

E Snyman-Van Deventer

Dispute resolution in NAFTA and the WTO: a useful guide for SADC?*

Summary

In the process of developing, structuring and formalising the mechanism for settlement of trade disputes in the SADC region, the system for the settlement of disputes in both NAFTA and the WTO can serve as a useful guide for SADC and even more so for the African Union. The swift, fair and just settlement of especially trade disputes will be a major factor in the economic development of the region and it is therefore necessary that a mechanism for the settlement of disputes is established that will serve the aims of SADC and its member states. This article provides an overview of the mechanisms for trade dispute resolution in the WTO and NAFTA as guide for SADC.

Geskilbeslegting in Noord-Amerikaanse Vrye Handelsooreenkoms en die Wêreldhandelsorganisasie: 'n nuttige rigtingaanwyser vir die Suider Afrikaanse Ontwikkelingsgemeenskap

In die proses van die ontwikkeling, strukturering en formalisering van die metodes van handelsgeskilbeslegting in die SAOG streek, kan die stelsel vir geskilbeslegting in beide NAFTA en die WHO as handige riglyne dien vir SAOG en selfs meer nog ook vir die Afrika Unie. Die vinnige, billike en regverdige beslegting van veral handelsgeskille sal 'n belangrike faktor in die ekonomiese ontwikkeling van die streek speel en dit is derhalwe noodsaaklik dat 'n stelsel vir die beslegting van geskille daargestel word wat die oogmerke van die SAOG en die lidlande sal dien. In hierdie artikel word 'n oorsig gegee van die stelsel van geskilbeslegting in NAFTA en die WHO as riglyn vir SAOG.

* The financial assistance of the National Research Fund (NRF) towards this research is hereby acknowledged. Comments and findings are those of the authors and should not be attributed to the NRF.

1. Introduction

The Southern African region is a developing region with dire need for foreign trade and investment. To increase both trade and investment, the creation of the necessary legal framework is of the utmost importance. One important aspect is the settlement of trade disputes. The dispute settlement mechanism of the North American Free Trade Agreement (NAFTA) and the World Trade Organisation (WTO) may serve as examples for the Southern African Development Community (SADC) to follow in its endeavour to create a swift and certain procedure for the settlement of disputes within the region as well as with the international community.

2. Dispute settlement mechanism in NAFTA

According to Huntington the long-term success or failure of NAFTA will in large part depend on the effectiveness of its dispute settlement system. In the highly politicized world of international trade law, a system that can resolve disputes and promote compliance with legal obligations will go far in advancing NAFTA's substantive goals of economic integration. A weak or underutilized system, on the other hand, is likely to undermine NAFTA's legitimacy and inhibit further progress toward hemispheric integration.¹

NAFTA's dispute settlement system is to a great extent modelled directly upon the provisions in the CFTA. However, NAFTA provisions are more comprehensive than those of the CFTA and should operate more effectively to help NAFTA parties prevent and resolve disputes concerning the interpretation and application of NAFTA, the specific unfair trade practices of dumping and subsidisation, and cross-border investment.²

NAFTA contains three primary mechanisms for the resolution of disputes, namely Chapters 11, 19 and 20. Chapter 11 deals with the resolution of disputes between a Party and an investor of another Party. Chapter 19 deals with the resolution of disputes arising under each Party's antidumping or subsidy laws and Chapter 20 deals with the resolution of general disputes concerning the interpretation and application of NAFTA.³

NAFTA also makes provision for the specific economic or industrial sectors. For example in the agricultural sector, an Advisory Committee on Private Commercial Disputes regarding Agricultural Goods makes recommendations for the prompt and effective resolution of disputes in the agricultural sector.⁴

1 Huntington 1993:407.

2 Endsley 1995:661.

3 Endsley 1995:661; Horlick and DeBusk 1994:51.

4 Foster and Alexander 1994:74.

2.1 Chapter 11

Uniquely the Chapter 11 provisions of NAFTA has created a system of arbitration for resolving investment disputes between foreign investors (nationals from one NAFTA country) and host governments (another NAFTA country's government). It provides for consultations and binding arbitration to settle disputes between private foreign investors and host governments, a subject matter which has not traditionally been dealt with in trade agreements.⁵ Each NAFTA country has consented to submission of a claim to arbitration in accordance with NAFTA procedures.⁶

An investor may seek arbitration if a member Party (eg the USA, Mexico or Canada) violates its commitment to afford treatment to investors of another Party that is no less favourable than it accords its own investors and investors of other countries.⁷ NAFTA prohibits the parties from imposing specific performance requirements such as minimum export levels, domestic content rules, preferences for domestic sourcing, trade balancing and technology transfer requirements.⁸

The NAFTA dispute resolution mechanism for investor disputes does not establish a new procedural regime but instead permits investors to seek arbitration under established regimes.⁹ With certain exceptions and when six months have elapsed since the events giving rise to a claim, an investor may submit a claim to arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention), provided that both the host country and the investor's home country are parties to the Convention; the Additional Facility Rules of the ICSID Convention, provided that either the host country or the investor's country is a party to the Convention; or the UNCITRAL Arbitration Rules.¹⁰

2.2 Chapter 19

Chapter 19 is modelled very closely after Chapter 19 of the CFTA creating a separate regime for dumping and subsidies matters.¹¹ Chapter 19 therefore creates a separate mechanism for the settlement of antidumping and countervailing duties disputes. This mechanism replaces the domestic judicial review proceedings of each member country, but applies the same standard of review that the challenged country's courts would apply.¹²

5 Endsley 1995:663; Horlick and DeBusk 1994:52.

6 NAFTA art 1122; Price 1993:731; Eklund 1994:140.

7 Horlick and DeBusk 1994:52; see NAFTA articles 1102 and 1103.

8 NAFTA article 1106; Horlick and DeBusk 1994:52.

9 Horlick and DeBusk 1994:52.

10 NAFTA article 1120; Price 1993:732; Horlick and DeBusk 1994:52; Eklund 1994:140.

11 Huntington 1993:407; Horlick and DeBusk 1994:57; Siqueiros 1993:384.

12 Gonzalez Jr 1996:363; Huntington 1993:407; Horlick and DeBusk 1994:58; Powell and Seastrum 1996:1452.

Parties to NAFTA will thus retain their national laws on antidumping and countervailing.¹³

Under this mechanism, final determinations of a competent investigating authority of a member country in an antidumping or countervailing duty dispute are subject to review by a five-member binational panel of experts chosen by the three countries.¹⁴ Each member state selects twenty five candidates to establish a roster of seventy five candidates for the binational panel.¹⁵ NAFTA provides for each of the two involved parties to select from the roster two panelists with the fifth panelist to be selected by mutual agreement, or, failing agreement, by lot.¹⁶ This mechanism is triggered when a written request for panel review is submitted within thirty days of the date of publication of the decision in question. The binational panel is composed of five members and is limited to judging whether the antidumping law of a NAFTA member is correctly applied.¹⁷

2.3 Chapter 20

The general framework for resolving disputes under NAFTA is contained in Chapter 20.¹⁸ Dispute resolution under Chapter 20 is neither a radical departure from the past nor a bold new approach.¹⁹ It is 20 is modelled after Chapter 18 of the CFTA,²⁰ but is a substantial redrawing thereof.²¹

The general dispute resolution provisions of Chapter 20 cover all disputes arising from the application or interpretation of the agreement or disputes concerning an actual or proposed measure of a Party to NAFTA inconsistent with the agreement,²² but with the exception of antidumping and countervailing matters and investment disputes.²³

Chapter 20 establishes a three-step method of resolving disputes²⁴ with the Free Trade Commission as the central institution of this mechanism.²⁵ The first step is mandatory consultations between the disputing parties. This settlement process involves state-to-state consultations. A member state to NAFTA may at any time, request consultations regarding actual or proposed measures it believes might affect the operation of NAFTA. The members states involved must make every attempt to arrive at a mutually satisfactory

13 Huntington 1993:407.

14 Gonzalez Jr 1996:364.

15 Horlick and DeBusk 1994:59.

16 NAFTA article 1901; Horlick and DeBusk 1994:60.

17 Gonzalez Jr 1996:364.

18 Huntington 1993:415.

19 Bailos and Siegel 1993:603.

20 Horlick and DeBusk 1994:64; see in general Chen 1992:1455-1499; Siqueiros 1993:384.

21 Endsley 1995:662.

22 NAFTA article 2004; Gonzalez Jr 1996:361.

23 Huntington 1993:415.

24 Gonzalez Jr 1996:361; Bailos and Siegel 1993:613.

25 Endsley 1995:678; Huntington 1993:415.

resolution of any matter through the consultations. They must provide information sufficient for the settlement of the dispute, preserve the status of any confidential or proprietary information exchanged and seek to avoid any resolution that adversely affects the interest of any third party.²⁶ Where a dispute arises under the provisions of both NAFTA and GATT, it may be settled in either forum at the discretion of the complaining party.²⁷

If the consultations fail to resolve the matter within thirty days, the second stage to resolve the dispute is a meeting with the Free Trade Commission (FTC). Any consulting Party may request a meeting of the FTC which must convene within ten days of the request and endeavour to settle the dispute promptly.²⁸ The FTC is a trilateral institution composed of cabinet-level representatives of the member parties or their designees.²⁹ The FTC can recommend the use of alternative dispute resolution procedures.³⁰ The FTC is authorised to employ a variety of alternative dispute resolution methods in an effort to bring about a negotiated settlement. It may seek advice from technical advisers or create expert working groups; have recourse to good offices, conciliation, mediation, or other such dispute resolution procedures and make recommendations to consulting parties.³¹ The FTC is vested with broad authority not only to resolve disputes, but also to oversee the implementation and further elaboration of the Agreement, supervise the work of all NAFTA committees and working groups, and consider any other matter relevant to the operation of the Agreement. The FTC is designed to function as a political troubleshooting institution rather than as an independent arbitral body. All decisions of the FTC are therefore taken by consensus, unless otherwise agreed by the FTC itself.³²

The third stage in the dispute resolution procedure and as the last resort an arbitration panel may be convened.³³ An arbitration panel is established if a matter remains unresolved after consultation and referral to the FTC. The parties may bring the dispute before an arbitration panel and upon delivery of a written request from any consulting Party, the FTC must establish an arbitration panel.³⁴ The panelists are normally selected from a permanent roster of up to thirty individuals qualified to adjudicate disputes under NAFTA.³⁵ Panels consists of five members and the procedures for selecting differ depending on whether there are two or three disputing parties.³⁶ Panel proceedings are to be conducted in accordance with two fundamental

26 Huntington 1993:417; Bailos and Siegel 1993:613.

27 Huntington 1993:417; Bailos and Siegel 1993:618.

28 Huntington 1993:417; Bailos and Siegel 1993:616.

29 Huntington 1993:415; Johnson Jr 1993: 2179; Bailos and Siegel 1993:616.

30 Gonzalez Jr 1996:361; Huntington 1993:417.

31 NAFTA article 2007; Endsley 1995:681; Huntington 1993:417; Bailos and Siegel 1993:616.

32 Huntington 1993:416.

33 Gonzalez Jr 1996:361; Bailos and Siegel 1993:616.

34 Huntington 1993:419.

35 Huntington 1993:420; Bailos and Siegel 1993:617.

36 Endsley 1995:681; Huntington 1993:421; Bailos and Siegel 1993:617.

safeguards. First, disputing parties must have a right to at least one hearing before the panel as well as the opportunity to present initial and rebuttal submissions. Second, with the exception of the final report, all proceedings before the panel are to be kept confidential.³⁷

Before issuing a final decision, the panel will present to the disputing parties an initial report containing the panels factual findings, legal determinations, and recommendations for resolution of the dispute. The parties will then have the opportunity to submit written comments to the panel on its initial report. Thereafter, the panel may request further comments by any participating Party, reconsider its report, and make any further examination that it considers appropriate.³⁸

Within thirty days of presentation of the initial report, the panel will present to the disputing parties a final report, including separate opinions on matters not unanimously agreed. The parties will then transmit the final report to the FTC, including any report of a scientific review board and any written views that a disputing Party desires appended. The FTC will normally publish the final report within fifteen days after receipt.³⁹

3. Dispute settlement mechanism in the WTO

Although the fundamental objectives of the old GATT system remain unchanged, the new WTO dispute settlement procedures contained in the *Understanding on Rules and Procedures Governing the Settlement of Disputes* represent a more consolidated and firmer legal framework for international trade disputes. Members of the WTO are still encouraged to resolve their disputes amicably and through diplomacy rather than confrontation, but where this is not possible the dispute settlement mechanism in the WTO provide for a streamlined procedure, with time limits, appeals and binding rulings which can only be reversed by mutual consent. The system includes an compulsory arbitration with consultations as well as a Dispute Settlement Body (DSB) that has the power to form panels to examine the matter and make findings to the DSB. The system also makes provision for an Appellate Body to hear appeals from panel cases.

WTO law limits access to the dispute settlement mechanisms to Members of the WTO only.⁴⁰ Private parties cannot be directly involved in instigating proceedings at the WTO. The obligations imposed under the WTO Agreement apply to Member States. Private parties can request their respective governments to initiate a complaint.⁴¹

Article 10 of the DSU limits the access the dispute settlement process of third parties to access to the written submissions of the disputing parties,

37 Huntington 1993:421.

38 Huntington 1993:422.

39 Huntington 1993:423.

40 Vermulst, Mavroidis and Waer 1999:5; Qureshi 1999:290.

41 Qureshi 1999:290.

the opportunity to attend first Panel meeting and to make a submission and the chance to respond to Panel questions addressed to them during the first Panel meeting.⁴²

The General Council convenes as the DSB to deal with disputes arising from any agreement contained in the *Final Act* of the Uruguay Round that is covered by the DSU.⁴³ The DSB has the sole authority to

- (i) establish dispute settlement panels;
- (ii) adopt panel and Appellate Body reports;
- (iii) maintain surveillance of implementation of rulings and recommendations; and
- (iv) authorise suspension of concessions in the event of non-implementation of recommendations.⁴⁴

The parties to a dispute are encouraged to enter into preliminary consultations aimed at clarifying and where possible settling disputes by agreement.⁴⁵ If the consultations are unsuccessful, the complainant can request the DSB to refer its complaint to a panel to hear the arguments of both parties.⁴⁶

The cornerstone of the DSU is the consultation and panel system.⁴⁷ Panels are appointed by the DSB at the request of the complaining party, once the consultation procedure has been exhausted. Establishment of the panel is automatic unless there is a consensus against.⁴⁸ Panels generally comprise three members, unless the parties request five, chosen from lists proposed by Members.⁴⁹ Dispute settlement panel members should be independent. They are required to have a sufficiently diverse background and a wide spectrum of experience.⁵⁰

Panel reports are compulsorily adopted, unless the DSB decides by consensus not to adopt them, or a party to the dispute appeals.⁵¹ In other words, the decisions by the panels are binding unless there is unanimous consent to overturn them.⁵²

Paragraph 12 of Appendix 3 of the DSU contains a fairly detailed proposed timetable for panel work. The norm is for the first substantive meeting to take place within two weeks and the second meeting within two weeks thereafter. At the first meeting each party simply presents its views, as well as any third party intervening, but counter-arguments can only be

42 Covelli 1999:126.

43 WTO Annual Report 2000:57.

44 WTO Annual Report 2000:57.

45 Wareham 1995:116.

46 Wareham 1995:116.

47 Qureshi 1999:300.

48 Wareham 1995:118.

49 Wareham 1995:117.

50 Wareham 1995:117.

51 Jackson 1999:72.

52 Edwards and Lester 1997:187; Jackson 1999:72.

put at the second meeting where the party complained against has the right to take the floor first. Written rebuttals have to be submitted to the Panel before the second substantive meeting takes place.⁵³ The Panel then gives a draft report to the parties and they then have a period of time, generally two weeks, to give their comments on the draft report to the Panel. The Panel should then issue an interim report to the parties containing both descriptive sections and the Panel's findings and conclusions.⁵⁴ The parties can then submit written requests for the Panel to review precise aspects of the interim report prior to circulation of the final report to the Members. A further meeting may be held. In the absence of comments, the interim report is deemed to be the final panel report and is immediately circulated to the Members. If comments are received at the interim review stage, they must be summarised in the final report.⁵⁵ There is an overall deadline of six months for the Panel to issue its final report. This period is reduced to three months in the case of urgency.⁵⁶

Panel deliberations are to be confidential and the panel members draft their reports in private, without the parties to the dispute being present. Any opinion expressed in the panel report by an individual panellist must be anonymous.⁵⁷ The purpose of the panel report is to set out the Panel's findings for the benefit of the DSB in cases where the parties to the dispute have failed to find a satisfactory solution. The report sets out the findings in fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes.⁵⁸

The WTO *Standing Appellate Body* (hereafter "Appellate Body") is established by the DSB to hear appeals from panel cases.⁵⁹ Either party to a dispute may appeal a panel report, but third parties cannot appeal.⁶⁰

The Appellate Body is to comprise of persons unaffiliated with any government, who will avoid participating in the consideration of any disputes that would create a conflict of interest. The Appellate Body is limited to seven members of which only three sit on a particular case.⁶¹

There is an overall time limit of 60 days from formal notification of the decision to appeal to the date the Appellate Body circulates its report. The DSB may be requested to grant an extension of up to 30 days.⁶²

53 Wareham 1995:119.

54 Wareham 1995:119.

55 Wareham 1995:119.

56 Wareham 1995:119.

57 Wareham 1995:119.

58 Wareham 1995:119.

59 Wareham 1995:120.

60 Wareham 1995:120.

61 Hallum 1998:74.

62 Wareham 1995:120.

Appeals are limited to points of law covered in the panel report and legal interpretations developed by the Panel.⁶³ The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the Panel.⁶⁴

All proceedings of the Appellate Body are confidential and reports are drafted without the presence of the parties to the dispute, in light of the oral and written submissions received. Appellate Body reports are anonymous. The Appellate Body reports are adopted unless the DSB decides by consensus not to adopt them.⁶⁵

A mechanism of dispute resolution is necessary⁶⁶ in a system governed by treaties or agreements to ensure the enforcement of the principles agreed to.⁶⁷ The implementation of the WTO Agreement are governed by the Code of conduct through the WTO *Dispute Settlement Mechanism and WTO Trade Policy Review Mechanism*.⁶⁸ The *Trade Policy Review Mechanism* governs the investigation and control, while the *Dispute Settlement Mechanism* is aimed at the settlement of disputes within a strict timeframe.⁶⁹ All members states are bound to the dispute settlement system of the WTO.⁷⁰

The WTO's procedure for resolving trade quarrels under the *Dispute Settlement Understanding* is vital for enforcing the rules and therefore for ensuring that trade flows smoothly. Countries bring disputes to the WTO if they think their rights under the agreements are being infringed. Judgements by specially appointed independent experts are based on interpretations of the agreements and individual countries' commitments.⁷¹ It should be noted that most international trade disputes are almost always

63 Wareham 1995:120.

64 Wareham 1995:120.

65 Wareham 1995:120.

66 Marceau 1998:57; Jackson and Croley 1996 quoted as follows in Vermulst and Komuro 1997: 5: "Over the last fifteen years, many countries have come to recognize the crucial role that disputes settlement plays for any treaty system. This is particularly the case for a treaty system designed to address the myriad of economic questions of international relations today and to facilitate the co-operation among nations that is essential to the peaceful and welfare-enhancing role of these relations. Dispute settlement procedures assist in making rules effective, thereby adding an essential measure of predictability and effectiveness for the operation of a rule-orientated system in the otherwise relatively weak realm of international norms."

67 See also Petersmann 1996:1211-1215; Gaffney 1999:1182; Van der Borght 1999:1224; Wang 1997: 59-72; Kufuor 1997:117:

"However, economic objectives can be achieved only to the extent that the international obligations are known, respected and understood not only by governments but also by private traders, producers, investors and consumers and to the extent that the obligations are consistently construed and applied over time."

68 See also Petersmann 1996:1211-1215; Gaffney 1999:1182; Van der Borght 1999:1224.

69 Qureshi 1999:287; Van der Borght 1999:1224.

70 Lichtenbaum 1998:1196.

71 <<http://wto.org>>.

about some form of trade barrier that had been erected between nations. The trade barrier is either legal or illegal in WTO terms and the forum has to find for one side or the other.⁷²

The system encourages countries to settle their differences through consultation. Failing that, they can follow a carefully mapped out, stage-by-stage procedure that includes the possibility of a ruling by a panel of experts, and the chance to appeal the ruling on legal grounds.⁷³

Confidence in the system is borne out by the number of cases brought to the WTO: 167 cases by March 1999 compared to some 300 disputes dealt with during the entire life of GATT (1947–94).⁷⁴ The WTO dispute settlement procedure had been called upon to resolve several disputes e.g. the so-called Banana dispute where the USA, Mexico, Ecuador, Guatemala and Honduras brought complaints against the EU's regime for the importation, sale and distribution of bananas.⁷⁵

In December 1996 the WTO adopted its *Rules of Conduct for the Understanding on Rules and Procedures Concerning the Settlement of Disputes* (hereafter "Rules of Conduct"). The Rules of Conduct are part of the WTO's integrated dispute settlement system. This system is centred around the 1994 *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) that is intended to be a comprehensive framework for conflict resolution in the field of international trade under the auspices of the WTO.⁷⁶ The DSU sets out the rules and procedures for the settlement of disputes between Member States.⁷⁷ The DSU establishes compulsory jurisdiction of the Dispute Settlement Body (DSB) for all disputes concerning the WTO Agreement and all multilateral trade agreements, which cover trade in goods and services and trade-related aspects of intellectual property rights.

Apart from the DSU and the Rules of Conduct, the dispute settlement system also comprises of the Working Procedures for the Appellate Review.

The main features of the dispute settlement mechanism are

- (i) The dispute settlement system is compulsory;
- (ii) The system is integrated and comprehensive;
- (iii) The system is quick and automatic;
- (iv) Appellate review of the first instance through the Appellate Body;⁷⁸
- (v) The results are binding on the parties to a dispute; and

72 McFarlane 1999:79.

73 <<http://wto.org>>.

74 See also Schoenbaum 1998:647.

75 Hirsh 1998:201.

76 Qureshi 1999:289.

77 Covelli 1999:125.

78 Hallum 1998:73.

(vi) The results of the dispute settlement process are enforceable.⁷⁹

In view of the frequent use and compulsory character of the dispute settlement system and also of the considerable effects its outcomes may have on national legal orders, additional safeguards have been sought to ensure that those involved in the dispute settlement process are impartial and independent. The Rules of Conduct aim to lay down such safeguards.⁸⁰ The dispute settlement mechanism provides for security and predictability in the trading system by:

- (i) preserving the rights and obligations of the Members as stated in the WTO Agreement. This objective is reinforced by the express stipulation that the recommendations and rulings arising from the dispute settlement mechanisms cannot add or diminish the rights and obligations agreed by Members under the WTO Agreement;
- (ii) facilitating clarification of the provisions of the WTO Agreement in an orderly fashion in accordance with the rules of interpretation under Customary International Law;
- (iii) providing that Members are not to make determinations of violations under the WTO Agreement, except through recourse to the mechanisms under the DSU. This is the measure that brings the use of unilateral measures deployed by States, e.g. section 301 of the USA trade law, under the framework of the DSU. It is clearly stated that the WTO authorisation must be sought before suspension of trade concessions or other obligations.

WTO law limits access to the dispute settlement mechanisms to Members of the WTO only.⁸¹ Private parties cannot be directly involved in instigating proceedings at the WTO. The obligations imposed under the WTO Agreement apply to Member States. Private parties can request their respective governments to initiate a complaint.⁸²

Article 10 of the DSU limits the access the dispute settlement process of third parties to access to the written submissions of the disputing parties, the opportunity to attend first Panel meeting and to make a submission and the chance to respond to Panel questions addressed to them during the first Panel meeting.⁸³

The General Council convenes as the DSB to deal with disputes arising from any agreement contained in the *Final Act* of the Uruguay Round that is covered by the DSU.⁸⁴ The DSB has the sole authority to

- (i) establish dispute settlement panels;
- (ii) adopt panel and Appellate Body reports;

79 Hallum 1998:74.

80 Qureshi 1999:289.

81 Vermulst, Mavroidis and Waer 1999:5; Qureshi 1999:290.

82 Qureshi 1999:290.

83 Covelli 1999:126.

84 WTO Annual Report 2000:57.

- (iii) maintain surveillance of implementation of rulings and recommendations; and
- (iv) authorise suspension of concessions in the event of non-implementation of recommendations.⁸⁵

The parties to a dispute are encouraged to enter into preliminary consultations aimed at clarifying and where possible settling disputes by agreement.⁸⁶ If the consultations are unsuccessful, the complainant can request the DSB to refer its complaint to a panel to hear the arguments of both parties.⁸⁷

The cornerstone of the DSU is the consultation and panel system.⁸⁸ Panels are appointed by the DSB at the request of the complaining party, once the consultation procedure has been exhausted. Establishment of the panel is automatic unless there is a consensus against.⁸⁹ Panels generally comprise three members, unless the parties request five, chosen from lists proposed by Members.⁹⁰ Dispute settlement panel members should be independent. They are required to have a sufficiently diverse background and a wide spectrum of experience.⁹¹

Panel reports are compulsorily adopted, unless the DSB decides by consensus not to adopt them, or a party to the dispute appeals.⁹² In other words, the decisions by the panels are binding unless there is unanimous consent to overturn them.⁹³

Paragraph 12 of Appendix 3 of the DSU contains a fairly detailed proposed timetable for panel work. The norm is for the first substantive meeting to take place within two weeks and the second meeting within two weeks thereafter. At the first meeting each party simply presents its views, as well as any third party intervening, but counter-arguments can only be put at the second meeting where the party complained against has the right to take the floor first. Written rebuttals have to be submitted to the Panel before the second substantive meeting takes place.⁹⁴ The Panel then gives a draft report to the parties and they then have a period of time, generally two weeks, to give their comments on the draft report to the Panel. The Panel should then issue an interim report to the parties containing both descriptive sections and the Panel's findings and conclusions.⁹⁵ The parties can then submit written requests for the Panel to review precise aspects of the interim report prior to circulation of the final report to the Members. A

85 WTO Annual Report 2000:57.

86 Wareham 1995:116.

87 Wareham 1995:116.

88 Qureshi 1999:300.

89 Wareham 1995:118.

90 Wareham 1995:17.

91 Wareham 1995:117.

92 Jackson 1999:72.

93 Edwards and Lester 1997:187; Jackson 1999:72.

94 Wareham 1995:119.

95 Wareham 1995:119.

further meeting may be held. In the absence of comments, the interim report is deemed to be the final panel report and is immediately circulated to the Members. If comments are received at the interim review stage, they must be summarised in the final report.⁹⁶ There is an overall deadline of six months for the Panel to issue its final report. This period is reduced to three months in the case of urgency.⁹⁷

Panel deliberations are to be confidential and the panel members draft their reports in private, without the parties to the dispute being present. Any opinion expressed in the panel report by an individual panellist must be anonymous.⁹⁸ The purpose of the panel report is to set out the Panel's findings for the benefit of the DSB in cases where the parties to the dispute have failed to find a satisfactory solution. The report sets out the findings in fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes.⁹⁹

The WTO *Standing Appellate Body* (hereafter "Appellate Body") is established by the DSB to hear appeals from panel cases.¹⁰⁰ Either party to a dispute may appeal a panel report, but third parties cannot appeal.¹⁰¹

The Appellate Body is to comprise of persons unaffiliated with any government, who will avoid participating in the consideration of any disputes that would create a conflict of interest. The Appellate Body is limited to seven members of which only three sit on a particular case.¹⁰²

There is an overall time limit of 60 days from formal notification of the decision to appeal to the date the Appellate Body circulates its report. The DSB may be requested to grant an extension of up to 30 days.¹⁰³

Appeals are limited to points of law covered in the panel report and legal interpretations developed by the Panel.¹⁰⁴ The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the Panel.¹⁰⁵

All proceedings of the Appellate Body are confidential and reports are drafted without the presence of the parties to the dispute, in light of the oral and written submissions received. Appellate Body reports are anonymous. The Appellate Body reports are adopted unless the DSB decides by consensus not to adopt them.¹⁰⁶

96 Wareham 1995:119.

97 Wareham 1995:119.

98 Wareham 1995:119.

99 Wareham 1995:119.

100 Wareham 1995:120.

101 Wareham 1995:120.

102 Hallum 1998:74.

103 Wareham 1995:120.

104 Wareham 1995:120.

105 Wareham 1995:120.

106 Wareham 1995:120.

4. Dispute settlement mechanism in the SADC

The annexure to the SADC Treaty allows a member State to request in writing consultations with any other member State regarding any measure that it considers might affect its rights and obligations under the provisions of the Trade Protocol. If the consulting member States fail to resolve a matter 60 days after the date of receipt of the request for consultations or within an agreed period, the member State may request in writing for a panel to be established. Other member States and the CMT are to be notified of the request through the Sector Coordinating Unit.¹⁰⁷ Conciliation and mediation are procedures that may be undertaken voluntarily if the disputing member States agree to mediation. These procedures will be confidential and may be requested at any time by a disputing member State. These procedures may begin at any time and may be terminated at any time.¹⁰⁸

If no mediation is reached, the Sector Coordinating Unit will on receipt of a request establish a panel. The panel is chosen from an indicative roster of prospective panel members nominated by member States on the basis of their relevant expertise and qualifications.¹⁰⁹ Panel members must have expertise or experience in international trade or international law, other matters covered by the Protocol or the resolution of disputes arising under international trade agreements, and will be chosen strictly on the basis of objectivity, reliability and sound judgment.¹¹⁰ The panel members may be either government or non-government representatives, but they serve on the panel in their individual capacities. They are also expected to comply with a code of conduct and rules of procedures to be established by the CMT.¹¹¹

The panel are made up of three members. The disputing member States must agree to on the chair of the panel. After the selection of the chair, each party to the dispute must select one panel member. However the panel member may not be a citizen of their country. If the disputing member States fail to agree on the chair and panel members within the prescribed time, the Executive Secretary of SADC will select the panel.¹¹²

The terms of reference for the panel are that they shall examine, in the light of the relevant provisions of the Trade Protocol, the dispute and make findings, determinations and recommendations.¹¹³ When a panel concludes that a measure is not consistent with the Trade Protocol, it will recommend that the member State bring the measure into conformity with the Protocol. The panel may also suggest ways in which the recommendations can be implemented. After adoption of the panel recommendations, it must be implemented within six months.¹¹⁴

107 <<http://www.sadcreview.com/sectoral%20reports%202001/frsector2.htm>>.

108 <<http://www.sadcreview.com/sectoral%20reports%202001/frsector2.htm>>.

109 <<http://www.sadcreview.com/sectoral%20reports%202001/frsector2.htm>>.

110 <<http://www.sadcreview.com/sectoral%20reports%202001/frsector2.htm>>.

111 <<http://www.sadcreview.com/sectoral%20reports%202001/frsector2.htm>>.

112 <<http://www.sadcreview.com/sectoral%20reports%202001/frsector2.htm>>.

113 <<http://www.sadcreview.com/sectoral%20reports%202001/frsector2.htm>>.

114 <<http://www.sadcreview.com/sectoral%20reports%202001/frsector2.htm>>.

If no satisfactory solution has been agreed within 20 days after the expiry of the implementation date, the complaining member State may request authorisation from the CMT to suspend concessions or other obligations of equivalent effect.¹¹⁵

The disputing parties may also select to settle their dispute through a World Trade Organisation (WTO) panel. Once a route has been decided upon, the disputing parties cannot move from one forum to another.¹¹⁶

5. South and Southern African perspective

All regional integration arrangements require surrender of some economic sovereignty.¹¹⁷ The Southern African region is more than merely a geographical region in search of cooperation. It is a region whose internal dynamics makes integration a matter of necessity. The need to pool together regional resources in order to create a momentum for economic development is sufficient reason for seeking a regional integration arrangement in the nature of a development community.¹¹⁸ The end of both apartheid and the Cold War brought opportunities for reconsidering notions of peace and cooperation, expectations of democracy and development and the possibility of building a strong and stable region. There are serious challenges to the region's development and security e.g. the demands of the global economy, the position of the region in the international economic division of labour, the spectre of large-scale population movements,¹¹⁹ transborder crime, environmental degradation and the crippling effects of international debt to name but a few.¹²⁰ Poverty, unemployment and illegal immigrants fuel economic and other crimes.¹²¹ The way in which Southern Africa approaches and manages these threats and challenges will determine, to a large extent, the future of the region.¹²²

The system for the settlement of disputes in both NAFTA and the WTO can serve as a useful guide for SADC and even more so for the African Union. The swift, fair and just settlement of especially trade disputes will be a major factor in the economic development of the region and it is therefore necessary that a mechanism for the settlement of disputes is established that will serve the aims of SADC and its member states.

115 <<http://www.sadcreview.com/sectoral%20reports%202001/frsector2.htm>>.

116 <<http://www.sadcreview.com/sectoral%20reports%202001/frsector2.htm>>.

117 Kumar 1996:123.

118 Mvungi 1994:73.

119 See also Kumar 1996:122.

120 Van Aardt 1997:145.

121 Kumar 1996:122.

122 Van Aardt 1997:145.

Bibliography

- BAILOS JP AND SIEGEL DE
1993. Dispute resolution under the NAFTA: the newer and improved model. 27 *The International Lawyer* 603
- CHEN JC
1992. Appointments with disaster: the unconstitutionality of binational arbitral review under the United States-Canada Free Trade Agreement. 49 *Washington and Lee Law Review* 1456.
- COVELLI N
1999. Public international law and third party participation in WTO Panel Proceedings. *Journal of World Trade* 33(2):125.
- EDWARDS RH AND LESTER SN
1997. Towards a more comprehensive World Trade Organization Agreement on Trade related investment measures. *Stanford Journal for International Law* 33:169.
- EKLUND CD
1994. A primer on the arbitration of NAFTA Chapter Eleven investor-state disputes. *Journal of International Arbitration* 136.
- ENDSLEY HB
1995. Dispute settlement under the CFTA and NAFTA: from eleventh-hour innovation to accepted institution. 18 *Hastings International and Comparative Law Review* 661.
- FOSTER KS AND ALEXANDR DC
1994. The North American Free Trade Agreement (NAFTA and the agricultural sector. 40 *Loyola Law Review* 64.
- GAFFNEY JP
1999. Due process in the World Trade Organization: the need for procedural justice in the dispute settlement system. *American University International Law Review* 14(4):1182.
- GONZALEZ JR JA
1996. The North American Free Trade Agreement. *The International Lawyer* 30(2):346.
- HALLUM V
1998. WTO dispute settlement. February *New Zealand Law Journal* 73.
- HIRSCH BR
1998. The WTO Bananas decision: cutting through the thicket. 11 *Leiden Journal of International Law* 201.
- HORLICK GN AND DEBUSK A
1994. Dispute resolution under Nafta. Building on the U.S-Canada FTA, GAT and ICSID. *Journal of International Arbitration* 52.
- HURTINGTON DS
1993. Settling disputes under the North American Free Trade Agreement. *Harvard International Law Journal* 34(2):407.
- JACKSON JN
1999. *The World Trade Organization Constitution and Jurisprudence*.
- JACKSON JH AND CROLEY S
1996. WTO disputes proecures, standards of review, and deference to national governments. *American Journal of International Law* 90(2).
- JOHNSON JR OT
1993. Alternative dispute resolution in the international context: the North American Free Trade Agreement. 46 *Southern Methodist University Law Review* 2179.
- KUFUOR KO
1997. From the GATT to the WTO: the developing countries and the reform of the procedures for the settlement of international trade disputes. *Journal of World Trade* 31(5):117.
- KUMAR U
1996. Southern African Customs Union and the regulation of economic activity in Southern Africa. 25 *Transactions of the Centre for Business Law Economic Crime in Southern Africa* 123.
- LICHTENBAUM P
1998. Procedural issues in WTO dispute resolution. *Michigan Journal of International Law* 1196.

- MARCEAU G
1998. Rules on ethics for the new World Trade Organization dispute settlement mechanism. 32 *Journal of World Trade* 57
- McFARLANE G
1999. Increasing activity on the world trade front. March *The New Zealand Law Journal* 79.
- MVUNGI SE
1994. *Constitutional questions in the regional integration process; the case of the Southern African Development Community with references to the European Union.*
- PETERSMANN E-U
1996. The dispute settlement system of the World Trade Organization and the evolution of the GATT dispute settlement system since 1948. 31 *Common Market Law Review* 1211.
- POWELL SJ AND SEASTRUM EC
1996. Straight talk about a complex issue: the U.S. standard of judicial review of antidumping and countervailing duty determinations: an important challenge for NAFTA panels. 19 *Fordham International Law Journal* 1452.
- PRICE DM
1993. An overview of the NAFTA investment chapter: substantive rules and investor-state dispute settlement. *The International Lawyer* 27(3):727.
- QURESHI AH
1999. *International Economic Law.*
- SCHOENBAUM TJ
1998. WTO dispute settlement: praise and suggestions for reform. 47 *International and Comparative Law Quarterly* 674.
- SIQUEIROS J-L
1993. NAFTA institutional arrangements and dispute settlement procedures. 23 *California Western International Law Journal* 384.
- VAN AARDT M
1997. The SADC organ for politics, defence and security: challenges for regional community building. *The South African Journal of International Affairs* 4(2):145.
- VAN DER BORGHT K
1999. The review of the WTO Understanding of Dispute Settlement: some reflections on the current debate. *American University International Law Review* 14(4):1224.
- VERMULST E, MAVROIDIS PC AND WAER P
1999. The functioning of the Appellate Body after four years. Towards rule integrity. *Journal of World Trade* 33(2):1-50.
- VERMULST E AND KOMURO N
1997. Anti-dumping disputes in the GATT/WTO; navigating dire straits. *Journal of World Trade* 31(1):5.
- WANG L
1997. Are trade disputes fairly settled? *Journal of World Trade* 31(1):59.
- WAREHAM PA
1995. The new WTO Dispute resolution procedure. 4 *International Trade Law and Regulation* 118.