Foreign judicial decisions

The Tanzanian Court of Appeal, functional immunity and the East African Development Bank

East African Development Bank (EADB) v Blueline Enterprises CACA 110/2009

Introduction

The period after the two world wars saw a sharp increase in the creation of international organisations with different objectives and purposes and with different capacities and structures. Africa was no exception; a number of treaties were signed creating new organisations all aimed at assisting development in Africa. A range of regional organisations were formed and each of these created additional international organisations to assist in the development of the region.

Just as these types of organisation are increasing in number, so too are they increasingly involved in different kinds of activity. An international organisation creates legal relationships and participates in commercial activity, some of which are enumerated in its constituent treaty and others not. Disputes arise as a result of its undertakings and in the resolution of these disputes – apart from the possibility of reference to arbitration – courts are often approached for assistance either by the international organisation itself or, for example, by the person with whom it contracted. This very often attracts a defence of immunity.

The immunities and privileges of international organisations only really emerged and have grown in importance since the Second World War. Before this immunities and privileges were generally addressed bi-laterally in headquarters agreements concluded with the relevant states where the headquarters of the organisation were situated.[1] The United Nations wanted

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[1]Petrovic 'Privileges and immunities of UN Specialized Agencies in field activity (preliminary paper)' paper presented at a conference entitled Practical Legal Problems of International Organizations: A Global Administrative Law Perspective on Public/Private Partnerships,

to prevent a fragmentation of privileges and immunities and the Convention on the Privileges and Immunities of the United Nations was adopted by the UN General Assembly in 1946 and came into operation in the same year.[2] A second treaty, the Convention on the Privileges and Immunities of the Specialized Agencies was adopted in 1947 and came into operation in 1948.[3] This convention was aimed at the immunities and privileges of the United Nations' specialised agencies and is divided into two parts: a general section dealing with standard clauses, and a second part consisting of a number of annexes dealing with each individual agency. It must be noted, however, that even though the main object was for international organisations to rely on the convention rather than to develop their own instruments to deal with these issues, there was no unanimity in the UN on this point.[4]

The main concern that is generally voiced when it comes to the regulation of the immunities of international organisations, is the need to protect them from outside influences, especially from interference from independent states where they cannot rely on the principle of reciprocity.[5] This was also found to be the reason for the insistence on absolute immunity from jurisdiction for states in the early parts of the nineteenth century before it became clear that the state, when it participates in the normal commercial sphere like an individual, does not have to be immune from jurisdiction. This resulted in the development of the principle of restrictive immunity of states which is currently followed in most jurisdictions.[6]

Today the doctrine of absolute state immunity is only applied in a limited number of instances[7] where the state's actions are considered to be *acta iure imperii,* while all *acta iure gestionis* do not attract immunity. The fact that state immunity has been restricted, has been recognised by the International Law Commission, the European Court for Human Rights, and numerous high courts throughout numerous jurisdictions. The reasons espoused for moving towards restricting state immunity are numerous.[8] It is often argued that state

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Accountability, and Human Rights 25 June 2009 at 3; Tauchmann *Die Immunität internationaler Organisationen gegenüber Zwangsvollstreckungsmaßnahmen* (2004) at 40.

[2] 1 *UNTS* 15.

[3] 33 *UNTS* 261.

[4] See Petrovic n 1 above at 5 n 6; Tauchmann n 1 above at 43.

[5] See, eg, Gaillard and Pingel Lenuzza 'International organisations and immunity from jurisdiction: To restrict or to bypass' (2002) *ICLQ* 1; Tauchmann n 1 above at 42.

[6] See Gaillard and Pingel Lenuzza n 5 above at 2; Schlemmer 'The enforcement of sovereign debt' in Giovanoli and Devos (eds) *International monetary and financial law: The global crisis* (2010) 418 428; Tauchmann n 1 above at 44 and the sources they cite.

[7] See *BVerfGE* 15,25; 16,27.

[8] See Schlemmer n 6 above at 428 433; Tauchmann n 1 above at 45 and the sources referred to. A successful defence of state immunity, however, does not mean that the act complained of was justified or can be excused, it only means that the act is not justiciable before a municipal court.

immunity also needs to be limited when it is necessary to provide effective legal protection which is regarded as a non-negotiable human right.[9] The European Court for Human Rights has, however, also found that a limitation of this right of access to the courts[10] may in some instances be justified. This aspect will be addressed presently.

It has been argued that the existence of absolute immunity for international organisations is part of customary international law. However, just as there are many voices that support this contention, there are also those who argue to the contrary thus making it clear that there is no international customary law rule supporting an absolute immunity for international organisations.[11]

Today, the conditions exist for the regime of immunity of international organisations, in turn, to undergo a major evolution. Just as the reinforcement of the authority of the state made its submission to the rule of law possible, so international organisations have achieved a sufficiently solid foundation in the international legal order for private persons to be able to have their disputes with those organisations heard, when this is required by the imperatives of justice.[12]

The Tanzanian Court of Appeal (in the judgment to be discussed) refers to the article by Gaillard and Pingel-Lenuzza,[13] but stops its 'analysis' or reading of the article just short of the sections that do not support its point of view, such as this one.

Functional immunity of international organisations

The main purpose of providing international organisations with immunity is to enable them to fulfil their functions without fear of interference.[14] The

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See also Rossi 'Staatenimmunität im europäischen Zivilprozessrecht' (2010) *Jahrbuch für Italienisches Recht* 47 at 56.

[9]Rossi n 8 above at 57; Tauchmann n 1 above at 208.

[10]Article 6 of the European Convention on Human Rights.

[11]See the sources, both pro and contra, referred to by Petrovic n 1 above and see also Reinisch *International organizations before national courts* (2000) at 258 262, 392 393; Herz 'International organizations in US courts: Reconsidering the anachronism of absolute immunity' (2008) *Suffolk Transnational Law Review* at 471; and Herz 'Rethinking international financial institution immunity' in Bradlow and Hunter (eds) *International financial institutions and international law* (2010) 137; Tauchmann n 1 above at 232.

[12]Gaillard and Pingel Lenuzza n 5 above at 2; see also Petrovic n 1 above at 6; Herz (2008) n 11 above at 471 and Herz (2010) n 11 above at 137.

[13]At par 28 of the judgment, albeit with an incorrect reference

[14]See Kloth *Immunities and the right of access to court under article 6 of the European Convention on Human Rights* (2010) 133; Reinisch and Wurm 'International financial institutions before national courts' in Bradlow and Hunter n 11 above at 103 136; Tauchmann n 1 above at 233 249; Reinisch n 11 above at 215; Muller *International organizations and their*

interference that one could expect is that of member states or other states attempting to influence policies or policy decisions of the organisation and who might be in a stronger position than the international organisation. The stronger position is based on the concept of state sovereignty to which, understandably, the international organisation cannot lay claim. Consequently, the international organisation cannot insist on reciprocity if it were to be subjected to the courts of one of its member states.

It has often been argued that international organisations enjoy *functional* immunity. According to Muller,[15] even though it is sometimes said that the jurisdictional immunity enjoyed by international organisations is more absolute than that of states, it would be more accurate to say that the jurisdictional immunity of international organisations is *different* from that of states and that this is mainly due to the functional aspect. He refers in this regard to the UN brief as *amicus curiae* in *Marvin R Broadbent et al v Organization of American States*[16] where the legal counsel stated that '[i]nternational organizations have a character completely different from that of States, and their requirements for and the legal basis of their immunity is consequently entirely different from that of States.' He went on to clarify to the court that the immunity of intergovernmental organisations is 'purely functional and designed to protect their ability to function independently of any government.'[17] The Charter of the United Nations[18] provides in article 105(1) that '[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities *as are necessary for the fulfilment of its purposes*'(my emphasis). That is, it only possesses immunity with regard to judicial interventions that may relate to its functions. With regard to all other conduct of the organisation, or any action it performs that does not fall within the ambit of its objectives and functions, together with any conduct that is *ultra vires* its competencies, the organisation is not entitled to the protection of immunity. It would be totally unacceptable for an international organisation focussed solely on the distribution of medical supplies or educational tools, to hide behind its purported functional immunity in a legal process resulting from its involvement in criminal activities like drug pushing or money laudering. The functional immunity of an organisation is necessary to ensure that it functions independently.[19] The immunity of an international organisation is

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host states: Aspects of their legal relationships (1995) at 149.

[15]Muller n 14 above at 153.

[16]628 F 2d 27 1980 DCC 8 January 1980.

[17]'Brief for the United Nations as *amicus curiae*' (1980) *United Juridical Yearbook* at 227 228.

[18]1 *UNTS* 993.

[19]For a more detailed analysis see the publications already referred to by Reinisch; Reinisch and Wurm n 14 above; Herz (2008) n 11 and Herz (2010) n 11 above; Tauchmann n 1 above at 232 and the sources they refer to; see also Tesfagabir 'The state of functional immunity of international organizations and their officials and why it should be streamlined' (2011) *Chinese*

thus never absolute, and the very first question to be answered when a claim to immunity is raised, should be what the objectives and functions of the organisation are and for any activity not covered by these, a reliance on its functional immunity cannot succeed in excluding the normal judicial processes.

Waiver of immunity

Waiver only becomes an issue once the answer to the preliminary question has indicated that the particular activity of the organisation does fall within its defined circle of functions and objectives. Only then can the possible waiver of the protection afforded under that shield arise.

Notwithstanding any principle that may exist regarding the granting of immunity to an international organisation, if that organisation waives its immunity the domestic courts will have jurisdiction over the particular dispute. The constituent documents of many international organisations contain express waivers of immunity, and one quite often sees that these waivers are fairly broad and clearly show that there is an amenability on the part of the organisation to subject itself to the domestic courts of its members in particular instances.[20]

An international organisation will often include an arbitration clause in a loan agreement or other type of contract it concludes with private individuals for those cases where disputes may arise. This provides a clear indication that it is agreeing to submit disputes to adjudication and is thus waiving its immunity. The Headquarters Agreement between Switzerland and the Bank for International Settlements makes express provision for this situation in article 4:

> 1 The Bank shall enjoy immunity from jurisdiction, save:
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> (a) to the extent that such immunity is formally waived in individual cases by the President, [the reference to the President of the Bank is no longer relevant as this position was abolished] the General Manager of the Bank, or their duly authorised representatives;
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> (b) in civil or commercial suits, arising from banking or financial transactions, initiated by contractual counterparties of the Bank, *except in those cases in which provision for arbitration has been or shall have been made ...*

Journal of International Law at 97 128.

[20] Article VII(3) of the Articles of Agreement of the IBRD provides a prime example; see also Reinisch n 11 above at 215: 'Treaty provisions on immunity protect international organisations against intervention by state organs. Where they renounce such protection in a contract, international organizations do not violate any right of the state but merely abandon their own right'. See also Tauchmann n 1 above at 139.

It has often been argued that immunity from jurisdiction and immunity from execution do not go hand in hand, and that a waiver of immunity from jurisdiction does not necessarily amount to a waiver of immunity from execution.[21] Elsewhere it has been argued that a waiver of immunity from jurisdiction is a representation to the other party that if a judgment is given against it, the instance waiving jurisdiction will abide by the terms of the judgment. If, after waiving its immunity, the 'losing' party then wishes to rely on the protection of immunity against execution of the court order, the successful litigant would be entitled to raise the defence of estoppel against such inconsistent behaviour.[22] Being granted legal satisfaction without being able to enforce the judgment in which is it stipulated is no satisfaction at all. Tauchmann argues that in those instances where the interests of the organisation would not be limited or negatively affected, one must balance the interests of the judgment creditor against those of the international organisation, and if it would be unjust to the judgment creditor, his interests should take preference over the immunity of the international organisation.[23] This formulation raises a sense of unease: if the conduct under investigation does not fall within the preliminary defined circle of the core functions of the organisation, it is unclear how the 'interest of the organisation would be limited or negatively influenced' by abiding by the judgment. Immunity should not even arise with regard to conduct falling outside of the defined inner circle of core activities.

The case law of the European Court of Human Rights relating to the immunity of international organisations has been applied by some national courts to the field of immunity from enforcement. 'The execution is considered by the European Court of Human Rights as an integral part of the trial and the right of access to a court, would be illusory if a definitive and obligatory judicial decision could not be enforced'.[24]

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[21] Tauchmann n 1 above at 139. She then also refers to those instances where the waiver of immunity of execution is required because if it is not given, it would lead to an unjust result (at 141).

[22] Schlemmer n 6 above at 442.

[23] Tauchmann n 1 above at 141.

[24] Wouters and Schmitt 'Challenging acts of other United Nations' organs, subsidiary organs, and officials' in Reinisch (ed) *Challenging acts of international organizations before national courts* (2010) at 100 and the sources they refer to; see also par 63 of *Immobiliare Saffi v Italy* Application No 22774/93 European Court of Human Rights, Judgment of 28 July 1999, where the European Court of Human Rights held as follows: 'the Court recalls that the right to a court would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6 § 1 should describe in detail procedural guarantees afforded to litigants proceedings that are fair, public and expeditious without protecting the implementation of judicial decisions. To construe Article 6 as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention. Execution of a judgment given by any court must therefore be regarded as an integral part of the 'trial' for the purposes of Article 6 (see the *Hornsby v Greece* [Application No 18357/91] judgment of 19 March 1997 *Reports of Judgments*

In *Hornsby v Greece* the court found that:

> ... according to its established case law, Article 6, paragraph 1 (art 6 1), secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal; in this way it embodies the 'right to a court', of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect .... However, that right would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6 par 1 (art 6 1) should describe in detail procedural guarantees afforded to litigants proceedings that are fair, public and expeditious without protecting the implementation of judicial decisions; to construe Article 6 (art 6) as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention.[25]

Petrovic[26] is of the opinion that an international organisation cannot waive its immunity against execution as

> a judgment against an international organization can only be executed against its budget. This budget is, however, financed by all Member States and the decision how to finance and spend the budget belongs to all of them. That is why the international organizations have to be very careful when lifting their immunity of jurisdiction. As the measures of execution cannot be implemented by the national authorities, the organizations have to make a voluntary commitment to execute the judgment each time where they decide to lift their immunity from legal process. Otherwise, their reputation could be put in question. Given that a judgment can substantively affect the budget, it may be prudent to involve several bodies of the organization in decisions regarding lifting of immunity.

When one reads further, however, it becomes clear that he feels that it should actually not be necessary to waive such an immunity as the international organisation should be giving effect to the judgment. This in essence renders the above statement unnecessary. If he is indeed of the opinion that judgments should be given effect to, then there is no logical reason (not even that which he gives as a reason) why an international organisation should not waive immunity from execution, and in essence why one cannot argue that a waiver of immunity from jurisdiction should not also include an automatic waiver of execution.[27]

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and Decisions 1997 II, p 510, § 40)'.

[25]Paragraph 40; see also Ehrenzeller *Der vorläufiger Rechtsschutz im internationalen Verhältnis: Grundlagen* (2005) 305 311 350 ('effektive Rechtsschutz' or 'effective protection').

[26]Petrovic n 1 above at 9.

[27]See, however, Tauchmann n 1 above at 225 where she investigates the role of art 6.1 of the European Convention on Human Rights and its application to enforcement of judgments and comes to the conclusion that it also applies to these instances.

The Tanzanian Court of Appeal and the East African Development Bank

The problems that can arise when one deals with an international organisation have once again been highlighted by a series of events relating to the East African Development Bank (EADB) and the resultant legal battles. A matter came before the Tanzanian Court of Appeal which addressed some of these issues within the framework of loan agreements between the EADB and a transport company and the status of the bank before national courts. Another issue relates to the enforcement of an arbitration award which was registered in terms of municipal law and thus obtained the status of a judgment and the resultant attempt to enforce that judgment.

The East African Development Bank

The EADB was initially established in 1967 and revived by the Treaty Amending and Re-enacting the Charter of the East African Development Bank in 1980. The objectives of the bank are enumerated in article 1 as follows:

> (a) to provide financial assistance to promote the development of the Member States;
> (b) to provide consulting, promotion, agency and other similar services for the region;
> (c) to give attention, in accordance with the operating principles contained in this Charter, to economic development in the Member States, in such fields as industry, tourism, agriculture, infra structure such as transport and telecommunications and similar or related fields of development;
> (d) to generally promote the development of the region;
> (e) to supplement the activities of the national development agencies of the Member States by joint financing operations, technical assistance and by the use of such agencies as channels for financing specific projects;
> (f) (*sic*) to co operate, within the terms of this Charter, with other institutions and organizations, public or private, national or international, which are interested in the development of the Member States; and
> (g) to undertake such other activities and provide such other services as may advance the objectives of the Bank.

Article 10 further provides for the methods of operation in terms of which the bank may provide finance or facilitate financing to 'any agency, entity or enterprise operating in the territories of Member States'. These include participation in or granting direct loans; the investment of funds, or 'guaranteeing, in whole or in part, loans made by other (*sic*) for industrial development'. To ensure that the bank functions on sound banking and business principles, article 13 contains a number of so-called 'operating principles' in terms of which the bank shall conduct its operations.

The Charter further contains provisions (termed 'terms and conditions' in art13) which should be included in loan agreements and guarantees. Provision

is also made for the charging of commissions and fees, and article 18 deals with 'defaults on loans and methods of meeting liabilities of the bank' and spells out exactly how and from which reserves its liabilities should be discharged – these all relate to liabilities in terms of borrowings or guarantees and contractual payments of interest etcetera (art 18(2)). Article 18(1) provides as follows:

> In cases of default on loans made, participated in or guaranteed by the Bank in its ordinary operations, the Bank *shall take such action as it considers appropriate to conserve its investment* including modification of the terms of the loan; other than any term as to the currency of repayment.[28]

On termination of its operations (which is provided for in art 39) the bank will cease all activities 'except those incidental to the orderly realization, conservation and preservation of its assets and the *settlement of its obligations*' (my emphasis). In a similar vein, article 40 provides that the liability of all members for uncalled subscriptions to its capital stock which 'shall continue until all claims of creditors ... shall have been discharged'. The article then continues to explain what the order of payment would be and thus gives a clear indication that the bank will be acting according to the generally accepted principles which are applied when a business entity is liquidated. Article 43 spells out the bank's legal status which is in essence a repetition of the corresponding article in the Charter of the United Nations:

> The Bank shall possess full juridical personality and in particular, full capacity:
> (a) to contract;
> (b) to acquire, and dispose of, immovable and movable property; and
> (c) to institute legal proceedings.'

For purposes of the current discussion, articles 44 and 45 are important:

Article 44 provides:

> JUDICIAL PROCEEDINGS
> 1 The Bank shall enjoy immunity from every form of legal process *except in cases arising out of exercise of its borrowing powers* when it may be used

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[28]Emphasis added. It is thus clear that the bank can take any action to ensure that its investment is conserved and that is not only limited to a modification of the loan agreement this provision does not make it impossible for the bank to take the borrower to court or to request its liquidation for instance. See for instance *Eastern African Development Bank v Ziwa Horticultural Exporter Limited* (High Court Misc Application no 1048 of 2000 arising from Companies Cause no 11 of 2000) (http://www.ulii.org/ug/cases/UGCommC/2000/8.html); and Wambugu 'Court gives EADB nod to seal deal on sale of Devani asset' *Business Daily* 2.08.2011 (http://www.businessdailyafrica.com/Court+gives+EADB+nod+to+seal+deal+on +sale+of+Devani+asset/ /539552/1211778/ /view/printVersion/ /91tsyqz/ /index.html (accessed 30 December 2011) as examples of instances where the bank has sued its lenders and thus subjected itself to the jurisdictions of local courts.

(*sic*) only in a court of competent jurisdiction in a Member State in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities.

2 *No action shall be brought against the Bank by members or persons acting for or deriving claims from members*. However, members shall have recourse to such special procedures for the settlement of disputes between the Bank and its members as may be prescribed in this Charter, in the regulations of the Bank or in contract entered into with the Bank (my emphasis).

In *Lutcher SA Cellulose e Papel v Inter American Development Bank,*[29] where the wording in the Inter American Development Bank's Articles of Agreement which contains provisions similar to those in this subsection was involved, the court held that '[p]rovision for suit *in any* member country where the bank has an office must have been designed to facilitate suit for some class other than creditors and bondholders, ie borrowers'. In discussing this aspect, Reinisch and Wurm[30] merely state that one can only speculate what other domestic courts would hold where jurisdictional immunity is granted save for actions involving the bank as a 'borrower' as we find in this article. The court in the *East African* case to be discussed, does not raise this issue at all, although similar reasoning might have led them to hold that the bank as lender should not be immune on the basis of the wording in article 44(2).

Article 45 provides:

IMMUNITY OF ASSETS

1 Property and other assets of the Bank, wheresoever located and by whomsoever held, shall be immune from interference, search, requisition, confiscation, expropriation or any other form of taking or foreclosure by executive or legislative or judicial or administrative action and premises used for the business of the Bank shall be immune from search provided that in *legal proceedings brought within the term of the Charter such immunity shall apply before delivery of a final judgment* against the Bank by the highest court of competent jurisdiction.

2 The Bank shall prevent its premises from becoming refuge for fugitives from justice, or for persons subject to extradition, or persons avoiding service of legal process or a judicial proceeding. (My emphasis. These provisions are almost identical to those found in the Charter of the Eastern and Southern African Trade and Development Bank.)

Provision is also made for waiver of immunities (art 51) and for submission of any disagreement between the bank and a member or former member to arbitration (art 54).

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[29]382 F 2d 454 (DC Cir 1967) 28 Mar 1966, 1967 ILR 183.
[30]Note 14 above at 124i.

The judgment

The judgment of the Court of Appeal of Tanzania in *East African Development Bank (EADB) v Blueline Enterprises*, is not one of the most inspiring judgments ever written. The way in which the judges arrive at their conclusion is curious, and the way in which the judgment is written even more so.

Rutakangwa J opens the judgment with the following statement: 'This assertion might appear banal. It is, nevertheless, worth repeating here. The East African Development Bank, the Eastern and Southern African Trade and Development Bank and the African Development Bank (the ADB), are **International Organizations**'.[31] This, indeed very strangely phrased opening statement to a judgment, might be understandable if one takes the political climate which developed as a result of the initial High Court decision into account.

It is very difficult, in fact impossible, to determine from the judgment the exact flow of events which eventually led to the current appeal. One must rely on newspaper reports over the years prior to the judgment in order to attempt to decipher the events that caused this case to be drawn out for over a decade. This sounds like judgment delayed is judgment denied if seen from the perspective of the claimant.

The respondent, Blueline, applied for a loan from the applicant (EADB) in 1989. The loan was to expand its road transport business and thus to partially finance the purchase of vehicles and equipment. The loan agreement was entered into in 1990.[32] This loan was supplemented by a second loan[33] and was to be paid back in thirty-six equal monthly instalments.[34] Blueline fell into arrears and the bank 'appointed a receiver-manager to seize 16 trucks and the operations of his (*sic*) firm'[35] Blueline opposed the appointment of the receiver-manager and the matter went to court in 1995. Because there was no

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[31]At par 1 of the judgment, emphasis in the original.

[32]Mungai 'East Africa: What lessons from Development Bank's legal drama in Dar?' *The East African* (8 March 2008) available at http://www.theeastafrican.co.ke/news/ /2558/874186/ /puk32yz/ /index.html (accessed 30 December 2011).

[33]In 1992 'East African Development Bank Annual Report 2010' at 89.

[34]Mworia 'EADB Blueline Ltd loan default case (*Another award monster lies in wait for Tanzanians)' available at http://lawrenceakiba.blogspot.com/2011/03/ eadb blueline ltd loan default case.html (accessed 14 April 2011).

[35]Kahoho 'How judges saved the East African Development Bank from collapsing' *Business Times* (27 January 2012) available at http://www.businesstimes.co.tz/index.php?option com content&view article&id 1743:how judges saved the east african development bank from collapsing &catid 1:latest news&Itemid 57 (accessed 27 January 2012). 'The Bank subsequently decided to invoke its powers under the Debentures by appointing a Receiver and Manager of the Borrower on 24 November 1995' 'East African Development Bank Annual Report 2010' at 89; see generally par 5 of the judgment.

progress made in court, the parties agreed to settle and have the matter resolved by arbitration.[36] The judgment itself merely states that the respondent petitioned for the submission of the dispute to arbitration and was awarded an *ex parte* court order restraining the appellant and the receiver-manager from taking over its business[37] Neither the judgment, nor any other report regarding the string of events, refers to the terms of the loan agreement apart from a passing reference to the debentures that were given as security[38]. However, as banks normally have standard form contracts in terms of which they issue loans, one may safely assume that this loan agreement would not have been any different from any other loan agreement entered into by the EADB. Working on this assumption, in the case of *Eastern African Development Bank v Ziwa Horticultural Exporter Limited,*[39]reference is made to the loan agreement between the parties which contained an arbitration clause and one therefore assumes that the Blueline agreement, too followed this route.

It was apparently agreed in court who the single arbitrator of choice would be (the former Chief Justice of Tanzania, Hon Francis Nyalali), and that if he was unable or unwilling to act in this capacity, the task would fall to ATH Mwakyusa. Again the matters get convoluted as neither the judgment (the judgment does not refer to Nyalali or an arbitration award by him) nor any of the newspaper reports gives any reliable account of what happened next:

> It was by such suit that the said firm obtained an ex parte order from Judge Simon Kaji, thereby restraining the bank's receiver manager from taking over, and running its business, till determination of the matter inter parties. After that, Judge Eustace Katiti heard the matter inter parties to the effect that the bank raised the issue of its absolute immunity. But the presiding judge opted to put lint into his ears and he deliberately closed his eyes to the bank's defence on the basis of having undertaken commercial transactions. The Katiti's decision led the parties to proceed with arbitration process, firstly, before former Chief Justice Francis Nyalali, who awarded that the bank be paid US $ 13,754,962.00. Lamba disputed the Nyalali's award that the court further appointed an alternate sole arbitrator, Dr. A. T. H. Mwakyusa. [The respondent pleaded before the court of appeal that the issue of immunity raised by the EADB *in casu* was *res judicata* since it was finally determined in Misc CC No 135/1995 before the High Court (31). This is the first reference to be found in the judgment to the issue of immunity.]
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> It was Dr. Mwakyusa, after hearing evidence of the parties, who so committed a great blunder of punishing the bank on August 31, 2005, to pay the

[36]Mungai n 32 above.
[37]At pars 6 and 32 of the judgment.
[38]At par 5 of the judgment.
[39]High Court Misc Application No 1048 of 2000 arising from Companies Cause No 11 of 2000 available at http://www.ulii.org/ug/cases/UGCommC/2000/8.html (accessed 31 Decemberr 2011).

> borrower a total sum of US $ 61,386,853.00 plus annual interests of 14 percent until final payment. His award was then registered by the High Court on 29th September, 2005. Notwithstanding, the bank was dissatisfied so it petitioned the lower court for setting aside the award on ground of misconduct on the part of the said arbitrator. Its petition was indeed dismissed on the basis of being lodged while time barred. It further appealed in vain to the Court of Appeal. Afterwards, the BEL started the execution process before Judge Shangwa of the High Court.
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> It was on September 25, 2006, when it applied to execute Mwakyusa's award to the extent of raising a garnishee order for US $ 68,546,653.00. The order was issued by the said judge in the absence of the bank. Nevertheless, the order moved the bank to file an application on 23rd November, 2006, seeking a declaration that the garnishee order was issued by the court in contravention of the Finance Act No. 13 of 2005. [40]

Arbitration apparently took place between the two parties and it was nowhere disputed that *in casu* the arbitration was consensual. In fact, it is stated that: 'Eventually the parties mutually consented to resolve their disputes through arbitration'.[41] The only thing that was apparently disputed was the validity of the arbitration award and perhaps also the validity of the appointment of the second sole arbitrator.The Annual Report of the EADB states the following:

> The Borrower then filed a petition in the High Court for it and the Bank to submit their dispute to arbitration. In the arbitration, the Bank claimed a sum of USD 13,754,962 which was due and outstanding from the Borrower as at 1 March 2001. In his award, the Arbitrator found in favour of Bank, and dismissed the Borrower's claim on the basis that it lacked legal merit. The Borrower successfully petitioned to have this award set aside and obtained an alternative award on 31 August 2005. ... Following this award, the Bank in November 2006 applied for an interim stay of execution of the award.[42]

According to the report in *The East African,* Justice Nyalali delivered his award 'on September 30, 2002 in which he dismissed Blueline's counter-claim but made no determination of the Bank's claim against Blueline'.[43] There are consequently two totally conflicting versions of the story. It seems as if the parties indeed went back to court (Blueline petitioned to have the award set aside and was successful) where the award was set aside, and the second (sole) arbitrator was appointed, apparently despite the bank's objections.[44] There is also reference (but not in the decision of the Court of Appeal) to an unsuccessful application on the part of the bank (in 2004) to have the appointment of the second sole arbitrator set aside.

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[40]Kahoho n 35 above.
[41]At par 6 of the judgment.
[42]'EADB Annual Report and Accounts 2010' at 89.
[43]Note 32 above.
[44]Mungai n 32 above.

A second arbitration ensued with one Mwakyusa (apparently an architect) as sole arbitrator. He gave an award of USD 61 386 853 *against* the bank (the reason for this award cannot be determined with certainty although it seems if one reads some of the newspaper reports, that it might have been damages based on the actions of the bank. What exactly these actions were – apart from the appointment of the receiver-manager – and why they might have caused these damages could not be determined). This award was then filed with the High Court in terms of section 12(2) of the Arbitration Act, and in terms of section 17(1) an 'award on a submission on being filed in the court in accordance with this Act shall, unless the court remits it to the reconsideration of the arbitrators or umpire or sets it aside, be enforceable as if it were a decree of the court'. The bank petitioned the High Court to set the arbitration award aside based on the apparent misconduct of the arbitrator. This petition was dismissed because it was lodged out of time.[45] In 2006 a garnishee order was issued against the bank's account at the Standard Chartered Bank.

It is only at this late stage when the respondent attempts to enforce the judgment, that the issue of immunity again comes into the equation.[46] The EAD Bank sought a declaration that the garnishee order '[had been] issued in contravention with (sic) the provisions of the Finance Act 13 of 2005'[47] and also that it should be set aside on the basis of another pending petition concerning the order. The judge in this instance came to the conclusion that the garnishee order contravened the provisions of the EADB Act 'as it [EADB] enjoyed absolute immunity in relation of all its assets and property against execution or interference'.[48] He continued and stated the following[49]:

> In my own interpretation of the amendment of the said provisions by the Finance Act No. 13 of 2005, S. 27 Article 45 Immunity of Assets, **the Applicant's money which is on its Account No 0109025071-00 at Standard Chartered Bank International House Branch Dar es Salaam which is a subject of the Garnishee Order is not a type of asset which is meant to be immune from interference.** Under those provisions, the type of assets which are meant to be immune from interference are **physical assets** of the Applicant Bank such as buildings, office equipments *(sic*), motor vehicles and computers but not money which is not physical asset. Money is [a] liquid asset, it stands as a medium of exchange of goods and services which is incapable of being immunized ... .

The reason the judge 'created' this exception is, according to the Court of Appeal, because 'any view contrary to this, would be fatal to the Respondent's

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[45] At par 6 of the judgment.
[46] The bank's annual report also does not allude to any earlier period where the issue of immunity was raised 'EADB Annual Report and Accounts 2008' at 77.
[47] At par 7 of the judgment.
[48] *Ibid*.
[49] As quoted by the Court of Appeal at par 8, emphasis in the original.

right as the latter would "be left with nothing to attach".'[50] It was thus held that the bank 'did not enjoy absolute immunity'.

The court of appeal rejected the argument that money held in a bank account cannot be attached (the issue of immunity will be dealt with shortly). The arguments advanced by both the High Court judge and the judge of the Court of Appeal are not examples of clear and logical thought, and do not provide this reader with a feeling of confidence that the judges were sufficiently acquainted with or fully understood the relevant legal principles.

It must be pointed out at this stage that notwithstanding the undertaking under oath by all government officials to abide by the rule of law, the fact that the garnishee order was issued caused a political upheaval and eventually led some of the EADB's shareholders (the African Development Bank and the PTA Bank) to lodge intervener applications because the ruling of the High Court *per* Shangwa J 'has had a direct and adverse effect on the immunity guaranteed'. These applications were 'struck out for being incompetent' but it is quite clear that the whole region was thrown into politically turmoil by the outcome of the High Court judgment.[51]It is also reported that on a political level measures were investigated to address the situation:

> The heads of state summit directed attorneys general of partner states to meet with EADB lawyers and EAC counsel by the end of this year and come up with a specific legal position on a way forward for EADB and Blueline company debt amounting to 137m/ .
>
> EAC secretary general Dr Richard Sezibera said the summit had directed the EADB to explore possibilities of making a reference to the East African Court of Justice on the matter, which had made the fate of the bank remain unknown for almost a year.
>
> He said regional leaders had asked the bank to appeal against the order of attachment made by the High Court of Tanzania. Sezibera also noted that so far, the council of ministers had initiated a bill that would protect EAC assets and its institutions and introduce it to the East African Legislative Assembly.[52]

The main issue on which the court of appeal focused its attention was the appellant's argument that 'it enjoys absolute immunity from judicial proceedings in relation to disputes arising from the exercise of its lending powers'[53] contrary to the respondent's contention that the granted immunity 'does not apply to

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[50] *Ibid*.

[51] Mworia 'Tanzanians will also be liable to pay anything up to US$129 million to Blueline' n 34 above.

[52] 'EAC leaders for salvaging EADB' *East Africa News Post* 5 Dec 2011 available at http://www.eastafricanewspost. com/index.php/east africa regional news/234 eac leaders for salvaging eadb (accessed 12 January 2012).

[53] At pars 12 and 32 of the judgment.

commercial transactions', and secondly that the case was *res judicata*. The court rightly rejected the respondent's argument that the bank enjoyed sovereign immunity and consequently that it enjoyed restricted immunity – in other words, that its position was exactly the same as that of a sovereign state and that the same exceptions to immunity should apply to it as to a sovereign state. It is trite that an international organisation is not sovereign and consequently enjoys no sovereign immunity. Even though the judge of appeal recognised this fact, he went into a long discussion of the development of the trend from absolute to restrictive immunity in the case of sovereign states.[54]

The court then quotes the following at paragraph 19:

> [they are] 'different legal institutions and distinguishable with respect to the fundamental grounds on which they are built and in regard to the extent to which the immunity is recognized'. See, for instance, FELICE MOREENSTERN (*sic*), in his 'Legal Problems of International Organizations', pp 5 10, and 'IMMUNITY OF INTERNATIONAL ORGANISATIONS AND ALTERNATIVE REMEDIES AGAINST THE UNITED NATIONS', by Dr Reinsich (*sic*), at a Seminar on State Immunity, held at the University of Vienna in 2006.

Although it is trite that states and international organisations are different, the court nevertheless found it necessary to quote authority, and unfortunately it chose a student assignment – written by Peter Neumann and not by Reinisch – to back up its argument. It is quite clear that the court did not appreciate the nature of the document (as a student assignment presented to his professor as part of his legal education at the University of Vienna – during what is in educational terms also known as a seminar but is not to be confused with a conference). Furthermore, even though the court refers to one of the sources that the student consulted – Morgenstern which is cited incorrectly by the court – it is a pity that it did not consult the very thorough work by Reinisch *International organizations before national courts* (2000) to which the student also refers. The judgment does not reveal that the court (or the respective legal counsel) undertook any independent research relating to this very important issue. The court might have gained additional insight into the nature of the international organisation with which it was confronted, as well as into the developments and debate surrounding the immunity – and more so the functional immunity – of international organisations had it undertaken credible research.

It is noteworthy that the court merely uses those sections in the essay (and other sources it later quotes as authority) which support its point of view, while disregarding other remarks which do not support its cause. Furthermore, no attempt is made to refute a number of convincing arguments raised. It is

[54] At pars 13 19 of the judgment.

also interesting that Reinisch too, refers to a different scope of immunity which generally applies in the case of international financial institutions:

> A different (restrictive) scope of immunity generally applies in the case of various international financial institutions. Their immunity from suit is generally more limited. Development banks, in particular, are usually not endowed with immunity concerning their lending operations. Here, the functionality rationale is more or less reversed. Because a general immunity from suit would decrease the creditworthiness of such an organization, immunity only applies in limited areas. A good example of such a limited immunity can be found in the IBRD's Articles of Agreement, which do not provide for the Bank's immunity as a matter of principle. Rather, they state in which country court actions against the Bank may be brought.[55]

The court makes no reference to the position of international financial institutions or that they are considered distinct from other international organisations.

The court's further exposition of the status and immunities of the international organisation and the authority it quotes as support is not very lucid. With reference to the agreements establishing international organisations, the court remarks that these agreements

> granting each one of them specific privileges and, in most cases, absolute immunities from judicial, executive, legislative, administrative, etc, processes. This emanated from the recognition by sovereign states of the fact that 'the attribution of these priviliges (*sic*) and immunities ... is an essential means of ensuring the proper functioning of such organizations free from the unilateral interference by individual governments.[56]

As support for this statement, it refers to *Beer und Regan v Germany,*[57] and *Waite and Kennedy*.[58] The statement cited appears in paragraph 63 of the *Waite* case. However, the European Court of Human Rights did not stop there, it continued in paragraph 68 to hold that:

> [f]or the Court, a material factor in determining whether granting […] immunity from […] jurisdiction is permissible is whether the applicants had available to them *reasonable alternative means* to protect effectively their rights under the Convention (emphasis added).[59]

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[55]Reinisch 'Privileges and immunities' in Klabbers and Wallendahl (eds) *Research handbook on the law of international organizations* (2011) at 132, 138.
[56]At par 2 of the judgment.
[57]Application No 28934/94 European Court of Human Rights 18 Feb 1999, 1999 ECHR 6.
[58]Application No 26083/94 European Court of Human Rights 18 Feb 1999, 1999 ECHR 13.
[59]The reference to the Convention is to art 6(1) of the European Convention on Human Rights which provide that '[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' European Convention for the

The European Court of Human Rights clearly expressed the view that the right of access to courts (to the extent that it forms part of customary human rights law) may place international organisations '*under a duty to provide such access* in cases of claims brought against them; should they fail to do so, they may encounter difficulties in insisting on their immunity from suit in national courts'.[60] In both the *Beer* and *Waite* cases, reasonable alternative means were available and the court thus granted immunity. The so-called 'alternative means test' according to Tomonori[61] 'is based on the notion that 'the transfer of powers to an international organization is not incompatible with the [ECHR] *provided that within that organization fundamental rights will receive an equivalent protection*.'

Is it not remarkable that the court *in casu* referred to these important cases but chose to ignore the most important part of the judgments which have a direct bearing on the position of the respondent in this matter? Even though this cannot be seen as a strict prerequisite for the granting of immunity, various jurisdictions in Europe have applied this requirement in subsequent decisions.[62]

In a decision relating to an international organisation closer to home, the African Development Bank was not granted immunity from jurisdiction by the *Cour de Cassation* in France. In *Consortium X v Swiss Federal Government (Conseil federal)*[63] the court did not rely on the European Convention on Human Rights, but it

> relied on the concept of '*ordre public international*' encompassing the prohibition of a '*déni de justice*', or a '*denial of justice*'. This approach demonstrates that the idea of a 'forfeiture' of immunity in cases in which no alternative remedy is provided for is not limited to those situations where the right of access to justice is derived from the ECHR. Rather, it indicates that this concept may be 'transferable' to other jurisdictions, where it may be based on due process or the prohibition of denial of justice understood as elements of an 'ordre public international' or equally of customary international law (emphasis added).

Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 *UNTS* 221.

[60]Emphasis added; see Reinisch 'The immunity of international organizations and the jurisdiction of their administrative tribunals' (2008) *Chinese Journal of International Law* 285 291; Wouters and Schmitt n 23 above at 77 100; Tomonori 'Denying foreign state immunity on the grounds of the unavailability of alternative means' (2008) *Modern Law Review* 734 ;Wellens *Remedies against international organisations* (2004) at 18*;* Kloth n 14 above at 138.

[61]Tomonori n 59 above at 735.

[62]See Reinisch (2008) n 11 above at 294 for a detailed discussion of relevant case law; see also Reinisch and Wurm n 14 above at 111 for a detailed discussion on employment related issues and international organisations, and also see Tauchmann n 1 above at 219.

[63]Chambre sociale 25 janvier 2005, 04 41012, 2005 132 *Journal du droit international* 1142 as discussed by Reinisch (2008) n 11 above at 298.

Reinisch concludes:

> The important point is that there is a clear development in the case law of domestic courts towards abandoning the traditional view of the immunity of international organizations, which merely decided on the basis of the applicable immunity provisions *without considering the human rights impact* of the decisions. The human rights based notion of access to justice or similar customary international law or national constitutional law concepts of access to judicial determination of one's rights are playing an increasingly important role in the decision whether to grant an international organization immunity from suit (emphasis added).[64]

Seidl-Hohenveldern[65] states that '[b]y definition, any grant of immunity, be it to States or to international organizations ... deprives the individual concerned of his human rights, [eg under article 6 of the ECHR], to have his case heard in court' and is considered to be incompatible with the rule of law. This very important aspect was overlooked by the court and also by the legal counsel involved.

The member states of international organisations have a responsibility to ensure that human rights obligations are complied with, and this applies equally to ensuring that international organisations comply with human rights. If the court of a member state provides an international organisation with immunity in the absence of alternative means by which to protect their rights, that member state might be held liable for denying recourse to the courts.[66]

Customary international law principles such as a prohibition of the denial of justice or other principles relating to an international *ordre public,* could and should indeed play a very important role in these instances. For purposes of the African continent, one could safely argue that the rights contained in the Banjul Charter (especially in arts 3, 7 and 14), together with article 14 of the International Covenant on Civil and Political Rights, place an equivalent obligation on states (and international organisations if those obligations form part of a particular state's constitutional dispensation) to that contained in article 6 of the European Convention on Human Rights and as such, if no alternative means are available to protect the individual concerned and his rights, immunity should not be granted.

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[64]Reinisch (2008) n 11 above at 302.

[65]'Functional immunity of international organizations and human rights' in Benedek *et al* (eds) *Development and developing international and European law: Essays in honour of Konrad Ginthe on the occasion of his 65th birthday* (1999) 137 146 as quoted in Tomonori n 59 above at 734.

[66]See the discussion by Reinisch n 11 above at 329 of the case law supporting this point of view (quoted above) and also the other authority he refers to.

In this instance therefore, the decision of the court of appeal to grant immunity to the EADB was reached in breach of its human rights obligations. The court did not show that in allowing the plea of immunity there were alternative means available that would not have amounted to a total prohibition of access to courts or an alternative means of accessing justice. By refusing the attachment order, Blueline was denied access to justice.

Conclusion

Individuals should have access to either national or alternative fora in order for them to get satisfaction in a legal process, but if these fora (including arbitral or internal administrative tribunals of an international organisation) do not provide adequate protection – for both the international organisation and the individual - alternative or subsidiary mechanisms should be created.[67] The legal processes that were dealt with *in casu* hardly represent a prime example of a fair trial (access to justice), or a fair and proper application of legal principles to the legal dispute(s) that existed between the parties. It would appear that the second arbitration did not address the legal issues properly, and given the final nature of an arbitration award, the bank had no option but to request an annulment based on apparent procedural irregularities (if indeed this could be proved). The fact that this application was brought out of time and could thus not be heard, does not affect the validity of the process. Rather it emphasises that the choice of legal representation can play a significant role in the effectiveness of the remedies at one's disposal. Abiding by the rule of law includes abiding by the applicable rules of procedure, and it is unacceptable to bend the rules of law to provide protection to a party who has authored his own predicament through lack of attention to the legal processes involved.

The bank was ordered to pay damages to Blueline. Whether the award was granted rightly or wrongly by the arbitration tribunal is neither here nor there: this is one of the risks that one assumes when one opts for arbitration. The award is final and if the arbitrator who was appointed fails to apply the law correctly – then *volenti non fit iniuria*. The bank willingly subjected itself to the jurisdiction of the arbitrator and as a result it also must abide by the arbitration award. Arbitration is not a tombola at a local church bazaar where there are no losers.

It is unfortunate that the court did not consider the issue of a waiver of immunity from execution and whether the fact that the parties agreed to subject the dispute to arbitration did not also amount to a waiver of immunity from execution of the eventual arbitration award. On a reading of article 45 (as quoted above) it is not entirely clear whether the immunity of assets includes

[67] *Ibid.*

an immunity from execution. It would have been helpful had the court looked into the meaning of 'any other form of taking or foreclosure by ... judicial or administrative action' – this blanket provision may well be broad enough to include a reference to immunity from execution, but clarity on the matter would have assisted with legal certainty. Nonetheless, when one reads the judgment in *Hornsby v Greece* (above) it emerges clearly that an argument can be made that the submission of a dispute to arbitration also allows for an inference that the bank thereby agreed (even tacitly) that it would abide by the arbitration award. If the bank were to argue that it is not prepared to comply with the award and plead immunity as soon as it emerged that the award was going against it – as it did here – one could rightly argue that it misrepresented that it would abide by its undertakings and not raise the shield of immunity. Under these circumstances reliance by the claimant on the defence of estoppel against the bank could have been appropriate.[68]

It is sometimes argued that international organisations have absolute immunity from execution and that all the organisation's assets are immune from execution because they are all necessary for the exercise of its functions.[69]This point of view is, however, not supported by the views expressed by the European Court of Human Rights and, interestingly enough, the sources supporting the view that absolute immunity should be granted to an international organisation, do not refer to these decisions and views of the human rights tribunals.[70] It is also noteworthy that the Tanzanian court did not investigate this particular aspect in any detail.

With the increasing emphasis on international governance and the protection of human rights, this case has shown that proper governance and management of an international institution is important to prevent actions on its side which may lead to expensive legal proceedings and judgments against it running into millions of dollars. It has also emphasised the importance of having a judiciary that knows the law and can deal appropriately with the law and legal questions brought before it –without a properly qualified judiciary, access to the courts and justice is a misnomer. And lastly, the choice of an arbitrator and legal counsel is as important as having the law to protect your rights – if those representing your case and those hearing your case are not the best legal minds

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[68]A waiver of immunity from execution in arbitrations is generally enforced and recognised in the courts of the United States with reference to sovereign states; see however *Creighton Ltd v Government of the State of Qatar* France, *Cour de Cassation* 6 July 2000 127 *ILR* 154; and Franzoni 'International law enforcement of International Centre for Settlement of Investment Disputes arbitral awards in the United States' (1998) *Georgia J Intl and Comparative Law* at 101 117 and *Liberian Eastern Timber Corp v Government of Republic of Liberia* 650 F Supp 73 SDNY 1986.

[69]Tauchmann n 1 above at 77.

[70]*Ibid.*

available, a good legal system and solid legal principles will not be enough to save the day.

In this case, the court decided in favour of the EADB so saving the bank from possible disaster. It also decided in favour of the political voices that were loudly raised ordering the courts in Tanzania to ensure the future existence of the bank. Outside of Africa, the independence of the judiciary is sacred – but *ex Africa semper aliquid novi*. The legal basis for this decision is unsound and should send a warning signal to individuals who are considering entering into private law relationships with international organisations.

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