *locus standi*, as they were parties interested in the observance of the EAC Treaty. In the case of *Professor Anyang' Nyong'o v Attorney General of Kenya*,<sup>78</sup> the Law Society was similarly granted leave to join the proceedings as a friend of the Court.

Unlike the CCOJ and the SADC Tribunal, individuals' access to the EACJ is not subject to exhaustion of domestic remedies. In fact, the Treaty is silent on this aspect. The lack of any provision in the EAC Treaty about exhaustion of local remedies has led to a liberal interpretation in favour of direct individual access. The EACJ has held that the rule on exhaustion of local remedies is inapplicable to references by individuals. In the *Prof Anyang' Nyong'o* case,<sup>79</sup>

73 Article 26 of the COMESA Treaty.

74 Reference No.1 of 2017.

75 Article 2 COMESA Treaty; Art 2 EAC Treaty.

76 Reference No. 8 of 2012.

77 Reference No. 1 of 2011.

78 Reference No. 1 of 2006.

79 *Ibid.*

the EACOG held that Article 30 of the EAC Treaty conferred direct access to individuals to challenge the legality of an act and/or conduct of Member States. Further, the Court opined that such a right to direct access means there is no limitation or precondition, such as exhaustion of local remedies.

Although individuals' access under the EAC Treaty is unfettered by exhaustion of local remedies, individual references are still subject to observance of a two-month limitation period. The position under the SADC and COMESA treaty frameworks differs as they lack limitation-period clauses. Initially, there was no time limit; however, pursuant to the 2007 amendment to the EAC Treaty, inserted by Article 30(2), individuals are now subject to stringent time limits. Although individuals<sup>80</sup>, Member States<sup>81</sup>, the Secretary General<sup>82</sup> and Community Employees<sup>83</sup> all have access to the EACOG, only individuals are required to file their complaint with the Court within two months of the cause of action arising. Alternatively, the reference may be commenced within two months from the date the grounds for the reference came to the Applicant's knowledge. Regarding the latter, the onus is on the Applicant to demonstrate that the complained-of action came to his knowledge within the stipulated time period.<sup>84</sup>

In the case of *IMLU v Attorney General of Kenya*,<sup>85</sup> the acts complained of by the Applicant occurred in 2008, and the reference was filed in 2010. When called upon to make a ruling on the Respondent's preliminary objection based on Article 30(2) of the EAC Treaty, the FID of the EACOG held that the Government's continued failure to remedy the situation complained of could not be limited by "strict mathematical computation of time." The FID of the EACOG followed the *IMLU* case in the matter of *Omar Awadh v Attorney General of Uganda*,<sup>86</sup> and the case *Rugumba v AG of Rwanda*.<sup>87</sup>

All three decisions that took a liberal view of treaty clauses governing limitation periods were appealed. In the *IMLU* case, the Appellate Division (AD) of the EACOG held that the Court had no jurisdiction to extend time under Article 30(2) of the EAC Treaty.<sup>88</sup> In the *Rugumba* case, however, the AD upheld the FID's decision on the ground that the acts complained of were, in the Court's opinion, continuing acts of violation.<sup>89</sup> In the *Omar Awadh* case, however, the AD held that the EACOG had no jurisdiction to extend time.<sup>90</sup> This restrictive approach to the interpretation and application of Article 30(2) of the EAC Treaty was further confirmed in the recent case of *Steven Dennis v AG of Burundi*.<sup>91</sup> In this case, the EACOG held that the Court lacked the power to extend time. The Court, however, conceded that the said provision was indeed discriminatory and thus called upon all relevant organs in the EAC to take appropriate

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80 Article 30(1) of the EAC Treaty.

81 Article 28 of the EAC Treaty.

82 Article 29 of the EAC Treaty.

83 Article 31 of the EAC Treaty.

84 Article 30(2) of the EAC Treaty.

85 Reference No. 2 of 2012.

86 Reference No. 4 of 2011.

87 Reference No. 8 of 2010.

88 *Attorney General of Kenya v IMLU* Appeal No. 1 of 2011.

89 *Attorney General of Rwanda v Rugumba* Appeal No.1 of 2010.

90 *Attorney General of Uganda v Omar Awadh* Appeal No. 2 of 2012.

91 Reference No. 3 of 2016.

legislative action.

The EACOJ's stance on time limits for references by individuals is a clear obstacle to access to justice, as illustrated by these cases.<sup>92</sup> The inclusion of the time period under Article 30(2) of the EAC Treaty in 2007 unduly restricts individuals' access. The Court has compounded this policy by adopting a restrictive interpretative approach, especially given that Article 4 of the EAC Treaty allows the EACOJ to extend time in procedural issues in cases before it.<sup>93</sup> Although limitation periods can indeed contribute to the stability and certainty of the international justice system by ensuring that claims are lodged before evidence dissolves and by reducing case backlogs, they can also be an impediment to access to justice. Therefore, a balance needs to be struck between individual access and the underlying policy considerations.

It is notable that both the EAC and COMESA dispute settlement architecture grant private parties access, subject to satisfying prerequisites such as compliance with the limitation period and exhaustion of domestic remedies, respectively. However, both the AfCFTA and SADC dispute settlement frameworks are oblivious to the merits of private parties' access, thereby leading to their closure. Thus, it is imperative to compare the state of private parties' access in other RECs so that lessons may be learnt on how the issue is regulated.

### 4 3 The SADC Tribunal

Individuals' access to the SADC Tribunal was provided for under the SADC Protocol signed on 7 August 2000. The Tribunal was, however, officially inaugurated on 18 November 2005,<sup>94</sup> and received its first case in 2007.<sup>95</sup> It empowered the SADC Tribunal to have jurisdiction over disputes between states and between individuals and Member States.<sup>96</sup> Following the judgment in the *Campbell* case,<sup>97</sup> a new Protocol was adopted at the 34th Summit of SADC Heads of State in 2014 to reconstitute the Tribunal with limited jurisdiction. Private parties no longer have access to the SADC Tribunal. However, the Protocol has still not come into force. Therefore, the restructured SADC Tribunal remains inoperative.<sup>98</sup>

The SADC Tribunal's jurisdiction over disputes was not limited by nationality or residency requirements, as is the case under the COMESA and EAC Treaties. Individuals who were not nationals or residents of SADC Member States could commence actions before the defunct tribunal.<sup>99</sup> Under the SADC Protocol of 2000,<sup>100</sup> references by individuals involve the application and interpretation of the SADC Treaty; this position also obtains under the COMESA and EAC

92 Possi "The Draconian Time Limitation Clause against Private Litigants of East Africa Court of Justice: A Commentary on Steven Dennis Case" Aug 2017 <http://ssrn.com/abstract=3017160> (accessed 15-10-2024).

93 *Ibid.*

94 Birhanu "Southern African Development Community Tribunal" Feb 2016 [https://www.mpi.lu/fileadmin/mpi/medien/research/MPEiPro/2496\\_Southern\\_African\\_Development\\_Community\\_Tribunal\\_SADC\\_EiPro\\_Sample\\_Entry.pdf](https://www.mpi.lu/fileadmin/mpi/medien/research/MPEiPro/2496_Southern_African_Development_Community_Tribunal_SADC_EiPro_Sample_Entry.pdf) (accessed 05-08-2024).

95 *Ernest Francis Mtingwi v SADC Secretariat* Case No. SADC (T) 1/2007.

96 Article 4 of the SADC Protocol.

97 Case No. SADC (T) 8/2008 (Unreported).

98 Swart "A House of Justice for Africa: Resurrecting the SADC Tribunal" Apr 2018 <https://www.brookings.edu/blog/africa-in-focus/2018/04/02/a-house-of-justice-for-africa-resurrecting-the-sadc-tribunal/> (accessed 05-08-2024).

99 *Ibid.*

100 Article 14 of the SADC Protocol.

treaties.

Individuals could lodge a reference only against a Member State, not another individual.<sup>101</sup> This was confirmed in the case of *Albert Fungai Mutze v Mike Campbell*.<sup>102</sup> This position was, however, relaxed in a later decision in the case of *United People's Party of Zimbabwe v SADC*,<sup>103</sup> where the Tribunal said that even though a reference was lodged against an individual by a fellow individual, the Applicant would still have standing so long as a Member State was one of the co-respondents. In that case, the Republic of Zimbabwe was the sixth Respondent.

However, unlike the EAC and COMESA, under SADC, an individual litigant must demonstrate an interest in a matter to have *locus standi* before the Tribunal. This position was confirmed in the *Chirinda case*.<sup>104</sup> The Applicants in that case sought to intervene in a reference filed in the *Campbell case*, but were found to have no interest; their application was therefore dismissed.

Similar to the CCOJ, an individual could commence a reference before the SADC Tribunal only after exhausting local remedies.<sup>105</sup> The requirement to exhaust local remedies prior to commencing a reference before the Tribunal, however, applied only to cases against Member States. In the case of *Mike Campbell v Republic of Zimbabwe*,<sup>106</sup> the Applicants lodged a reference before the SADC Tribunal challenging the legality of the acquisition of their farmlands without compensation. The Government of Zimbabwe argued that the Applicant had not satisfied the admissibility element of exhaustion of domestic remedies. Whilst agreeing that individuals could file a reference before the Tribunal only after exhausting local remedies, the SADC Tribunal held that the local remedies rule was inapplicable in this case because effective remedies were not available in Zimbabwe. This is similar to the position adopted by the CCOJ in *Polytol Paints and Adhesives Manufacturers Co. Ltd v The Republic of Mauritius*.<sup>107</sup>

Aggrieved by the SADC Tribunal's decision in the *Mike Campbell case*, Zimbabwe retaliated and championed initiatives that led to its suspension in 2010 and its technical disbandment in 2014. The SADC Authority declined to appoint new judges or to renew the tenure of the serving judicial officers, rendering it inquorate and incapable of hearing cases. The protests by the Tribunal's judges against such illegal encroachment on its space were brushed aside. Thereafter, the SADC Summit, at its session on 18 August 2014, adopted a new protocol to reconstitute the SADC Tribunal; however, it has not come into force.<sup>108</sup> The new protocol under Article 33 removes individuals' right of access to the Tribunal, as it gives the Tribunal jurisdiction only to adjudicate disputes between Member States.<sup>109</sup>

At the time of its purported dissolution in 2014, the Tribunal had adjudicated 18 disputes, none of which were between Member States. Instead, these disputes involved individuals against SADC itself, individuals against governments and private companies against national governments.<sup>110</sup> The removal of individuals' access in the promulgated Protocol is in direct

101 Article 4 of the SADC Protocol.

102 Case No. SADC (T) 8/2008 (Unreported).

103 Case No. SADC (T) 12/2008 (Unreported) 6–7.

104 *Mike Campbell v Zimbabwe (Interim Measures) Case* no SADC (T) No. 09/2008.

105 Article 5(2) of the SADC Protocol 2000.

106 SADC (T) Case No. 2/2007.

107 Reference No. 1 of 2012.

108 The protocol is still not in force; it has been signed by 8 of the 15 Member States, however, it can only enter into force if ratified by two-thirds of the Member States, which is ten Member States.

109 Konrad Adenauer Stiftung "Statement of the Participants in a Round Table on the Restoration of the SADC Tribunal Held at the Centre for Human Rights" <http://www.kas.de/suedafrika/en/publications/39069/> (accessed 04-09-2024).

110 Jonas "Neutralising the SADC Tribunal by Blocking Individuals' Access to the Tribunal" 2013 *HRLR* 294.

violation of the regional courts' objectives to provide access to justice and practical legal remedies where these are unavailable or inadequate within the municipal regime. Once it comes into force, the new protocol will entail that individuals' access will only be available against those Member States of SADC, such as Malawi, Zambia, Zimbabwe, and Eswatini, that are also members of COMESA, which guarantee individuals' access to their courts.<sup>111</sup> Further, it will render the Tribunal almost defunct, as all the cases lodged were initiated by individuals rather than Member States.<sup>112</sup> Notably, excluding individuals also creates an anomaly for some Member States that are members of other RECs. For instance, Eswatini, Malawi, Tanzania, and Zambia have accepted individuals' access under the EAC and COMESA treaty regimes, respectively. Yet they are also parties to a SADC treaty regime that may deny individuals access.<sup>113</sup> The removal of individuals' access in the new Protocol entailed denying employees of SADC access to justice, as they would have no legal remedies against their employer for employment disputes. Therefore, to address this challenge, the SADC Summit mandated the establishment of an *ad hoc* administrative Tribunal to adjudicate over labour disputes. However, this arrangement does not amount to an inclusive solution and remains discriminatory because *locus standi* before the Tribunal is granted only to employees or former employees.<sup>114</sup>

#### 4 4 Interventions in SADC Municipal Courts to Reinstate the Tribunal

Multiple calls have been made by Civil Society organisations (CSOs) to the SADC to restore the SADC Tribunal to no avail.<sup>115</sup> The SADC national courts have condemned the adoption of the 2014 Tribunal Protocol. These include: the *Ordem dos Advogados de Moçambique v Republica de Moçambique, Recurso de Apelação*;<sup>116</sup> the *Law Society of South Africa (LSSA) v President of the Republic of South Africa (The Law Society of South Africa case)*<sup>117</sup> and the *Tanganyika Law Society v Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania (The Tanganyika Law Society case)*.<sup>118</sup>

##### 4 4 1 *The Law Society of South Africa case*

In this case, the applicants challenged the Presidential decision to sign the 2014 Tribunal Protocol, which restricts the SADC Tribunal's jurisdiction to hear inter-state matters only, thereby eroding the individuals' access to the SADC Tribunal.<sup>119</sup> The Constitutional Court held that the President acted in a manner that undermined South Africa's international law obligations under the SADC Treaty.<sup>120</sup> The Court observed that the conduct of the President purported to frustrate the right

111 Fritz "Up in Smoke, the SADC Tribunal and Rule of Law in the Region" Sep 2012 <http://www.polity.org.za/article/up-in-smoke-the-sadc-tribunal-and-rule-of-law-in-the-region-2012-09-21> (accessed 12-08-2024).

112 See, for example, the case of *Ethiopia v Eritrea* Number 1 of 1999 and the fact that that has been the only inter-state dispute in the three RECs.

113 Fritz "Up in Smoke" Sep 2012.

114 Konrad Adenauer Stiftung "Statement of the Participants".

115 The Coalition for an Effective SADC Tribunal "Coalition for an Effective SADC Tribunal Calls on Heads of State to Reinstating the SADC Tribunal" <https://www.southernafricalitigationcentre.org/2015/08/15/coalition-for-an-effective-sadc-tribunal-calls-on-heads-of-state-to-reinstating-the-sadc-tribunal/> (accessed 12-10-2024).

116 No. 26/2016 *decidido pelo Acórdão* No. 74/2016-P (*Acórdão do Tribunal Administrativo de Moçambique*).

117 2018 ZACC 51 at para 105 (*Law Society*).

118 Cause No. 23 of 2014 (Judgment delivered on 6 Jun 2019) (*Tanganyika Law Society*).

119 Paragraph 1 of the Applicants' Heads of Arguments (Heads of Arguments). Available at <http://www.saflii.org/za/cases/ZACC/2018/51hoa.pdf> (accessed 23-10-2024).

120 *Law Society* paras 53–55.

to access to justice.<sup>121</sup> The Court concluded that the President’s decision and participation in the events leading to the closure of the Tribunal were unconstitutional, unlawful and irrational.<sup>209</sup> It ordered the President to withdraw his signature to the 2014 Tribunal Protocol.<sup>122</sup> The decision led to the withdrawal of the signature.<sup>123</sup>

#### 4 4 2 *The Tanganyika Law Society case*

This was an application launched before the Tanzania High Court challenging the actions of the respondents in suspending the SADC Tribunal on the basis that the respondents violated constitutional and international human rights provisions contained in the Constitution of the United Republic of Tanzania (Tanzania Constitution),<sup>124</sup> the SADC Treaty, the African Charter and the Universal Declaration. As in the *LSSA case*, the gist of the matter was the right of access to justice and the principles of democracy, human rights and the rule of law as provided for in article 4(c) of the SADC Treaty.<sup>125</sup> The court observed that it is incorrect to say that individuals’ access was not permitted in the Tribunal, as the 2014 Tribunal Protocol never repealed the 2000 Tribunal Protocol.<sup>126</sup> It, however, held that the suspension of the Tribunal amounted to the violation of the right of access to justice.<sup>127</sup> The court proposed that the Government of Tanzania reconsider its conduct and participation in the suspension of the Tribunal.<sup>128</sup> The court further opened the door to entertain any matters arising from the SADC Treaty that may be referred to it by the citizens of Tanzania, while the suspension of the Tribunal lasts.<sup>129</sup>

Unlike the Constitutional Court of South Africa, the court declined to order the government to withdraw its signature from the new Protocol. It left the matter to the Executive’s discretion, in accordance with the principle of the separation of powers.<sup>130</sup> These interventions by professional associations expose the growing level of dissatisfaction with the status quo of dispute settlement arrangements under SADC. On their part, municipal courts have progressively resolved disputes in favour of granting access to private parties. Domestic judicial pronouncements have collectively upheld the initial dispute settlement framework that allowed private parties access.

121 *Ibid* para 77. At para 81, Mogoeng CJ states as follows: “Through his [President] actions, we made common cause with other Member States in the region to deprive South Africans and citizens from other SADC countries of access to justice, even in circumstances where domestic courts lack the jurisdiction to entertain human rights and rule of law-related individual disputes.”

122 *Law Society* para 94.

123 SADC Summit “Communique on the 39th Ordinary Summit of the Heads of State and Government of the Southern African Development Community (SADC), held at Julius Nyerere International Convention Centre in Dar es Salaam, United Republic of Tanzania, 17–18 Aug 2019” para 20 [https://www.sadc.int/files/1915/6614/8772/Communique\\_of\\_the\\_39th\\_SADC\\_Summit-English.pdf](https://www.sadc.int/files/1915/6614/8772/Communique_of_the_39th_SADC_Summit-English.pdf) (accessed 23-10-2024).

124 1977 (Cap. 2 RE 2002) as amended.

125 *Tanganyika Law Society* para 15.

126 *Ibid* 26.

127 *Ibid* 44.

128 *Ibid* 50.

129 *Ibid* 51.

130 *Ibid*.

## 5 RATIONALE FOR PRIVATE PARTIES' ACCESS TO INTERNATIONAL JUDICIAL BODIES

Private parties are the leading actors in international trade and an essential component that promotes economic integration.<sup>131</sup> Non-state actors and private economic operators bear the brunt of regulatory government policies and measures in the states where they operate, and they have shown a greater appetite to challenge digressions.<sup>132</sup>

A closed dispute-resolution system risks undermining popular support, thereby weakening the legitimacy of the AfCFTA and SADC DSBs as the final arbiters of trade disputes in the region. Private parties' access to dispute resolution enhances the legitimacy and acceptance of communities' legal systems. The AfCFTA and SADC's continued viability and relevance will depend on the support of those they are intended to benefit: the people.<sup>133</sup>

The success of the AfCFTA will depend significantly on the effectiveness of its dispute settlement mechanisms. Uncertainty, non-compliance, non-transparency and a lack of remedies will undermine the benefits to be gained from any trade agreement.<sup>134</sup> Investors tend to shy away from markets where they lack legal protection and cannot enforce their rights.<sup>135</sup> An inclusive and robust dispute settlement system helps to instil business confidence in investors.

In addition, the private sector plays a role in international trade by facilitating and implementing trade through the provision of unique skill sets and expertise to assist governments in “[designing] and [implementing] trade facilitation reform.”<sup>136</sup> Individuals can mobilise for legal reforms, both domestically and at the community level, through litigation on community law issues.

Individuals' access to DSBs is imperative because it increases the number of cases that may be brought before regional tribunals; it provides a mode of offsetting states' traditional apathy in utilising the dispute settlement regimes as evidenced by the fact that only one interstate dispute has been registered in the three RECs since their inception in the case of *Ethiopia v Eritrea* which was eventually resolved through alternative dispute resolution.<sup>137</sup>

Individuals have an essential role to play in economic integration, not least in ensuring the implementation of community laws.<sup>138</sup> It potentially instils greater state accountability and compliance with community obligations since Governments are aware that breaches are likely to be contested.<sup>139</sup> In other words, individuals' access provides a layer of private enforcement to complement public enforcement mechanisms such as states' reporting on compliance or

131 Article 1(3) of the TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr 15 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1C, 1869 UNTS 299 (TRIPS Agreement).

132 *Polytol Paints & Adhesives Manufacturers Co. Ltd v The Republic of Mauritius* Reference Number 1 of 2012 CCJ where a private entity successfully sued a State party before the COMESA Court of Justice to enforce trade aspects of the COMESA Treaty; *Malawi Mobile Limited v Government of the Republic of Malawi* Reference Number 1 of 2015 CCJ; *Agillis v Republic of Mauritius* Reference Number 1 of 2019 CCJ; See also *British American Tobacco Uganda Limited v Attorney-General of Uganda* Reference Number 7 of 2017 EACJ.

133 Charnovitz “Participation of Non-Governmental Organizations in the World Trade Organization” [https://www.law.upenn.edu/journals/jil/articles/volume17/issue1/Charnovitz17U.Pa.J.Int%27IEcon.L.331\(1996\).pdf](https://www.law.upenn.edu/journals/jil/articles/volume17/issue1/Charnovitz17U.Pa.J.Int%27IEcon.L.331(1996).pdf) (accessed 10-08-2024).

134 Erasmus “Is the SADC Trade Regime a Rules-based System?” 2011 *SADCLJ* 17–34.

135 *Ibid.*

136 Global Alliance for Trade Facilitation “Engaging the Private Sector in Trade Facilitation Reform” (April 2020) Paper LL-01 4.

137 Reference No.1 of 1999.

138 Oppong *Legal Aspects* 165.

139 *Ibid.*

enforcement actions by community institutions.<sup>140</sup>

In addition, private parties' access provides a mechanism for bridging the disjunction between community and national legal systems. By complying with the mandatory principle of exhaustion of local remedies, individuals contribute to creating a nexus between municipal and community legal systems. It grants them a stake in the evolution of community law jurisprudence whilst creating a national constituency for community law.<sup>141</sup>

The rise in the relevance of regional community courts stems from their active use by private parties. The AfCFTA and SADC dispute settlement regimes are beneficial to private businesses.<sup>142</sup> Consequently, during the current nascent phase, the opportunity should be seized to expand overall access to the dispute settlement regime under the AfCFTA.<sup>143</sup> All these factors support a case for individuals' access as a fundamental element of a functioning and effective trade dispute judicial body.

## 6 REGULATION OF PRIVATE PARTIES' ACCESS

Needless to state, an extremely liberal position on *locus standi* would overburden the AfCFTA and SADC DSB in terms of treasury and time, due to the sheer volume of cases. Therefore, rules regulating access by private parties must be adopted, including requirements to exhaust domestic remedies and to comply with limitation period clauses.

The principle of exhaustion of domestic remedies is well entrenched in international law. The rule is desirable because it allows a state to redress an alleged wrong in municipal courts before its responsibility can be questioned at global level.<sup>144</sup> The rule assumes that there is an effective remedy in the national legal system.<sup>145</sup> The introduction of the exhaustion of domestic remedies principle, incidentally, also enhances judicial economy, ensuring that only deserving cases that have been fully ventilated in domestic courts reach the international DSBs.<sup>146</sup> Notably, the three RECs, save for the EAC, which grants direct access, maintain clauses that require prior litigation in domestic courts before their judicial organs assume jurisdiction.

Another way to regulate individuals' access is through time-limitation clauses. As a matter of public policy, limitations on actions are designed to encourage litigants to pursue actions with expedition. These also serve to protect respondents from having to defend stale claims, which may be compounded by difficulties in accessing evidence and witnesses. Limitations of action also promote peace of mind by avoiding disruption of settled expectations and by reducing uncertainty about the future. However, a restrictive interpretation of limitation period clauses

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140 *Ibid.*

141 *Ibid.*

142 See Gathii "The East African Court of Justice: Human Rights and Business Actors Compared" in Alter *et al.* (eds) *International Court Authority* (2018) 5981 (arguing that regional trade rules and dispute settlement mechanisms that have been transplanted from Europe has had little salience for business actors.); Iheduru "Organised Business and Regional Integration in Africa" 2015 *RIPE* 910.

143 See Tsighe "Can the Dispute Settlement Mechanism be a Crown Jewel of the African Continental Free Trade Area?" <http://www.afronomicslaw.org/2024/04/08/can-the-dispute-settlement-mechanism-be-a-crown-jewel-of-the-african-continental-free-trade-area/> (accessed 13-09-2025).

144 Trindade *The Application of the Rule of Exhaustion of Local Remedies in International Law* 1 ed (1983) 145.

145 Onoria 2010 *AJICL* 143.

146 See *Malawi Mobile Limited v Malawi Government and MACRA* Reference number 1 of 2015; CCOJ where the Malawi Government argued that assuming jurisdiction would inundate the CCOJ with References initiated by individuals.

may operate as an obstacle to access to justice.<sup>147</sup>

Commercial disputes also arise between private entities involved in cross-border trade. In such an eventuality, resort to national courts faces various challenges, including language barriers, conflict of laws, bureaucratic bottlenecks and cost constraints.<sup>148</sup> There is a need for a responsive, Afro-centric legal regime and a supranational dispute mechanism to address such challenges.

## 7 CONCLUSION

This paper constitutes a historical and comparative analysis of the dispute settlement regimes of AfCFTA and SADC, on the one hand, and those of COMESA and EAC on the other, about private parties' access to courts. It identifies the AfCFTA and SADC dispute settlement mechanism exclusion of direct access to non-state actors. However, the paper lauds the liberal stance adopted by some African RECs, such as EAC and COMESA, towards the *locus standi* of private parties, albeit with varying threshold requirements. Further, the article provides justificatory grounds for private parties' access and also proposes procedural prerequisites for attaining a modicum of its regulation. In essence, the paper assesses the dispute settlement architecture as an area in dire need of review to expand access for private parties.

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147 Possi "The Draconian Time Limitation Clause".

148 Onyema 2019 *World Trade Rev* 1–23.