

Replication of WTO dispute settlement processes in SADC

Clement Ng'ong'ola*

Abstract

This paper discusses the substantial reproduction of the dispute settlement mechanism of the World Trade Organisation (WTO) in Annex VI of the Protocol on Trade in the Southern African Development Community (SADC). The paper suggests that the misgivings which this reproduction initially aroused should be set aside. The WTO rules and procedures copied by SADC provide a greater assurance that decisions taken will be implemented. The paper calls for the review and strengthening of provisions – which appear to have been hastily copied into Annex VI from the WTO mechanism – relating to the adoption, implementation, and surveillance of decisions implemented in SADC. The paper also calls for the clarification of other aspects of Annex VI, such as the restriction on forum shopping, in so far as it may restrict recourse to WTO dispute settlement; the authorisation of the establishment of a panel without input from a political body such as the Committee of Ministers responsible for Trade (CMT); and the award of litigation costs even in cases where there may not have been any abuse of the process. It is also suggested that the review of the mandate of the Tribunal sanctioned by the Summit of Heads of State and Government could usefully include the bifurcated jurisdiction of the Tribunal, requiring Rules of Procedure and a distinct modus operandi for the exercise of its original jurisdiction on most matters, and Working Procedures copied from the WTO for the exercise of appellate jurisdiction on trade matters.

Introduction

Article 32 of the 1996 Protocol on Trade of the Southern African Development Community (SADC) initially provided for the resolution of disputes arising from the interpretation and application of the Protocol in a peculiar manner: consultations began the process; these were followed by referring the matter to a panel of trade experts if consultations did not produce an agreement; and, as a last resort, the matter could be referred to the SADC Tribunal.¹ This procedure resembled in outline the process described in Articles XXII

* LLM (Exeter) PhD (London), Associate Professor, Department of Law, Faculty of Social Sciences, University of Botswana.

1 Constituted and empowered in terms of Article 32 of the SADC Treaty to settle any dispute arising from the interpretation or application of the Treaty and the interpretation, application or validity of Protocols or other subsidiary instruments made under the Treaty which cannot be settled amicably.

ARTICLES

and XXIII of the 1947 General Agreement on Tariffs and Trade (GATT). As the Protocol on Trade was about to be implemented, Article 32 was amended to provide for dispute resolution in the manner specified in a new Annex VI, added to the Protocol in 2000.² Annex VI apparently attempted to replicate some of the reforms and changes to GATT dispute settlement reflected in the Understanding on the Rules and Procedures Governing the Settlement of Disputes (DSU) of the World Trade Organization (WTO), without the provisions on appellate review. In August 2007, both Annex VI to the Protocol on Trade³ and the Protocol on the SADC Tribunal⁴ were amended to confer upon the Tribunal jurisdiction over appeals from panel decisions.

SADC is probably the only regional integration arrangement in Africa to attempt to replicate WTO processes for the resolution of trade disputes. This paper examines the consequences of this unique approach to the resolution of trade disputes. SADC's approach is as yet untested, since no trade dispute has so far been processed in terms of either the original or the amended Annex VI. The invocation of the procedure, however, is now more likely after the launch in 2008 of the SADC Free Trade Area (FTA), a major aspect of SADC's regional integration agenda.⁵

The WTO, on the other hand, has had more than a decade of experience with the implementation of the DSU. Some would argue that this has largely been a successful experiment.⁶ Notwithstanding several shortcomings, which are now well-known in the light of the review of the DSU mandated by the 2001 Doha Ministerial Declaration,⁷ the WTO is noteworthy for its robust and fairly effective dispute settlement. What can SADC learn from the WTO's

2 Articles 5 and 9 of the Amendment Protocol on Trade in SADC, 7 August 2000.

3 Agreement Amending Annex VI to the Protocol on Trade Concerning the Settlement of Disputes between Member States of SADC, 17 August 2007.

4 Agreement Amending the Protocol on the Tribunal, 17 August 2007.

5 See statement by Dr TA Salomao, Executive Secretary of SADC, on the occasion of the launch of the SADC FTA, at the Sandton Convention Centre, Johannesburg, South Africa, on 17 August 2008; available at <http://www.sadc.int/index/save/page/206>; last accessed 14 January 2011.

6 See some of the essays in Yerxa, R & B Wilson (Eds). 2005. *Key issues in WTO dispute settlement: The first ten years*. Cambridge: Cambridge University Press; and Janow, M, V Donaldson & A Yanovich (Eds). 2008. *The WTO: Governance, dispute settlement and developing countries*. New York: Juris Publishing Inc.

7 In paragraph 30 of the WTO, Ministerial Declaration, Ministerial Conference, Doha, 9–14 November 2001, WT/MIN(01)/DEC/W/1, members agreed to conduct "negotiations on improvements and clarifications of the Dispute Settlement Understanding", to be based on "work done thus far as well as any additional proposals". For a review of participation by African member states in these negotiations, see Ng'ong'ola, C. 2008. "Africa's contributions to dispute settlement negotiations in the World Trade negotiations: An appraisal". *Southern Africa Trade Research Network (SATRN) Working Paper No. 8*.

experience, and what can the WTO itself learn from the adaptations proposed in SADC? These themes or issues will be discussed after looking at the WTO dispute settlement process and the elements adopted by SADC.

Core features of WTO dispute settlement

The DSU has 27 substantive provisions dealing with, among other issues, the scope of the system, administrative arrangements, objectives and informing principles, and the main steps of the process. The dispute settlement mechanism may be described as integrated, intergovernmental, compulsory and quasi-judicial. It is a mechanism that builds upon the principles and procedures for dispute settlement that evolved under GATT. The emphasis under GATT, as in the DSU, is on reaching a negotiated, mutually acceptable solution, as opposed to adversarial adjudication, identifying a breach, and imposing damages for loss caused by the breach. The process seeks to preserve the balance of rights and obligations that are acquired principally through negotiations, rather than to determine such rights and obligations.

An integrated, intergovernmental and compulsory process

Article 1.1 indicates that the DSU applies to disputes between WTO members arising from and relating to their rights and obligations in the so called covered agreements. Appendix 1 to the DSU identifies the covered agreements as the Marrakesh Agreement Establishing the WTO; all the obligatory, multilateral trade agreements referred to in the Annexes to the WTO Agreement; and any of the optional, plurilateral trade agreements included within the scope of the DSU by a decision of the parties thereto. It is partly because of this extensive coverage of most trade agreements that the DSU is commonly regarded as establishing an integrated dispute settlement mechanism.⁸

The delineation of the scope of the DSU in reference to the covered agreements also ensures that only WTO members – the parties to the covered agreements – are entitled to access the system directly. It is an intergovernmental dispute settlement process. Private traders and other non-governmental actors affected by rights and obligations arising from the covered agreements need to persuade host member states to initiate action under the process.

The DSU can also be described as establishing a compulsory or mandatory mechanism for WTO members. Firstly, a defending party is not required to

8 Article 1.2 and Appendix 2 of the DSU, however, provide special or additional rules and procedures to be preferred and applied to disputes arising in identified areas or sectors of WTO law. Article 1.2 further indicates that, in the event of conflict between these special rules and the general rules and procedures in the DSU, the special rules generally prevail.

consent to the processing of a complaint against it.⁹ Secondly, Article 23.1 states that members “shall have recourse to, and abide by, the rules and procedures of this Understanding” when they seek redress for violations of obligations in the covered agreements or for the “nullification or impairment” of benefits arising thereunder. Article 23.2 further asserts that “members shall not make a determination” on these issues except through recourse to the DSU. The DSU process, therefore, is the first – and probably the only – mechanism WTO members can employ to address issues in the covered agreements.

A quasi-judicial process

The channelling of disputes through member states’ governments ensures that the WTO dispute settlement process is not insulated from political influence. This is one element that leads to the characterisation of the process as *quasi-judicial*. Arrangements for the administration of the DSU described in its Article 2 reinforce this. Article 2.1 establishes a Dispute Settlement Body (DSB) and gives it authority to supervise the various stages of the process. The General Council of the WTO, composed of representatives of all the member states, convenes as appropriate to discharge the functions of the DSB.¹⁰ Thus, WTO members, through their representatives in the General Council, appear to have extraordinary powers over the disposal of disputes – unlike politicians, civil servants or legislators in most domestic legal systems governed by liberal democratic constitutions and traditions.

The ability of WTO members to influence the process and outcome of WTO dispute settlement is, however, circumscribed by some ingenious rules on decision-making. Article 2.4 of the DSU, for example, requires members in the DSB to generally follow the practice of taking decisions by consensus. A footnote to the provision indicates that the DSB is deemed to have decided by consensus if no member present at the relevant meeting formally objects to the proposed decision. This is the concept of *positive consensus*, which is also observed in the WTO General Council.¹¹ It was also a notorious feature of dispute settlement under GATT. It effectively secured for GATT members, including the parties to a dispute, the right to veto unwanted or unfavourable decisions.¹² The ‘negative’ or ‘reverse consensus’ rule is now prescribed for

9 Compare Article 36(2) of the Statute of the International Court of Justice, under which states parties may enter into a special agreement accepting the jurisdiction of the court, or declare that they recognise the jurisdiction of the court as compulsory *ipso facto*, without a special agreement.

10 Article IV.3, WTO Agreement. Article 2.2 of the DSU enjoins the DSB to inform other relevant WTO Councils and Committees of developments in disputes relating to covered agreements for which they are responsible.

11 Article IX.1, WTO Agreement.

12 It would appear that GATT members were initially not too eager to block or veto unwanted or unfavourable decisions. Not many panel reports were apparently blocked before 1980, but the numbers increased appreciably between 1986 and 1994. See

the taking of decisions in the DSB on matters such as the establishment of panels, adoption of panel and Appellate Body reports, and the suspension of concessions. Proposals tabled before the DSB on these issues are obliged to be accepted or adopted unless the DSB decides by consensus not to do so.¹³ It is almost impossible to muster consensus in the DSB to disavow a proposed decision because there is always at least one member in favour of the proposal, i.e. the party that sponsors the proposal, or that is favoured by the decision to be adopted. Decisions to be taken applying the negative or reverse consensus approach in the DSB are now, invariably, made automatically.

Adherence to GATT 1947 principles

One principle informing dispute settlement in the WTO is “adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947”.¹⁴ These Articles essentially implored parties to attempt to resolve disputes through “private” or “inter-party” consultations, and if that did not yield a satisfactory solution, through “institutionalised processes”. In terms of Article XXIII, a complaint could be lodged and a dispute would arise if non-compliance or violation of obligations in the covered agreements was harmful to another party. Strangely, Article XXIII of GATT also suggested that a dispute could arise even if “nullification or impairment” of benefits was not due to a violation of obligations. In other words, a complaint could be lodged if such nullification or impairment arose from the application of measures not inconsistent with GATT, or from the “the existence of any other situation”.¹⁵

Wiess, F. 1989. “Dispute settlement in the GATT: The current debate”. In Butler, WE (Ed.). 1989 *The use of force in international law*. Dordrecht: Kluwer Academic Publishers, p 235; Castel, JG. 1989. “The Uruguay round and improvements to the GATT dispute settlement rules and procedures”. *International and Comparative Law Quarterly*, 38(4):839–840; World Trade Organization, 1995. *GATT Analytical Index: Guide to GATT law and practice*, Vol. 2 (Updated Sixth Edition). Geneva: WTO, Table V, pp 771–787; and Hudec, R. 1993. *Enforcing international trade law: The evolution of the modern GATT legal system*. New Hampshire: Butterworth Legal Publishers, especially Chapter 10, pp 199–270.

13 See Articles 6.1, 16.4, 17.14, and 22.6 of the DSU.

14 Article 3.1 begins with an affirmation that members are obliged to adhere to such principles.

15 It was apparently necessary to provide for non-violation complaints in order to dissuade contracting parties from attempting to negate the benefits of negotiated tariff concessions through non-tariff barriers and other policy measures that were not anticipated and regulated by GATT; India – Patent Protection for Pharmaceutical and Agricultural Chemical Production, WT/DS50/AB/R, 19 December 1997, AB-1997-5, Appellate Body Report, paragraphs 38, 39 and 41. Nonetheless, non-violation complaints were rare under GATT and obviously difficult to prove. Violation of an obligation, on the other hand, led to an assumption of nullification or impairment of benefits, and violation complaints could, therefore, be more readily sustained. Article 3.8 of the DSU retains this presumption of nullification and impairment of

Application of rules of public international law

In addition to the application of GATT principles and procedures, Article 3.2 of the DSU suggests that uncertain provisions in the covered agreements should be clarified in dispute settlement “in accordance with customary rules of interpretation of public international law”. It is now standard practice in WTO dispute settlement to apply Articles 31 and 32 of the Vienna Convention on the Law of Treaties of 1969 as codifications of the customary international law rules on this issue. The general rule of interpretation in Article 31(1) of the Convention requires that a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. The application of this rule has added a touch of legal sophistry to WTO dispute settlement, with which some of the political overseers of the process in the DSB may not be comfortable. There have been complaints in some quarters of surprising jurisprudence in panel and Appellate Body reports, which some members would seek to correct if the negative or reverse consensus principle were not applicable.

Additional informing principles and core objectives

Article 3 of the DSU, the general provisions clause, lists other core objectives and informing principles of WTO dispute settlement in addition to those outlined above. Paragraph 2 of the Article proclaims that the system “is a central element in providing security and predictability to the multilateral trading system”. By clarifying the covered agreements, dispute settlement also seeks to preserve the rights and obligations of members reflected in those agreements. It is not the objective of dispute settlement to vary the rights and obligations in the covered agreements. Outcomes of WTO dispute settlement, therefore, always need to be consistent with the rights and obligations in the covered agreements. Paragraph 3 of Article 3 declares that the prompt settlement of “violation complaints” is essential to the effective functioning of the WTO and the maintenance of “a proper balance between the rights and obligations of members”. Paragraph 4 states that recommendations or rulings of the DSB will seek to achieve a satisfactory settlement of the matter in accordance with the rights and obligations conferred by the DSU and the covered agreements. Paragraph 5, referring to methods of dispute settlement, reiterates that “all solutions to matters formally raised” are obliged to be consistent with the covered agreements and “shall not nullify or impair benefits accruing to any member under those agreements”, nor impede the attainment of the objectives of those agreements. Paragraph 9 declares that provisions of the DSU “are without prejudice to the rights of members to seek

benefits from non-compliance with obligations, while Article 26 provides additional rules for processing non-violation complaints.

Regulation of WTO dispute settlement processes in SADC

authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement".¹⁶

The message of these paragraphs is that members' rights and obligations in the WTO are determined in negotiations, not in litigation, and negotiators have the final say in the interpretation of those rights. Dispute settlement organs in the WTO do not have a final or an exclusive mandate in the interpretation of WTO legal texts. This is another unique feature of WTO dispute settlement that might be surprising to legal professionals familiar with the constitutional separation of powers in national legal systems.

Paragraphs 7 and 10 of Article 3 provide that another core objective of WTO dispute settlement is to secure a "positive solution" to a dispute, consistent with the covered agreements, and preferably a "mutually acceptable solution". If this cannot be achieved, the entire process in the WTO will be guided by one desired outcome: the withdrawal of measures found to be inconsistent with the covered agreements. Remedies such as compensation and withdrawal or suspension of concessions may be awarded in WTO dispute settlement, but these are temporary, and designed only to facilitate a positive solution to the dispute.

The main stages of WTO dispute settlement

At least three main phases of dispute settlement are discernible from the DSU. The first involves the search for a negotiated solution, through consultations or recourse to good offices, conciliation or mediation. The second phase involves adjudication or a formal determination of the violation of obligations or the nullification or impairment of benefits. This second phase is conducted by a panel in the first instance, and by an Appellate Body on appeal. The third phase is concerned with the implementation of the adjudicating body's decision. This involves adoption of the decision, implementation by the member concerned, surveillance of the implementation by the DSB, and the imposition of temporary remedies for non-implementation. Implementation may also require recourse to various modes of dispute settlement. There are time frames for all the main stages of WTO dispute settlement, but the setting thereof, and the manner in which they are applied, seem to acknowledge that settling disputes or enforcing decisions in this area of international economic relations is inherently challenging.

16 This provision echoes Article IX.2 of the WTO Agreement, which gives the Ministerial Conference and the General Council "exclusive authority" to adopt interpretations of the WTO Agreement and the multilateral trade agreements, through decisions passed by a three-quarters majority of the members.

Consultations

The WTO dispute settlement process starts with the lodging of a formal request for consultations. There is an obligation to attempt a consultation before any other action is pursued under the process.¹⁷ A request for consultations is to be in writing and should give the reasons for such request, “including identification of the measures at issue and an indication of the legal basis for the complaint”.¹⁸ This serves to inform the member concerned as well as to distil the legal issues and the substance of subsequent proceedings, should there be no settlement of the matter.¹⁹

Article 4.3 stipulates that a request for consultations should, unless otherwise mutually agreed, elicit a response within 10 days after its receipt, and consultations should commence within a period of not more than 30 days. A complaining party may proceed to request the establishment of a panel to adjudicate the dispute if there is no reply or if consultations do not commence within these time frames. According to Article 4.7, a complaining party may also request the establishment of a panel if consultations fail to settle the dispute within 60 days after the receipt of the original request. The request for a panel may also be lodged within the 60-day period if both parties agree that consultations have failed.²⁰

Consultations in WTO dispute settlement are a private matter between the parties concerned, and are confidential. The DSB and other organs of the WTO responsible for the administration of the DSU are not involved, beyond the processing of notifications required at the commencement and conclusion of the process. The DSU does not provide for supervision or monitoring of the actual conduct of the consultations, or for assessment of the mutually satisfactory solutions reached. These are obvious shortcomings at this initial stage of WTO dispute settlement, and those seeking to replicate the process in other settings should be careful to avoid them.

Another controversial aspect of consultations is the restriction on other member states from participating in the process. Article 4.11 provides that a member interested in consultations being undertaken in pursuance of Article XXII.1 of GATT 1994, or corresponding provisions in other covered agreements, may be joined in the consultations if it has a “substantial trade interest” in the

17 Articles 4.2, 4.5, and 4.7. Article 4.2 is comparable to Article XXII of GATT 1947.

18 Article 4.4.

19 India – Patent Protection for Pharmaceutical and Agricultural Chemical Production, Appellate Body Report, WT/DS50/AB/R, paragraph 94.

20 In cases of urgency, including those involving perishable goods, Article 4.8 stipulates that consultations are to commence within a period of 10 days after the receipt of a request, and a request for a panel may be lodged if the consultations fail to produce a solution within a period of 20 days.

matter, and if the member state to which the request for consultations was addressed agrees that the claim of substantial interest is well-founded. In this way, the responding member state can exclude third parties. The complaining member state can also exclude third parties by requesting consultations, not in terms of Article XXII.1 of GATT 1994, but in terms of Article XXIII. A third party prevented from joining ongoing consultations is nevertheless free to request its own consultations as the main or complaining party. Before bringing a case, each member state is expected to exercise its own judgment, in good faith, as to whether it would be fruitful to do so.²¹

Good offices, conciliation and mediation

Resort to good offices, conciliation and mediation by the Director-General of the WTO in his/her ex officio capacity is referred to in at least two provisions as an alternative method of settling disputes, prior to referring the matter to a panel. Firstly, Article 3.12 provides that a developing country seeking to complain against a measure or measures taken by a developed country may invoke the procedure described in the GATT Decision of 5 April 1966 (BISD14S/18). This procedure suggested recourse to the good offices of the Director-General to find a solution, and an expedited panel process if the Director-General was unsuccessful. The second provision on good offices, conciliation and mediation is Article 5,²² which describes the process as voluntary, and as one which can be requested or terminated at any time by any party to a dispute. It is also a confidential process, and without prejudice to the rights of either party in further proceedings under the DSU.

It appears that, under GATT and in the WTO, very little use has been made of good offices, mediation or conciliation by the Director-General.²³ The essence of the process is that the Director-General can only facilitate the search for a mutually satisfactory solution to be agreed upon by the parties. It may well be that, in most trade disputes, the DSU is invoked by parties seeking a more definitive, formal and binding resolution of the matter after exhausting the

21 Article 3.7.

22 Paragraphs 1 and 2 of Article 5 refer to the process as “good offices, conciliation and mediation”, but paragraphs 3, 4, 5 and 6 refer to the process as “good offices, conciliation or mediation”.

23 Article 5 was invoked, apparently for the first time, in a request for mediation by the Philippines, Thailand and the European Commission (EC) “to examine the extent to which the legitimate interests of the Philippines and Thailand were being unduly impaired as a result of the EC’s preferential tariff treatment of canned tuna originating in ACP States”; see WTO, General Council, WT/GC/66, 16 October 2002, and WT/GC/66/Add.1, 16 October 2002. The mediation report by Deputy Director-General Rufus Yerxa was treated as confidential.

non-formal, diplomatic avenues open to them.²⁴ Good offices, mediation and conciliation may serve only to delay the definitive resolution of the matter by a panel.

The panel stage

Aspects of the panel stage of WTO dispute settlement to be noted are the time within which a panel is required to be established, its terms of reference, its composition, the selection of panellists, third party participation, and the conducting of proceedings.

A panel may be established at the first meeting at which a written request is presented to the DSB, if consensus can be achieved in the DSB. If there is no consensus at the first meeting, a panel is nevertheless obliged to be established at the second meeting at which the request appears on the agenda, applying the reverse consensus principle.²⁵

Apart from the request indicating whether consultations were attempted, Article 6.2 stipulates that the request needs to identify the specific measures at issue and provide a brief summary of the legal basis of the complaint. The measures at issue, and the legal basis for the complaint, together referred to as “the matter”,²⁶ are to be sufficiently clear to enable the responding party to prepare its defence. This will also delineate the panel’s mandate. The standard terms of reference incorporated in most requests require the panel “to examine the matter referred to the DSB” in the light of relevant provisions of a covered agreement or agreements cited in the request, and “to make such findings as will assist the DSB in making the recommendations or in giving the rulings” provided for in the cited agreements.²⁷

The composition of a panel is a responsibility shared by the parties to the dispute and the WTO Secretariat. A panel normally comprises three panellists, but the parties can agree to a panel of five within ten days from its establishment.²⁸

24 See Palmeter, D & PC Mavroidis. 2004. *Dispute settlement in the World Trade Organisation: Practice and procedure* (Second Edition). Cambridge: Cambridge University Press, p 86.

25 Article 6.1 of the DSU provides this, using emphatic and imperative language. It says in part that “a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB’s agenda”. If there is no DSB meeting scheduled at which the request may be considered, one shall be convened for that purpose within 15 days of the request, provided that at least 10 days’ advance notice of the meeting is given.

26 Guatemala – Anti-dumping Investigation Regarding Portland Cement from Mexico, WT/DS60/AB/R, Appellate Body Report, 2 November 1998, paragraph 72. The legal basis for the complaint is also referred to as “the claims”.

27 Article 7.1.

28 Article 8.5.

Regulation of WTO dispute settlement processes in SADC

The WTO Secretariat proposes the names of the panellists, which the parties may reject only for “compelling reasons”.²⁹ If there is no agreement on the panellists within 20 days after the date of the panel’s establishment, the Director-General, acting in consultation with the Chairpersons of the DSB and the relevant Council or Committee, may determine the composition if so requested by one of the parties.³⁰ Panellists may be selected from an indicative list maintained by the Secretariat and periodically updated with inputs from members,³¹ or they may be identified in other ways.

It is in keeping with the quasi-judicial nature of WTO dispute settlement that legal or judicial expertise is not the sole or preferred qualification for appointment as a panellist. As under the GATT system, the expectation may have been that panellists would largely be drawn from diplomats and others serving in member states’ delegations in Geneva.³² It is necessary to clarify in this regard that panellists are to serve in their individual capacities and not as government representatives, nor as representatives of any organisation, and members cannot instruct them or seek to influence them with regard to matters before a panel.³³ Unless the parties otherwise agree, citizens of members party to the dispute are not eligible for selection as panellists in cases in which their governments are involved.³⁴ If, however, a developing country is involved in a dispute with a developed country, the developing country can request that at least one of the panellists is to be from a member state which is a developing country.³⁵

As at the consultation stage, a third country with a substantial interest in a matter before a panel is entitled to request to participate in the proceedings.³⁶ The third country, however, need only have a “substantial interest” in the matter, not a “substantial trade interest”.³⁷ Nonetheless, a third party has limited rights of participation in panel proceedings. It has the right to be heard, to make written submissions, and to receive submissions of the other parties to the dispute, but only in reference to the first meeting of the panel.³⁸ A third party wishing to participate fully in the proceedings should consider initiating dispute settlement proceedings as a main party. As far as possible, the same panel may be entrusted with the disposal of disputes involving the

29 Article 8.6.

30 Article 8.7.

31 Article 8.4.

32 Article 8.8.

33 Article 8.9.

34 Article 8.3.

35 Article 8.10.

36 Article 10.

37 (*ibid.*).

38 Article 10.3.

ARTICLES

consideration of the same matter, and the panel is required to organise the proceedings appropriately.³⁹

Article 12.1 of the DSU provides for the conduct of panel proceedings in accordance with the Working Procedures in Appendix 3 of the DSU. The procedures emphasise timeliness, transparency and confidentiality, and flexibility in the application of technical rules. As soon as practicable and wherever possible, within one week after the composition and terms of reference for the panel have been agreed upon, the panellists and the parties are required to establish a timetable for the disposal of the dispute. The work timetable for the panel starts with the circulation of initial written submissions by the parties. This is followed by the first substantive meeting of the panel, at which the complaining and responding parties will make their presentations. Third parties may also make their presentations at this meeting. The third step is the receipt and circulation of written rebuttals from the parties. The fourth step is the second substantive meeting with the parties, but with no third party involvement. The fifth step is the interim review stage. The panel will first issue to the parties for comments the “descriptive” portions of its interim report, which summarise the facts and the parties’ arguments. After consideration of any comments on the descriptive portions, the panel then issues the full interim report, including findings and recommendations, for review by the parties within a set time period. The sixth step is the production and circulation of the final report to the parties, if changes were required to the full interim report. The last step is the circulation of the final report to WTO members.

In normal cases not regarded as urgent, a panel has a period of six to nine months from the date of its composition to issue the final report to the parties.⁴⁰ The DSB needs to be informed of any likelihood of delay, the reasons for such delay, and an estimate of the additional period required. Time extensions are now not unusual in the WTO, as many cases are complex and involve multiple complainants and third parties.

In the interests of transparency, the Working Procedures require that presentations, rebuttals and statements to the panel are to be made in the presence of the parties; and written submissions, responses to questions and panel reports are to be made available to the parties.⁴¹ At the same time, panels are required to meet in closed session. The parties are present

39 Article 9.

40 Article 12.8 in fact states that, as a general rule, the period from the composition of the panel to the issue of the report “shall not exceed six months”. The period is three months in cases of urgency, including those cases relating to perishable goods. Article 12.9, somewhat unrealistically, states that “[in] no case should the period ... exceed nine months”.

41 Paragraph 10, Working Procedures, Appendix 3.

only when invited.⁴² In addition, the deliberations and documents circulated during the process are confidential.⁴³ Panel reports are to be drafted without the parties, and opinions expressed by individual panellists in panel reports are obliged to be anonymous. However, a party cannot be precluded from disclosing statements of its own positions to the public, and a party that has provided a confidential submission may be requested to provide a non-confidential summary of information contained in its submission.⁴⁴

Appellate review

WTO dispute settlement appears to be less formal, judicial or legalistic in the earlier stages of the process thus far described. On the other hand, the process appears to be more judicial or legalistic at the appeal stage. For purposes of this review, the notable elements of the appeal stage of the process include the composition and mandate of the Appellate Body – the forum responsible for hearing appeals – and the manner in which appeals are to be conducted. These aspects are described in Article 17 of the DSU and in the Working Procedures for Appellate Review, as revised from time to time.⁴⁵

The Appellate Body was established by the DSB in 1995,⁴⁶ as required by Article 17.1, specifically for the purpose of hearing “appeals from panel cases”. It is a standing body, consisting of a total of seven persons, three of whom, called a *division*, are selected to serve in any one case in accordance with internal rules which do not require input from the parties or the WTO Director-General. In accordance with Article 17.2, appointments to the Body are for a term of four years, and are subject to reappointment only once. Article 17.3 indicates that appointees need to be “persons of recognised authority, with demonstrable expertise in law, international trade, and the subject matter of the covered agreements generally”. They are to be “unaffiliated with any government”, but the total composition of the Body is obliged to be “broadly representative of membership in the WTO”. Appointees are also required to observe ethical rules, and to avoid cases creating any conflict of interests, but nowhere does it say that citizens of members are not permitted to serve in appeals involving their countries. These provisions have ensured that the WTO has a professional, independent, and generally highly regarded dispute settlement organ at the appeal stage.

42 Paragraph 2, Appendix 3.

43 Article 14, DSU.

44 Paragraph 3, Appendix 3.

45 For a more recent version of the Working Procedures, see WTO, Appellate Body Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010.

46 See minutes of the DSB meeting held on 10 February 1995, Document WT/DSB/M/1.

ARTICLES

In terms of Article 17.6 of the DSU, an appeal to the Appellate Body “shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel”. The mandate of the Appellate Body is to address such legal issues, and “uphold, modify or reverse the legal findings and conclusions of the panel” as appropriate. The Appellate Body is not mandated to revisit the factual findings in a panel report. The delineation of the Appellate Body’s mandate in this manner has given rise to at least two sets of problems. Firstly, distinguishing matters of fact from legal issues can be exceedingly difficult in some cases.⁴⁷ In such cases, the Appellate Body cannot be precluded from acting as an assessor of some factual matters related to the legal issues. Secondly, the Appellate Body appears to have no mandate under the DSU to refer a case back to a panel for a clearer assessment of the facts of a case to which the law must be applied. Thus, the Appellate Body has found itself assessing or trying some of the facts of a dispute in the process of upholding, modifying or reversing aspects of a panel’s decision. This is what has been termed “completing the analysis” that should have been done by the panel.⁴⁸

Appeals are obliged to be processed timeously, in a transparent manner, and are to adhere to certain strictures on confidentiality. A notice of intention to appeal needs to be filed and circulated within 60 days after the final panel report has been circulated. Within 25 days after the filing of the notice, all submissions by the parties, including third parties, should have been made. As a general rule, there should be an oral hearing within 30 days of the filing of the notice of appeal, and within a period of 60 to 90 days, the Appellate Body should have circulated its report.

The Working Procedures for Appellate Review provide for a meeting of all Appellate Body members for an exchange of views before the division responsible for the appeal finalises its report.⁴⁹ This engenders ‘collegiality’ in the Appellate Body, which minimises the possibility of dissenting opinions and of inconsistent decisions being issued by the same Appellate Body. As part of collegiality, all Appellate Body members are entitled to receive all documents filed in an appeal, and are expected to be available to meet regularly in Geneva to discuss and review aspects of WTO dispute settlement.

Some of the key elements of transparency in appellate review proceedings are that opinions expressed in the Appellate Body Report by individual

47 See EC – Measures concerning Meat and Meat Products (Hormones), WT/DS26/AB/R and WT/DS48/AB/R, Appellate Body Report, 16 January 1998, paragraphs 132 and 133.

48 See, for example, United States (US) – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, Appellate Body Report, 29 April 1996; and Canada – Certain Measures Concerning Periodicals, WT/DS31/AB/R, Appellate Body Report, 30 June 1997.

49 Rule 4, Working Procedures for Appellate Review 2003.

members are anonymous; no ex parte communications with the Appellate Body on matters under consideration are permitted; reports are to be drafted without the parties being present; no party to the dispute is to be given an audience or to be contacted in the absence of the other parties; and, except where otherwise indicated, written communications and documents should be copied to all the parties.⁵⁰ As regards confidentiality, the proceedings and submissions to the Appellate Body are to be treated as confidential, but a party cannot be precluded from disclosing statements of its own position to the public. A party may also be requested to provide a non-confidential summary of the information contained in its written submissions that can be disclosed to the public.⁵¹

Adoption of panel and Appellate Body reports

A legal fiction is maintained in WTO dispute settlement that panels and the Appellate Body present recommendations in their reports which are converted into decisions to be unconditionally accepted by the parties upon the DSB's adoption of a report. It is provided that a panel report is required to be adopted at a DSB meeting to be scheduled within 60 days of the report's circulation, as long as members are given at least 20 days to consider and study the document.⁵² An Appellate Body report is obliged to be adopted within 30 days of its circulation. If necessary, a special meeting of the DSB may be convened for this purpose. According to Article 20, unless the parties otherwise agree, the overall time frames – from the establishment of a panel to the date the DSB considers the report – should not exceed nine months if there is no appeal, or 12 months where an appeal is heard.

All members of the WTO, including the parties to the dispute, are entitled to participate fully in the consideration of a panel or an Appellate Body report for adoption. They can indicate their objections to the report, if any, and have them recorded.⁵³ At the end of the deliberations, however, the negative consensus rule operates to ensure or guarantee adoption of the report. This is why it is legal fiction to describe a report as merely making a recommendation, and to regard the DSB as the body that resolves the dispute.

Implementation of rulings and recommendations

As indicated above, one core objective of WTO dispute settlement is securing a positive solution to the dispute which is consistent with the rights and obligations in the covered agreements. In violation complaints, such a solution

50 Articles 17.10; 17.11 and 18.1, DSU; Rule 19, Working Procedures for Appellate Review 2003.

51 Articles 17.10 and 18.2, DSU.

52 Articles 16.1 and 16.4, DSU.

53 Articles 16.2 and 16.3, DSU.

ARTICLES

entails withdrawing a measure or measures found to be inconsistent with rights and obligations in the covered agreements. A panel or the Appellate Body “should recommend” this solution, and “may suggest” ways in which this may be done.⁵⁴ This is likely to be a difficult and delicate matter. Bringing a measure into conformity with a covered agreement may require executive or legislative action on issues on which the sovereign competence of member states is jealously guarded, and on which the WTO should be loath to dictate. Thus, Articles 21 and 22 of the DSU describe a complex process aimed at persuading and ultimately compelling a member state to comply, and ensuring that its actions are constantly under surveillance in the DSB.

At a DSB meeting convened 30 days after the adoption of a report, the member concerned will be required to inform the DSB of its intentions as regards implementation of rulings and recommendations.⁵⁵ The expectation is immediate or prompt compliance. If it is not practicable to comply immediately, the member concerned is to be given a reasonable period of time (RPT) within which to do so. The RPT may be proposed by the member concerned and approved by the DSB, it may be agreed upon by the parties, or it may be determined through arbitration. A guideline for the arbitrator is that the period should not exceed 15 months from the date of adoption of the panel or Appellate Body report.⁵⁶

Six months after the establishment of the RPT, the issue of the implementation of recommendations and rulings is required to be placed on the DSB agenda, and has to remain on it until the issue is resolved. At least ten days prior to each DSB meeting, the member concerned is obliged to present a written status report on progress made in implementing the ruling and recommendation.⁵⁷

If there is disagreement as to whether measures taken or attempted in compliance with rulings and recommendations are consistent with the covered agreements, the matter is to be referred to dispute settlement. Although, strictly, this is a different matter, the dispute should, wherever possible, be referred to the original panel. The panel is required to report within 90 days of the referral of the matter to it. The actual phrase employed in Article 21.5 is that this type of disagreement is to be resolved “through recourse to these dispute settlement procedures”.

If the member fails to comply with rulings and recommendations within the RPT established, before the expiry of the period, the member may be requested to offer compensation.⁵⁸ Compensation is “temporary” and clearly not intended

54 Article 19.1, DSU.

55 Article 21.3, DSU.

56 Article 21.3(c), DSU.

57 Article 21.6, DSU.

58 Article 22.2, DSU.

as atonement for non-compliance or reparation for loss. It is also described in Article 22.1 as “voluntary” and, if granted, it has to be consistent with the covered agreements. It may be presumed from this that compensation will generally be in the form of trade concessions.⁵⁹

If no satisfactory compensation is agreed upon within 20 days after the expiry of the RPT, the complaining party may request authorisation from the DSB to retaliate – by suspending concessions and other obligations under the covered agreements. The request is to indicate the sector or sectors within which retaliation is sought, and the extent or level of retaliation. Article 22.3 indicates that retaliation should preferably be within the same sector as that in which there was a violation; however, if this is neither practicable nor meaningful, it may be sought in respect of another sector. If there are objections to the selection of the sector or sectors within which to retaliate, or the proposed levels of retaliation, Article 22.6 proposes reference of the matter to arbitration. The arbitration can be conducted by the original panel if its members are available, or by an arbitrator appointed by the Director-General.

Annex VI and settlement of trade disputes in SADC

Annex VI, as amended in 2007, has 22 distinct provisions covering the scope and application of the dispute resolution process, the main stages of the process, and the timelines and parties involved at each stage.

Scope and application of Annex VI

This is addressed in Article 1 of the Annex, which was supplemented by Article 1bis (Ed.’s note: Please check style guide for request to eliminate Latin phrases as far as possible in favour in their English counterparts) in August 2007. Article 1 provides that the rules and procedures in the Annex “shall apply to the settlement of disputes between member states concerning their rights and obligations under” the Protocol. Article 1bis, on forum shopping, provides that if a member state has invoked the rules and procedures of the Annex or any other applicable international dispute settlement mechanism with respect to any matter, that member is not permitted to invoke any another dispute settlement mechanism on the same matter.

59 Shaffer, G. 2003. “How to make the WTO dispute settlement system work for developing countries”. In Shaffer, G, V Musoti & A Qureshi (Eds). *Towards a development-supportive dispute settlement system in the WTO* (ICTSD Resource Paper No. 5). Geneva: International Centre for Trade and Sustainable Development, p 37. Shaffer refers to only two cases in which compensation was paid: Japan – Taxes on Alcoholic Beverages, Mutually Acceptable Solution on Modalities for Implementation WT/DS8/19, 12 January 1998; and United States – Section 110(5) of the US Copyright Act, Recourse to Arbitration under Article 25 of the DSU WT/DS160/ARB25/1, 9 November 2001.

ARTICLES

An assessment of comparable provisions on the scope of the DSU above led to the characterisation of the WTO mechanism as integrated, intergovernmental and compulsory or exclusive. Articles 1 and 1bis suggest that the mechanism in Annex VI is also intergovernmental, but probably not integrated, compulsory or exclusive. It is a process available only to member states, and in respect of their rights and obligations under the Trade Protocol. Private actors who may be adversely affected by the implementation of the Protocol may not invoke the process other than through member states. The moot point is whether private, non-state actors can have direct recourse to other available SADC dispute settlement processes. Article 32 of the SADC Treaty, for example, initially conferred upon the Tribunal – the body responsible for appellate review under the Annex – jurisdiction over all disputes relating to the interpretation, application or validity of the Treaty, Protocols and other subsidiary instruments. Article 14 of the Protocol on the Tribunal confirmed this. Article 15 of the Protocol on the Tribunal also confirmed that the scope of this jurisdiction included disputes between member states, and between natural or legal persons and member states. When Article 32 of the Protocol on Trade was amended in 2000 to provide for the mechanism in Annex VI, there was no corresponding clarification in Article 32 of the Treaty, or Articles 14, 15, and 18 of the Protocol on the Tribunal that the Tribunal would cease to have original jurisdiction over the interpretation or application of the Protocol on Trade, and over disputes between natural or legal persons and member states in respect of that Protocol. In theory, therefore, Annex VI does not describe the only mechanism for resolving trade disputes. It is partly for this reason that the mechanism in Annex VI is not described as proposing an integrated dispute settlement process. SADC, in fact, has a bifurcated dispute settlement mechanism: the Tribunal has original jurisdiction over some matters and, seemingly, only appellate jurisdiction over trade matters, although Article 32 of the SADC Treaty and Articles 14 and 15 of the Protocol on the Tribunal would, on the face of it, appear to suggest otherwise.

The purported prohibition of forum shopping in Article 1bis of Annex VI is also not without ambiguity. It is implicitly acknowledged in this provision that disputes arising under the Protocol on Trade between SADC member states could conceivably be regarded as disputes falling within the jurisdiction of other dispute settlement mechanisms. All SADC member states party to the Protocol on Trade, for example, are members of the WTO; some SADC members also belong to the Common Market for Eastern and Southern African States (COMESA); while others are members of the Southern African Customs Union (SACU). A trade dispute under the SADC Protocol on Trade could, thus, equally be a WTO, COMESA or SACU dispute. Article 1bis appears to give such parties a choice as to what dispute settlement mechanism to invoke. Article 1bis further suggests that the choice of a particular mechanism is in effect irrevocable or irreversible. This is consistent with Article 24(3) of the Protocol on the Tribunal, which declares that decisions and rulings of the Tribunal “shall be final and binding”. But it is not consistent with Article 23

Regulation of WTO dispute settlement processes in SADC

of the DSU, which effectively compels WTO members to invoke the DSU primarily and exclusively for purposes of dispute resolution. As long as a dispute under the Protocol on Trade in SADC could also be regarded as a dispute relating to a covered agreement in the WTO, it would be contrary to WTO law and obligations – besides being ineffective – to prevent a WTO member from invoking the DSU simply because the member had previously attempted to invoke a regional dispute settlement mechanism.

The main stages of dispute settlement in Annex VI

The similarity of the process described in Annex VI to WTO dispute settlement is most apparent in the stages of the process described in the Annex. As the main stages, Annex VI originally provided for –

- consultations
- resort to good offices
- conciliation or mediation
- reference of a dispute to a panel of trade experts
- adoption and implementation of panel recommendations, and
- imposition of remedies of compensation and suspension of concessions.

As noted in the introduction, Agreements amending Annex VI and the Protocol on the Tribunal have added appellate review of panel reports by the SADC Tribunal to the process. Before these steps of the process are outlined, Article 2, in a manner comparable to Article 3 in the DSU, describes cooperation as the underlying principle of the process.

Cooperation

Article 2 provides that SADC member states are obliged to –

- (a) at all times endeavour to agree on the interpretation and application of the Protocol
- (b) make every attempt to arrive, through cooperation, at a mutually satisfactory resolution of any matter that may affect the operation of the Protocol, and
- (c) make use of the rules and procedures in the Annex to resolve disputes in a speedy, cost-effective and equitable manner.

There is a hint, particularly in paragraph (a), that resorting to dispute settlement will not supplant negotiations and agreement among member states as the principal method through which rights and obligations are acquired. As under the DSU, one of the basic aims of dispute settlement is to clarify rights and obligations that would have been settled in negotiations.

Consultations

In terms of Article 3 of Annex VI, consultations may be requested regarding any measure that a member state regards as affecting its rights and obligations

ARTICLES

under the Protocol. The request needs to be in writing, and it has to identify the measures at issue as well as indicate the legal basis of the complaint. The request to the member state concerned is to be copied to the CMT, through the Registrar of the Tribunal, and to all other member states. As under the DSU mechanism, a member state other than the consulting states may request to join the consultations. The requesting member will be allowed to join if it has a substantial trade interest in the matter, and if the responding member state agrees that the claim of substantial interest is well-founded. Consultations are to be attempted within strict time frames.

As under the DSU, consultations are to be a confidential matter, not amenable to supervision by bodies such as the DSB in the WTO or the CMT in SADC. Nevertheless, Article 3(6) of Annex VI enjoins consulting member states to make every attempt to arrive at a mutually satisfactory solution of any matter, and to “(a) provide sufficient information to enable a full examination of how the actual or proposed measure or other matter may affect the operation of this Protocol”, and “(c) seek to avoid any resolution that adversely affects the interests of any other member state under this Protocol”. Thus, Annex VI provides for the monitoring of the outcome of consultations. In the WTO, this is one of the clarifications proposed for the consultations stage in negotiations on the DSU’s reform.

Good offices, conciliation and mediation

Article 4 of Annex VI, on good offices, conciliation and mediation, is essentially a summary of Article 5 of the DSU on the same subject. Article 4 describes *good offices, conciliation and mediation* as procedures to be undertaken voluntarily. These procedures are to be confidential, can be requested at any time, and can begin and be terminated at any time. No time frames are suggested for the process.⁶⁰ Good offices, conciliation and mediation under the SADC process may be offered by “the Chairperson of the CMT, or any other member of the CMT designated by the Chairperson who is not a national of a disputing member state ...”.

Panel proceedings

Reference of a dispute to a panel of trade experts is covered in 11 of the 22 provisions in Annex VI,⁶¹ thus suggesting that this is a critical stage in the dispute settlement process. The first issue, covered in Article 5, is requesting the establishment of a panel. A request in writing is to be lodged with the

60 Compare Article 5.4 of the DSU, which provides that when good offices, conciliation or mediation are entered into within 60 days after receipt of a request for consultations, a complaining party must allow a period of 60 days after the date of receipt of a request for consultations before requesting the establishment of a panel.

61 Articles 5 to 15.

Regulation of WTO dispute settlement processes in SADC

Registrar of the Tribunal, indicating whether consultations have been held, the specific measures giving rise to the complaint, and the legal basis of the complaint in the light of the provisions of the Trade Protocol. A panel so requested has to be established within 20 days from the date of receiving the request.

The Registrar of the Tribunal has been installed as the officer to whom a request for the establishment of a panel is to be addressed. The Registrar replaces the Sector Coordinating Unit, which no longer exists as a SADC administrative organ.⁶² The Registrar is responsible for the initiation of dispute settlement in the first instance, and for servicing the Tribunal at the appeal stage. These roles place the Registrar in an invidious position that might create the impression that the appeal process is corrupt. It would have been better to set the appeal process apart from the panel process, by entrusting administration at the panel stage either to the CMT or to some functionary in the SADC Secretariat. The second criticism of Article 5 is that the CMT – the political organ with oversight over many aspects of the Protocol on Trade – has no role to play in the process. The comparable provision in WTO dispute settlement provides that the DSB is obliged, by reverse or negative consensus, to establish a panel at the second meeting at which the request appears on its agenda. This ensures that the process is a WTO matter. In SADC, the Registrar of the Tribunal might be politically exposed if the establishment of a panel is not a collective decision of the entire organisation, even if a lack of consensus on the matter is cleverly circumvented through reverse consensus.

Articles 6 to 8 of Annex VI deal with the selection of a panel after the receipt of a request. A panel is required to be composed of three panellists, all of whom are to have expertise or experience in international trade, international law, and international economics, or in other matters covered in the Protocol on Trade. If selected, however, they must serve in their individual capacities, and cannot take instructions from or be influenced by any government or organisation. Panellists are to be selected from an indicative roster, initially compiled and subsequently updated by the Registrar of the Tribunal with inputs from member states. Within 15 days of the delivery of a request, disputing member states are required to endeavour to agree on the chair of the panel. Within ten days of the selection of a chair, each disputing member state selects one panellist who is not a citizen of such member state. If there are several complaining member states, they are to jointly select one panellist, who is not a citizen of such member states. Where the parties fail to select a chair or a panellist within the stipulated time period, the matter needs to be referred to the SADC Executive Secretary, who is obliged to select one by lot, within five days, from lists of panellists nominated in the indicative roster. This is an odd

62 Article 3 of the Agreement amending Annex VI to the Protocol on Trade, 2007, replacing the term “Sector Coordinating Unit” with “Registrar of the Tribunal” wherever they appear in Article 5.

ARTICLES

way of breaking an impasse. It somewhat contradicts Article 7(a), which states that all panellists “shall be chosen strictly on the basis of objectivity, reliability and sound judgment”. Apart from this odd element, parties to the dispute notably have considerable latitude in selecting panellists. As in international arbitration, each party chooses at least one panellist, and contributes to the choice of the chair. Under the comparable DSU provision, panellists are to be suggested by the WTO Director-General, and may not be rejected by the parties, except for compelling reasons.

The conduct of panel proceedings is covered in Articles 9 to 15 of the Annex. Article 9 describes the standard terms of reference to be adhered to by the panel if specific terms of reference have not been set. These are to –

- examine the matter referred to in the request, in the light of relevant provisions of the Protocol
- determine whether the matter under dispute has nullified or impaired benefits of the complaining member state under the Protocol
- make findings, as and when appropriate, on the degree of adverse trade effects on any member state of any measure found to be inconsistent with the Protocol or causing nullification or impairment of benefits, and
- recommend bringing into conformity with the Protocol any measure found to be inconsistent with it.

The notable adaptation from the DSU mechanism here is that panels under the SADC process are required to make findings as to the adverse effects of measures complained of. This is likely to be a challenge and to compound what is already an onerous assignment.

Article 10 provides for at least one hearing between the parties and the panel. At this hearing the parties are to be given the opportunity to make initial and rebuttal written submissions. Deliberations, submissions and communications exchanged during the hearing are confidential. This is not consistent with the culture of open or public hearings that now prevails at the Tribunal.⁶³

Article 12 gives third parties enhanced rights to participate in the process. A *third party* is a member state with a “substantial trade interest” in the matter which has duly notified the CMT and the Registrar of the Tribunal of its interest. A third party is entitled to attend all hearings, to make written and oral submissions to the panel, and to receive the written submissions of the disputing member states. As noted earlier, third parties in WTO dispute settlement are entitled only to attend the first meeting between the parties and the panel, and to receive submissions and communications relating to that meeting.

63 See Article 24(1) of the Protocol on the SADC Tribunal, and Rule 45(1) of the Tribunal's Rules of Procedure.

Regulation of WTO dispute settlement processes in SADC

Articles 14 and 15 provide for the issue of the panel's report in two stages at the end of the hearing. In the first stage, an initial report is required to be issued within 90 days of the last panellist being selected. The report is to contain findings of fact, a determination of the issues indicated in the terms of reference, and recommendations for the resolution of the dispute. The parties are entitled to comment on the report, and the panel may or may not take these comments into consideration in the preparation of a final report. In the second stage, a final report is to be issued to the parties within 30 days after the presentation of the initial report. Majority and minority opinions are not permitted to disclose the names of the panellists associated with them. Again, this is contrary to the culture obtaining in the Tribunal of issuing dissenting opinions that bear the name of the dissenting Tribunal member.

Appeals from panel reports

As indicated earlier, Annex VI originally did not provide for appeals against decisions in panel reports. This was provided for in 2007, through the insertion of Article 20A in the Protocol on the Tribunal, and Article 15A in Annex VI,⁶⁴ both of which confer upon the SADC Tribunal jurisdiction to consider appeals against panel decisions. Both Articles 20A and 15A stipulate that only a party to a dispute may appeal against a panel report. Third parties have no right of appeal, but they may participate in the proceedings if they have a substantial interest in the matter, and have notified the Registrar of the Tribunal of their interest. Appeals are limited to issues of law and legal interpretation covered in panel reports.

Article 20A is somewhat opaque on the conduct of appeal proceedings. It does not set time frames for the disposal of appeals. Paragraph 7, for example, states that appeals from a decision of a panel established under the Protocol on Trade "shall be dealt with in accordance with that Protocol". The import of this is unclear, as neither the Protocol nor Annex VI initially provided for appellate review.

Article 15A is more specific on some of these issues. Paragraph 2 provides that "the length of the appeal proceedings shall not exceed 90 days". Paragraph 4 further provides for the Tribunal, in consultation with the SADC Executive Secretary, to develop working procedures for appellate review which "shall not be less restrictive" than the Working Procedures of the Appellate Body of the WTO under the DSU. The Working Procedures of the Appellate Body underscore timeliness, confidentiality and collegiality. In effect, Article 15A calls upon the SADC Tribunal to adapt its modus operandi on the conduct of

⁶⁴ Article 5 of the Agreement amending the Protocol on the Tribunal, Lusaka, Zambia, 17 August 2007; Article 10 of the Agreement amending Annex VI to the Protocol on Trade concerning the Settlement of Disputes between the Member States of the Southern African Development Community, Lusaka, Zambia, 17 August 2007.

ARTICLES

proceedings in public and on the issue of dissenting opinions. Unfortunately, this has been suggested at a time when many are calling for greater transparency in the conduct of proceedings in WTO dispute settlement. There should, therefore, be further debate in SADC as to whether transparency might be enhanced by aligning SADC Tribunal Rules with WTO Appellate Body Working Procedures. An additional consideration in this debate is the desirability of a bifurcated jurisdiction for the SADC Tribunal, giving rise to the need for Rules of Procedure for the hearing of most disputes for which the Tribunal has original jurisdiction, and working procedures for the appellate review of panel reports.

Adoption and implementation of panel and appeal decisions

Article 15 provides that a panel's final report is to be transmitted to the CMT for adoption through the Registrar of the Tribunal. But if a party if a party has notified the CMT of its decision to appeal, the report will only be considered for adoption after the appeal. Article 15A does not mention adoption of reports arising from appellate review. However, Article 17 was amended in 2007 to read, in paragraph 2, that "provisions of paragraph 1 and Article 19 shall apply *mutatis mutandis* to decisions taken by the Tribunal pursuant to Article 15A". Paragraph 1 of Article 17 provides for prompt implementation of recommendations in a panel report, or for the implementation of the same within an RPT. Article 18 – on compensation and suspension of concessions or obligations (retaliation) as temporary measures that may be authorised to encourage compliance with panel decisions – was also amended to authorise the imposition of such measures in the implementation of appeal decisions. This means that all the provisions on implementation of panel reports are applicable to the implementation of Tribunal decisions on appellate review. However, none of the adjustments to Articles 15, 17, 18 or 19 refers to or provides for the adoption of Tribunal decisions on appellate review. This gap in the procedure leads to an assumption that a Tribunal report on appellate review, like a panel report, is to be transmitted to the CMT for adoption, which will decide on the matter applying the reverse consensus rule. But is it realistic to assume that the Tribunal's report, like a panel's final report, "shall be adopted by the CMT within 15 days after it is transmitted to the CMT and shall promptly be made public thereafter"?⁶⁵ The Registrar of the Tribunal probably needs clearer guidance on this issue.

As in WTO dispute settlement, the expectation and requirement is that, where a panel and/or the Tribunal recommends that a measure found to be inconsistent with the Trade Protocol should be brought into conformity with the Protocol, the member state concerned is immediately obliged to comply with the ruling or recommendation. If it is impracticable to do so, the member state has to be given a RPT to do so. The RPT cannot exceed six months from the

65 Article 15(4).

Regulation of WTO dispute settlement processes in SADC

date of the report's adoption. Under the WTO mechanism, a RPT may also be determined by an arbitrator, and the guideline to arbitrators is that such period cannot exceed 15 months. No provision is made in Article 17(1) for resolving disagreements as to what may be a reasonable period in the circumstances of each case. Such disagreements are always likely in this area of international economic relations, and provision should have been made for the expeditious resolution of such disputes by arbitration or other means. In the absence of such a provision, a party will probably be entitled to initiate panel proceedings over the matter – a process that could take some time to conclude.

Article 18(2) of Annex VI, as amended, provides that, if there is no compliance with the ruling or recommendation within the RPT established in terms of Article 17(1), the parties "shall enter into negotiations with a view to developing a mutually satisfactory solution". If no satisfactory solution is reached within 20 days after the expiry of the RPT, the complaining member state may request authorisation from the CMT to suspend concessions or other obligations of equivalent effect to the level of nullification or impairment. Article 18(1) underscores that compensation and retaliation are temporary measures, available when rulings and recommendations are not implemented within the established RPT. Therefore, when Article 18(2) provides for "negotiation of a mutually satisfactory solution" in the event of non-compliance within the RPT, it is referring to the negotiation of compensation. Article 18 does not explicitly mention compensation, and it does not indicate the form which it may take. Should we assume that, as in the WTO, compensation will be in the form of additional trade concessions, to be accorded on a most-favoured-nation basis? If so, an opportunity was missed to be innovative in the framing of Article 18, and to provide for negotiation and the award of monetary or other compensation as reparation for loss caused by non-compliance.

Article 18(3) provides that the CMT is obliged, by reverse consensus, to authorise the suspension of concessions or obligations within 20 days from the date of receiving the request. As in WTO dispute settlement, this is to be attempted in the same sector as that in which there was nullification and impairment, and other sectors should be targeted if same-sector retaliation is not practicable. Paragraphs 5 and 6 of Article 18 provide for expeditious resolution, by arbitration, of disputes as regards the level of retaliation to be exacted.

Article 19 – on the expenses and costs of dispute settlement in terms of Annex VI – is a fitting provision on which to conclude this discussion on implementation of panel and Tribunal decisions and what may happen to the respondent in the event of non-implementation. Article 19(2) originally proposed that the costs and expenses of panel proceedings "shall be borne in equal parts by the disputing member states or in a proportion as determined by a panel". In 2007, Article 19 was revised to provide generally that panel and appellate review proceedings in the Tribunal are to be funded from the regular

ARTICLES

SADC budget and from other sources, as may be determined by the CMT. Paragraph 4 stipulates that each “disputing member state shall be responsible for payment of its own costs arising from litigation”. But where a panel (or the Tribunal) determines that –

a disputing member state has abused the process ... , it may require from that disputing member state to pay for the costs reasonably incurred under the circumstances of the particular case by the other disputing member state arising from the litigation.

Developing countries have suggested that the WTO dispute settlement process should adopt the award of litigation costs as a remedy.⁶⁶ With clarification as to what may be regarded as *abuse of the process*, this is one element of the SADC process that could be recommended to the WTO for emulation. The other element is Article 3(6), which provides for sufficient disclosure of mutually satisfactory solutions reached during consultations, so that the effect of measures proposed on other parties and on the operation of the Protocol on Trade can be assessed.

Concluding remarks and observations

The replication of some WTO dispute settlement procedures in Annex VI in 2000 can be criticised as a quixotic experiment, attempted without a profound appreciation of the special needs of a fledgling institution and of the different environment obtaining in the WTO.⁶⁷ It can also be defended on at least two grounds. As regards the first of these, all SADC member states then party to the Protocol on Trade were also members of the WTO. The FTA proposed in the Protocol was due, and had to be assessed for consistency with WTO law. Aligning the dispute settlement provisions of the Protocol with WTO dispute settlement procedures could have contributed to a positive assessment of the FTA. Domesticating WTO dispute settlement could familiarise SADC member states with WTO procedures and prepare them for effective participation in the multilateral process. Recent developments in SADC dispute settlement also suggest that the replication of WTO dispute settlement procedures was fortuitously far-sighted. After the ruling by the SADC Tribunal in the Zimbabwe land seizures case,⁶⁸ which Zimbabwe has failed to observe, the Summit of Heads of State and Government called for a review of the role, functions

66 See WTO Proposal by Mexico in the Negotiations on DSU Reform, Document TN/DS/W/23, 4 November 2002; and proposals by Cuba and others, TN/DS/W/19, 9 October 1992, and TN/DS/W/51/ Rev.1, 13 March 2003.

67 For this type of criticism, see Trade Law Centre for Southern Africa. 2003. “Report of the Round Table Conference on the SADC Protocol on Trade and the trade dispute settlement mechanism” (Unpublished), p 3; Conference held on 19–22 March 2003, in Stellenbosch, South Africa, and hosted by the SADC Secretariat, the German Agency for Technical Cooperation (GTZ), and tralac.

68 *Mike Campbell (Pvt) Ltd & Others v The Republic of Zimbabwe* SADC (T) 2/2007.

Regulation of WTO dispute settlement processes in SADC

and terms of reference of the Tribunal.⁶⁹ Whether the review is well-intended or not, if this had been a trade dispute resolved in terms of Annex VI, the implementation of the decision would probably have been different and certain. It is unlikely that SADC member states will impugn decisions taken locally but under rules and procedures that are adhered to at a multilateral level.

This study therefore concludes that the replication of the WTO dispute mechanism in Annex VI should be embraced. It provides SADC with a more secure platform for the implementation of decisions likely to be politically unpopular. Annex VI should, thus, be revised to improve and strengthen the dispute resolution process.

The first issue is the restriction on forum shopping in Article 1bis. This might not be entirely consistent with the obligations of WTO member states, and will not be recognised in the WTO in respect of a dispute that, within the regional forum, is couched in terms of obligations under the Trade Protocol and, at a multilateral level, in terms of violation of a covered agreement.

At the consultations stage, resort to good offices, conciliation and mediation is often not a popular alternative to consultations or panel proceedings at a multilateral level. It is also not likely to be popular in a regional organisation with only a handful of members who claim to have strong historical and political ties. On the positive side, it should be noted that Annex VI already has one aspect that would be regarded as a desirable clarification of provisions on consultations under the DSU, namely Article 3(6). This Article provides for more detailed reporting and some assessment of the outcome of consultations, which are otherwise supposed to be private and confidential.

At the panel stage, issues in Annex VI that should be re-examined include the designation of the Registrar of the Tribunal as the officer responsible for the establishment of a panel, and the non-involvement of the CMT in this process. It has also been suggested that requiring a panel to make findings on the adverse effects of an offending measure might be more challenging than making an objective assessment of “the matter” referred to a panel. At the multilateral level, the method employed for the selection of panellists has been problematic, leading to calls for a shift from ad hoc panels to a standing body of panellists, similar to the Appellate Body. The method for the selection of panellists in Annex VI is not likely to be problematic, however, since the parties to the dispute have more latitude in the matter. Still, the added value that a standing body of panellists might provide should be considered.

At the appeal stage, the main problem is that appeals lie to an existing Tribunal, with a mandate, composition, rules of procedure and a juridical

69 Communiqué of the SADC Summit of Heads of State and Government, 17 August 2010.

ARTICLES

culture that may not comply with expectations regarding the final resolution of international trade law disputes. Thus, the Tribunal needs to develop new Working Procedures which should be similar to those that obtain in the WTO. Perhaps what is required is an appeals body or chamber, distinct from the current Tribunal in terms of its jurisdiction, composition and rules of procedure.

The replication of WTO dispute settlement processes in SADC was perhaps unsatisfactory in respect of the implementation of Tribunal decisions. It has been noted that Annex VI has no provisions on adoption by the CMT of Tribunal decisions, and on subsequent surveillance of implementation by the CMT or any other political organ. Annex VI further has no provisions on determining, through litigation, an RPT for the implementation of a decision, or the sufficiency or legality of measures adopted in compliance with a panel or Tribunal decision. Difficulties encountered in the implementation of the Zimbabwe land seizures case suggest that that there should be no gaps at this stage of the process. SADC member states could also be bold and consider remedies that have been mooted in the WTO but are not likely to be agreed upon, such as the standard awarding of litigation costs in situations not involving abuse of process, and the awarding of monetary compensation.