HIGHLIGHTS FROM THE OFFICE OF THE CHIEF STATE LAW ADVISOR (INTERNATIONAL LAW)

Sandea de Wet*

1 Introduction

The shifting and complex nature of contemporary international relations increasingly requires clear and coherent international law norms for the promotion of peace, security, promotion of human rights and socio-economic development. One of the challenges faced by states in working towards achieving the rule of law at the international level, is the proliferation of processes and fora in which international law norms are developed.

The Office of the Chief State Law Advisor (International Law) (the Office) participates in an array of international processes at the global and regional levels, tasked directly or indirectly with the development of international law with a view to advancing South Africa's national priorities and foreign policy objectives. The Office fulfils this role in addition to its mandate of providing legal advice and assistance related to international law to the government as a whole and to the Department of International Relations and Cooperation in particular, on all aspects of legislative, operational and departmental matters. The Office is also the custodian and depository of the South African Treaty Collection.

During 2018 the Office participated in international conferences held under the auspices of the United Nations (UN), the African Union (AU), the Southern African Development Community (SADC), the International Institute for the Unification of Private Law (UNIDROIT), the Antarctic Treaty System and The Hague Conference on Private International Law (HCCH).

The Office is further represented by legal counsellors based at the South African Permanent Missions to the African Union in Addis Ababa and the United Nations in New York, as well as the South African Embassy in The Hague, the latter being responsible for engagement with The Hague-based international legal institutions, including the International Criminal Court (ICC), the International Court of Justice (ICJ), the Permanent Court of Arbitration, the HCCH and the ad hoc criminal tribunals.

This article aims to share some of the most notable outcomes of these processes and the contributions that South Africa has made in the deliberations.

* Chief State Law Advisor (International Law), Department of International Relations and Cooperation.

2 Consolidation of the African Agenda

2.1 African Continental Free Trade Area

The 30th Ordinary Summit of the African Union Heads of State and Government that took place in Addis Ababa, Ethiopia from 26 to 29 January 2018 decided to hold an Extraordinary Summit on 21 March 2018, preceded by an Extraordinary Session of the Executive Council on 18 and 19 March 2018 in Kigali, Rwanda to consider the legal instruments of the African Continental Free Trade Area (CFTA).

The process to develop the CFTA agreement started a number of years ago when the Assembly at its 18th Ordinary Session in January 2012 adopted a decision to establish a CFTA by 2017. The Summit also endorsed the Action Plan on Boosting Intra-Africa Trade (BIAT), which identified seven clusters: trade policy, trade facilitation, productive capacity, trade related infrastructure, trade finance, trade information and factor market integration. The CFTA will bring together 54 African countries with a combined population of more than one billion people and a combined gross domestic product of more than US$3,4 trillion. The objectives of the CFTA include:

(1) creating a single continental market for goods and services, with free movement of business persons and investments, and thus paving the way for accelerating the establishment of the continental customs union and the African customs union;
(2) expanding intra-African trade through better harmonisation and coordination of trade liberalisation and facilitation regimes and instruments across regional economic communities (RECs) and across Africa in general;
(3) resolving the challenges of multiple and overlapping memberships and expediting the regional and continental integration processes; and
(4) enhancing competitiveness at the industry and enterprise level through exploiting opportunities for large-scale production, continental market access and better reallocation of resources.

It is against this background that a series of meetings were held and that the CFTA agreement was finalised and signed by some member states on 21 March 2018.

The CFTA Negotiating Forum was established as a meeting of the chief trade negotiators and trade law experts from member states. The 10th CFTA Negotiating Forum negotiated the texts of the CFTA agreement, the Draft Protocol on Trade in Services, the Draft Protocol on Rules and Procedures for the Settlement of Disputes, and the Draft Protocol on Trade in Goods and its annexes and appendices.

The Negotiating Forum considered institutional issues, such as whether the secretariat of the CFTA would be autonomous and independent from the AU Commission; an issue on which no consensus has yet been reached. However, the meeting of ministers responsible for trade that met from 8 to 9 March 2018 decided that the secretariat should have functional autonomy and independent legal personality. Notwithstanding this development, a reiteration of objections during the meeting of the AU Executive Council on 19 March 2019, comprising ministers of foreign affairs, resulted in this issue remaining unresolved.

The issues of entry into force and reservations were also vigorously debated. The CFTA agreement contained an AU standard provision stipulating that the agreement shall enter into force after 15 ratifications, the formula usually applicable to AU agreements. However, some delegations argued that the entry into force threshold should be higher to ensure inclusivity, whereas others expressed concern that a larger number of states required to ratify would delay continental trade and integration. The ministers responsible for trade decided on a compromise number of 22 ratifications, which is higher than the usual 15, but lower than the two-thirds of member states proposed by some delegations. Similarly, many delegations opposed the inclusion of a provision which would allow member states to enter reservations. Ministers ultimately rejected the proposal to include a provision allowing reservations to be made to the CFTA agreement.

Although the texts of the draft CFTA agreement and its protocols were agreed, the more detailed annexes still require a dedicated session of negotiation and legal scrubbing.

2.2 Protocol on Statelessness

The second meeting of member states experts on the Draft Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa was held from 7 to 11 May 2018 in Abidjan, Côte d'Ivoire. It was a continuation of the negotiations which began in Johannesburg, South Africa in March 2018. The main objective of the meeting was to finalise the Draft Protocol on Statelessness at the level of member states' experts.

The right to nationality is a critical human rights, humanitarian and security issue that is important in ensuring social inclusion, access to basic services such as education, healthcare and civic participation, as well as advancing the objectives of the AU's Agenda 2063 and creating an enabling environment for integration on the continent. Progress in addressing statelessness in Africa should also be seen in the context of

the AU's initiative to create a single African Passport and the objective to advance free movement of persons and establishing the CFTA.

In addition to reflecting on the Protocol's linkages to the African Charter on Human and Peoples' Rights, the African Charter on the Rights and Welfare of the Child, and international refugee law, some of the key substantive issues that were considered in the deliberations included children's rights, the issue of dual and multiple nationality, evidence of entitlement to nationality, loss or deprivation of nationality and limitations on expulsion. Questions such as the meaning of arbitrary deprivation of nationality, the right of states to rely on national security, including mercenary and terrorist activity, in cases of deprivation of nationality and expulsion, remain controversial.

3 Global System of Governance

3.1 International Court of Justice

South Africa has played a meaningful role in the work of the International Court of Justice (ICJ). The United Nations General Assembly sought an advisory opinion from the ICJ on the legal consequences emanating from the separation of the Chagos Archipelago from Mauritius in 1965. As the matter had decolonisation, self-determination and human rights at its core, South Africa participated throughout the process by submitting a written submission and also making an oral statement when the matter was heard.

It was submitted on behalf of South Africa that the court had jurisdiction to give an advisory opinion on the matter, that the independence process of Mauritius was incomplete, that the right to self-determination of the territory has not been achieved, and that the forcible removal of the population of the Chagos Archipelago was in contravention of international human rights obligations.

3.2 Permanent Court of Arbitration

The South African Ambassador, The Hague, served as the Chair of the Budget Committee of the Permanent Court of Arbitration in 2018. Besides chairing the meetings of the Committee and reporting thereon to the Administrative Council, it also required close liaison with the Secretary-General and the Financial Committee, as well as with states parties, specifically on proposals by some state parties on the revision of the budget procedures.

3.3 Sixth Committee of the United Nations General Assembly

The General Assembly is the main deliberative, policymaking and

representative organ of the United Nations and therefore the chief multilateral forum to discuss issues of concern to the international community. The Sixth Committee of the General Assembly carries out the mandate of article 13 of the Charter of the United Nations to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification. Accordingly, the Sixth Committee met from 3 October to 13 November 2018. South Africa made statements on the issues of criminal accountability of United Nations officials and experts on mission; the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law; the rule of law at the national and international levels; the scope and application of the principle of universal jurisdiction; measures to eliminate international terrorism; the report of the International Law Commission on the work of its 70th session; and the report of the United Nations Commission on International Trade Law on the work of its 51st session.

3.3.1 International Law Commission

On the topic 'Subsequent agreements and subsequent practice in relation to the interpretation of treaties' South Africa cautioned that subsequent agreements and subsequent practice should not be seen as a means of amending treaties through interpretation and that, where parties wish to amend or modify a treaty, this should be done through the procedure prescribed by the treaty itself, or in accordance with the customary law rules on treaty amendment.

On the topic 'Identification of customary international law' South Africa reiterated the accepted 'two-element approach' for determining the existence and content of customary international law norms. Although the roles that international organisations and non-state actors may play in this regard were also considered by the Commission, most delegations put forward the view that states, comprised of their executive, legislative and judicial branches, are the primary actors in the formation of customary international law.

Regarding the topic of 'Peremptory norms of general international law (*jus cogens*)', South Africa welcomed the analysis by the Special Rapporteur that non-derogation is a consequence of a norm being classified as *jus cogens*, rather than as a criterion for its classification. South Africa also supported efforts by the Special Rapporteur to address the problem of treaty invalidity as a consequence of inconsistency with *jus cogens* norms and his attempts to reconcile the principle of *jus cogens* with the principle of *pacta sunt servanda*.

During the discussion on the topic 'Protection of the environment in relation to armed conflict', South Africa focused on the duty incumbent on occupying powers to protect the environment of territories under occupation and cautioned against an over-emphasis of the conflict between the duty to protect the environment and the law of occupation.

The discussion of the topic 'Immunity of state officials from foreign criminal jurisdiction' focused mainly on the procedural aspects of immunity. South Africa highlighted the need to work towards a set of norms that would enhance objectivity in determining whether immunity applies in order to avoid politicisation of the process of determining whether state officials enjoy immunity.

3.3.2 The United Nations Commission on International Trade Law

The United Nations Commission on International Trade Law (UNCITRAL) was established by the United Nations General Assembly in 1966. In establishing the Commission, the General Assembly recognised that disparities in national laws governing international trade created obstacles to the flow of trade, and it identified UNCITRAL as the vehicle through which the United Nations could play a more active role in reducing or removing these obstacles.

During the 50th session of the Commission in 2017, UNCITRAL mandated its Working Group III to consider the topic of Investor-State Dispute Settlement (ISDS) reform. The topic was divided into three parts: exploring the issues that states experience in relation to ISDS; whether these issues necessitate reforms; and what reforms should be considered.

South Africa has been a strong proponent of ISDS reform since the adoption of its new policy on Bilateral Investment Treaties in 2013. In accordance with South Africa's new policy, a number of its bilateral investment treaties were terminated, as South Africa decided to regulate investor protection through domestic legislation. Problems with the dispute settlement procedures were one of the main drivers for South Africa's change in policy.

The deliberations revealed that while the majority of states are evidently in favour of ISDS reforms, there are divergent views on the establishment of a multilateral investment court, which some see as risking entrenching the current inequalities inherent in the ISDS system. Discussions focused on whether substantive standards should be incorporated into the ISDS regime and ensuring that such standards would be interpreted and applied fairly between investors and states. Other substantive issues that were discussed include instances of

conflict of interest, for example, where practitioners act as counsel in some arbitrations and as arbitrators in other arbitrations, despite the fact that the subject matter and parties involved with the arbitrations might be the same; funding of arbitrations by third parties in exchange for receiving a percentage of the possible award; and the effect of large monetary arbitration awards on the national budgets and governmental priorities of states.

Working Group V of UNCITRAL continued its work on drafting a model law on cross-border insolvency of multinational enterprise groups. The purpose of the draft model law on enterprise group insolvency is to provide effective mechanisms to address cases of cross-border insolvency affecting the members of an enterprise group; to develop a group insolvency solution; to provide fair and efficient administration that protects the interests of all creditors and debtors; to maximise the overall combined value of assets; and to facilitate the rescue of financially troubled enterprise groups, thereby protecting investment and the interests of creditors. The Working Group also considered the draft text on a simplified insolvency regime of micro-, small and medium-sized enterprises. Although the form that the final text will take has not yet been decided, the draft text focuses on features such as out-of-court and hybrid procedures and fast-track in-court insolvency proceedings, in order to develop workable alternatives to formal insolvency processes.

3.4 International Institute for the Unification of Private Law

3.4.1 Election of South Africa to the UNIDROIT Governing Council

Professor EA Fredericks (University of Johannesburg) was elected to the Governing Council of the International Institute for the Unification of Private Law (UNIDROIT) after a successful campaign led by the Office. Professor Fredericks follows in the footsteps of Professor JL Neels, the previous South African member of the prestigious Governing Council. The Office is the official contact point in South Africa for UNIDROIT and performs diplomatic desk-related functions for South Africa's membership of UNIDROIT. As one of only four African members of UNIDROIT, and as the only state from the Southern African Development Community (SADC) region, South Africa aims to give an African voice to UNIDROIT activities in co-operation with Nigeria, Tunisia and Egypt.

3.4.2 Luxembourg Rail Protocol to the Cape Town Convention

Regarding the Luxembourg Rail Protocol to the Cape Town Convention on International Interests on Mobile Equipment, the Office has been

involved in promoting the Protocol to the South African government. Meetings were facilitated between high-level officials of the Department of Transport, the Secretary-General (*ad interim*) of UNIDROIT, and the Rail Working Group. The Office also participated in these meetings in an attempt to secure the due consideration of the Rail Protocol for signature by the Minister of Transport. The funding of railway rolling stock is a matter of great concern for South Africa, the SADC region and the African continent, and the Rail Protocol will facilitate the private funding of the purchase or leasing of railway rolling stock without the need for government guarantees or funding.

3.4.3 Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment

South Africa contributed to the project of revising and updating the Official Commentary to the Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment, which will be used as guidance in the finalisation of a new protocol to the Convention on Mining, Agriculture And Construction Equipment (MAC Protocol), due to be adopted at a diplomatic conference in 2019.

3.4.4 Workshop on the MAC Protocol

The University of Johannesburg, UNIDROIT and the Office jointly hosted a workshop on the future MAC Protocol at the University of Johannesburg in June 2018. Under the Cape Town Convention, protocols have been successfully developed on aircraft, space assets and railway equipment. Members identified mining, agriculture and construction as areas of commercial activity of universal importance, with heightened relevance in developing countries. It was therefore decided to develop a fourth protocol in this regard. The reasons for proposing that mining, agriculture and construction equipment form the subject matter of a fourth protocol are twofold. First, it would allow enterprises engaged in mining, agriculture and construction to develop the ability to acquire equipment they would otherwise not be able to acquire and thus to permit them to optimise their activity. Second, it would allow producers of equipment to export to markets that, without such a protocol, would have remained closed to them.

3.5 Environment, Science and Technology

3.5.1 Marine Biological Diversity in Areas Beyond National Jurisdiction

Pursuant to Resolution 72/249 of 24 December 2017, the General Assembly decided to convene an Intergovernmental Conference, under the auspices of the United Nations, to consider the recommendations of the Preparatory Committee that was established by Resolution 69/292 of 19 June 2015 with the mandate to develop elements of a draft text of an international legally binding instrument on marine biological diversity in areas beyond national jurisdiction.

The first session of the conference was convened from 4 to 17 September 2018 at the headquarters of the United Nations in New York. The following topics were discussed in informal working groups: (1) capacity-building and technology transfer; (2) area-based management tools; (3) environmental impact assessments; and (4) marine genetic resources, which include questions on benefit-sharing.

The meeting enhanced the understanding among delegations on issues such as funding, procedural options on area-based management tools and marine protected areas, practical modalities for environmental impact assessments, and approaches to move forward on access and benefit-sharing from marine genetic resources.

Resolution 72/249 provides for the conference to meet initially for four sessions, with the second and third taking place in 2019, and the fourth in the first half of 2020.

3.5.2 Climate Change

The United Nations Framework Convention on Climate Change (UNFCCC) convened its 24th Conference of the Parties (COP24), 14th Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol (CMP14), and the 3rd part of the first Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement (CMA1-3) in Katowice, Poland from 2 to 14 December 2018. The conference included the resumed 49th sessions of the Subsidiary Body for Scientific and Technological Advice (SBSTA49) and the Subsidiary Body for Implementation (SBI49), as well as the 7th and concluding part of the first session of the ad hoc Working Group on the Paris Agreement (APA1-7).

The main task of the conference was to finalise the negotiations on the modalities, procedures and guidelines required to operationalise the Paris Agreement from 2020. COP24 adopted an omnibus decision, which contains the main outcomes from the Paris Agreement Work Programme,

including the outcomes on finance, climate change adaptation and the modalities of the global stocktake process, which will assess progress globally towards the Paris Agreement goals.

The Katowice outcome also contains the modalities and procedures for the effective operation of the committee to facilitate implementation and promote compliance, which was established in the Paris Agreement. The modalities and procedures of the committee recognise that the committee's work shall be guided by the provisions of the Paris Agreement, specifically article 2, which reflects equity and common but differentiated responsibilities and respective capabilities in light of different national circumstances. This principle is further operationalised in the outcome by according flexibility to parties with regard to timelines of the prescribed procedures as may be needed in light of parties national circumstances.

The modalities and procedures of the committee provide for a party to approach the committee to consider issues related to its implementation of, or compliance with, the provisions of the Paris Agreement. The committee is empowered to undertake a range of measures to assist that party. This includes making recommendations to the party with regard to challenges in and solutions to accessing assistance from the finance, technology and capacity-building bodies and support arrangements that serve the Convention and the Paris Agreement. These recommendations may then be communicated directly by the committee to such bodies and arrangements with the consent of the party concerned, giving the recommendations significant status, while respecting the independent legal mandates of the support arrangements.

The committee is also empowered to initiate the consideration of issues in cases where a party fails to submit a mandatory report or communication. Importantly for developing countries, this includes cases where a developed country party fails to submit its biennial communication of indicative quantitative and qualitative information related to the provision of financial resources. Given that the committee will also consider obligations related to the provision of support and not just those related to emission reductions provides assurance to developing countries that the functioning of the committee will be balanced and fair.

3.5.3 Antarctica

The Antarctic Treaty was signed on 1 December 1959, and 2019 will mark its 60th anniversary. South Africa is one of the 12 original parties to the Antarctic Treaty, even though it did not claim territory in Antarctica. Article IV(2) of the Antarctic Treaty has the effect that all territorial

claims made in Antarctica have been 'frozen' and no new claims may be asserted while the treaty remains in force.

Every year, South Africa participates in the Antarctic Treaty Consultative Meeting, which is the forum where parties to the Antarctic Treaty and those demonstrating their interest in Antarctica meet

> ... for the purpose of exchanging information, consulting together on matters of common interest pertaining to Antarctica, and formulating and considering, and recommending to their Governments, measures in furtherance of the principles and objectives of the Treaty ...[1]

South Africa's Antarctic Programme is based in Cape Town and South Africa maintains a base station, SANAE IV, in Antarctica. South Africa cooperates with several states in relation to Antarctica. Particularly, based on the fact that Cape Town is one of the Antarctic gateway cities (along with Christchurch, New Zealand; Hobart, Australia; Punta Arenas, Chile; and Ushuaia, Argentina), the Antarctic personnel of many states travel through the city to reach Antarctica.

In recent years, including in 2018, there have been increasing concerns about the rising number of tourist activities taking place in Antarctica and the detrimental impact it is having on its pristine environment. Whereas South Africa does not itself engage in tourism, there are a number of tourist operators that operate out of Cape Town. It is thus becoming a matter of growing importance that provision is made by states to ensure appropriate regulation of tourist activities in Antarctica.

There appears to be a common misapprehension that the Antarctic Treaty will expire. However, when one reads article XII(2)(a) of the Antarctic Treaty, it is clear that 30 years after the entry into force of the Antarctic Treaty, a consultative party may request that a review of the treaty be held. Such a review has never occurred. On the contrary, in the 30th anniversary year following the entry into force of the Antarctic Treaty, the parties reiterated their commitment that Antarctica shall be used exclusively for peaceful purposes.[2] With its 60th anniversary nearing, there is nothing to suggest that such a strong commitment by Antarctic states will not once again be reaffirmed.

4 Private International Law

4.1 The Hague Conference on Private International Law

South Africa has been a member of The Hague Conference on Private

[1] Article IX of the Antarctic Treaty.

[2] Declaration by contracting parties in the 30th anniversary year of the entry into force of the Antarctic Treaty.

International Law (HCCH) since 14 November 2002. South Africa is also a party to five of the HCCH Conventions.

In 1992 the HCCH embarked on the 'Judgments Project' on the enforcement of foreign judgments. The initial phase of the project resulted in the conclusion of the Convention on Choice of Court Agreements. Thereafter, in August 2013, the second phase of the project led to the decision to develop a new Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. As a result, a Special Commission on the Recognition and Enforcement of Foreign Judgments was created. The fourth meeting of the Special Commission took place from 24 to 29 May 2018. The new Convention is designed to provide an efficient system for the recognition and enforcement of foreign judgments in civil or commercial matters and provide for the circulation of judgments in circumstances that are largely uncontroversial. The draft Convention provides for the recognition and enforcement of judgments from other contracting states that meet certain listed requirements and sets out the grounds upon which recognition and enforcement of such judgments may be refused.

5 South African Bills

5.1 The Foreign Service Bill

The Office continued work on the Foreign Service Bill during 2018. The Bill's purpose is to provide for the management, administration and functioning of South Africa's foreign service and for the operational requirements that are suitable to and supportive of the operations of the foreign service in a global environment.

The Bill was finally adopted by the Portfolio Committee on International Relations and Cooperation on 22 November 2018 and subsequently, by the National Assembly on 4 December 2018. This means that the Bill will now be presented to the National Council of Provinces for public comment, and then referred to the President for assent.