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Dispute settlement as a tool for achieving integration objectives: lessons for Southern Africa from the WTO

Summary

Dispute settlement processes within regional organisations tend to exhibit a preference for diplomatic intervention and settlement. These processes often take place behind closed doors and settlements are secret. Due to the fact that decisions, whether on regional or multilateral level, affect a greater constituency of interested parties it is imperative to empower such stakeholders to influence the decision-making process. Transparency within dispute settlement systems has always been questioned. Notable examples exist today that demonstrate how effective dispute settlement systems may enhance the aims of organisations that employ them. The World Trade Organisation (WTO) and the European Communities (EC) provide ample proof of this contention. This article attempts to identify and apply examples of good dispute settlement principles found within the jurisprudence of the WTO and to apply them to regional organisations like SADC and SACU. Various aspects of the development of the dispute settlement system within the WTO will be traced. Transparency and public access to dispute settlement procedures are also accentuated.

Dispuut beslegtiging as hulpmiddel vir die nastreef van integrasie doelwitte. Lesse vir Suidelike Afrika vanuit die WHO

Dispuut beslegtigingsprosesse binne streeksverband toon duidelike voorkeure vir diplomatiese ingryping en skikking. Verrigtinge geskied agter geslote deure en word noodwendigerwys geheim gehou. Sadinge besluite affekteer 'n breër gemeenskap van belanghebbendes wat dikwels geen stem het om besluitnemingsprosesse te beïnvloed nie. Openlikheid en deursigtigheid is dikwels 'n probleem in organisies van hierdie aard. Daar is ook verskeie voorbeelde van hoe effektiewe dispuut beslegtigingsprosedures doelwitte van sodanige organisasies kan bevorder. Die bestaan van die Wêreld Handelsorganisasie (WHO) en die Europese Gemeenskappe (EG) getuig daarvan. Hierdie artikel poog om voorbeelde van goeie dispuut beslegtigingsbeginsels te identifiseer binne die WHO en hulle toe te pas op streeksorganisasies soos die Suidelike Afrikaanse Ontwikkelingsgemeenskap en die Suidelike Afrikaanse Doeane Unie. Verskeie aspekte van verwikkelinge binne die WHO sal nagegaan word. Verder word die vereiste van deursigtigheid en die toegang van die publiek tot dispuut beslegtigingsprosesse ook beklemtoon.

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1. Introduction

The advent of the World Trade Organisation (WTO) has refocused our attention on the importance of the multilateral trading system. Global trade and the demands for a level playing field necessitate the establishment and enforcement of common rules. In this regard the WTO has undergone some fundamental institutional changes in order to ensure that fears in this regard are quelled. The recognition of the WTO as an organization and the apparent move away from the 'absolute consensus' model may be indicative of the quasi-legalisation of the so-called 'GATT system'. In the same vain, the introduction of a more balanced and progressive dispute resolution system has reinforced the idea.

A teleological progression may be observed in the way institutional changes over the various multilateral trade rounds (MTRs) have culminated in the present dispensation.

This article, in part, attempts to trace especially the evolution of certain aspects of dispute settlement and possible future development in this regard. Against the backdrop of this multilateral dispensation, many regional integration schemes have also evolved. Some of them have developed vibrant principles regarding dispute resolution. The most emphatic example of an integrated dispute system within a regional integration scheme is the one developed by the European Communities (EC). Some guiding principles from this jurisdiction can be implemented within organisations like Southern African Development Community (SADC) and Southern African Customs Union (SACU) regarding dispute settlement.

Should one look at regional organisations like the EC or NAFTA, one is struck by the general move towards "judicialisation" of the dispute settlement process. Economic relations increasingly define international relations, which signifies a move from power-oriented to rule-oriented (legalistic) approaches to international relations. As the WTO becomes more influential, parallel developments at regional level tend to mimic dispute settlement mechanisms at a multilateral level.

The dynamics of integration within the southern African region is characterised by an uneven geography of economic development. Due to economic disparities and the presence of a rather dominant economic power in the form of South Africa, the allocation of benefits from economic integration is a rather difficult task.[1] The polarisation of economic growth and investment toward South Africa in for instance the SACU resulted in a revenue sharing formula that sought to compensate members for losses in this regard. Scant regard was had for any dispute settlement system within a South African dominated SACU.[2] Greater institutionalisation within SACU with the new agreement will probably precipitate a new approach to dispute settlement. Yet SADC is also moving rapidly to implement its Trade Protocol

1 For a general overview see the following sources: Davies 1996:27-38; Maasdorp 1994:6-10; Gibb 1996:1-26.

2 See Kumar 1990:36-38.

that will invariably lead to more conflicts due to greater complexity of the integration dynamic. How these conflicts are addressed within the context of the implementation of the Trade Protocol will determine its success.

If regional integration schemes like SADC, SACU or the Common Market of Eastern and Southern Africa (COMESA) are to succeed, robust regional dispute settlement systems must be put in place. The emergence of independent regional courts or tribunals may further strengthen the legitimacy of such schemes by ensuring that the full benefit of economic integration accrues equally to all members. The birth of the African Union and initiatives like NEPAD (New Economic Partnership for Africa's Development) necessitates a greater commitment to economic integration on the continent. The relationship between the African Economic Community (AEC) and the various regional economic communities (RECs) will also have a bearing on the development of successful dispute settlement systems.

2. Context of dispute settlement within southern Africa

Whether or not a case can be made for the existence of "judicialised" dispute settlement systems within organisations like SADC or SACU is doubtful. In the same vain, one can understand that SADC has only recently transformed itself from the sectoral cooperation model to an economic integration model and would hence lack the institutional capacity to operate such a system. The SADC Trade Protocol[3] provides for the elimination of barriers to intra-SADC trade (Article 3); elimination of import duties (Article 4); elimination of export duties (Article 5); and undertakes to adopt measures to eliminate existing non-tariff barriers (Article 6). This articulation does not once refer to any legal norm or dispute settlement measure for the achievement of these laudable objectives.

Since no judicial authority is mentioned, it seems that the primary mode of "dispute settlement" would be through mutual negotiation and diplomatic processes. Article 32 of the Trade Protocol confirms this sentiment. No referral or adjudication is necessary for the withdrawal of equivalent concession.[4] Only if there is no agreement (after the withdrawal of equivalent concession) will the Committee of Ministers that is responsible for trade matters appoint a panel of trade experts.[5]

Further afield the Common Market for Eastern and Southern Africa (COMESA)[6] makes provision for the establishment of a Court of Justice under Article 7 of that treaty. The COMESA Court ensures adherence to "the law" in the interpretation and application of the Treaty. Though the Treaty delineates competency *vis-à-vis* the other institutional role-players, dispute resolution within the integration framework, has always been nettled with political conservatism and a pre-dereliction for negotiated settlements.

3 SADC Trade Protocol.
4 See Article 32(3) of SADC Trade Protocol.
5 See Article 32(5).
6 Treaty Establishing the Common Market for Eastern and Southern Africa 1993.

Naturally, the perceived loss of sovereignty in the integration process has precipitated this unfortunate state of affairs. COMESA is the successor of an organisation called the Preferential Trade Agreement (PTA) Treaty.[7] The PTA made provision for dispute resolution by an institution known as the Tribunal. Very limited jurisdictional powers were given to the Tribunal, and this ensured that it would never play a prominent role in any dispute that arose. A majority of disputes that arose were resolved informally, in most cases by the Secretary-General under strict confidentiality protocols.[8] This system was surely geared toward dispute avoidance and not dispute settlement.

The COMESA Treaty does not enumerate the sources of COMESA law but merely charges the Court to "… ensure the adherence to the law in interpretation and application ...[9] This recognition affords the COMESA Court the opportunity to develop a relevant jurisprudence. No similar provision is found in the SADC Trade Protocol.

If one looks at SACU, clearer provision for dispute resolution is found, though also limited. Provision is made for a Tribunal with the power to adjudicate matters referred to it.[10] From a reading of article 13(3) it seems that the Tribunal is mandated to adjudicate any "issue concerning the application or interpretation of this Agreement…" Thus, also in the case of SACU the opportunity exists to develop some kind of jurisprudence. The question is how SADC may create a facilitatory environment to address the need for some kind of dispute settlement process based on a more legalistic process to dispute settlement. In order to distil some principles, the article will analyse some brief moments of developments of the dispute resolution system within the WTO.

The various relationships between the regional economic communities and the African Economic Community (AEC) must also be clarified. Article 19 of the Treaty Establishing the African Economic Community posits that decisions of the AEC Court of Justice "shall be binding on all Member States". Precisely how regional economic communities will translate this provision is not certain. No mechanism is currently in place to ensure primacy of 'AEC norms' within the various regional dispute settlement systems. The EC has developed concepts like 'direct effect' and 'community loyalty' than can work within the African context.

3. The World Trade Organisation and dispute settlement

The requirements of global trade presuppose predictability and legal certainty as far as the enforcement of legitimate rights and interests are concerned. The WTO seems to have made this leap in its phraseology. The dispute

7 Treaty for the Establishment of the Preferential Trade Area for Eastern and Southern African States Dec. 21/1981.
8 Kiplagat 1995:445.
9 Article 19 of the COMESA Treaty.
10 See Article 13 of the Southern African Customs Union Agreement — February 2002.

settlement system has gone a long way in addressing critical questions relating to institutional recourse and the prevention of unilateralism. Under the General Agreement on Tariffs and Trade of 1947 (GATT 1947) the dispute settlement system was often characterised by political compromise and diplomatic protocol. The Ministerial Declaration adopted at Doha on 14 November 2001 envisages negotiations on improvements and clarifications on the Dispute Settlement Understanding (DSU) are complete no later than May 2003.[11] Proposed changes to the DSU have been discussed during May 2003, some of them will be analysed later on.[12] Many of the changes that were introduced after the conclusion the Uruguay MR (multilateral round) have had a remarkable effect on the scope and activities of the WTO.[13]

New proposals regarding dispute resolution will further deepen the process of institutional reform and will ensure greater transparency and access of the public to the dispute settlement process.[14] The proposed amendments to the Dispute Settlement Understanding regarding public access and transparency are particularly instructive for economic integration schemes regarding the broader constituency affected by integration. Especially the formalisation of *amicus curiae* briefs is an exciting development as it affords greater access to civil society at large.

4. A brief history

It may be useful to survey developments within the GATT legal system as distinct stages during which certain patterns predominated.[15] The history of the GATT dispute settlement process is divided into four distinct stages.[16] The first stage spans a period from 1948 to 1959. During this period panels brought out rulings that were steeped in diplomatic vagueness. The second stage commenced with the 1960s and saw the membership of the GATT increase dramatically, breaking up the 'old boys' club especially with the entry of a number of developing countries.[17] This changed the whole dynamic within GATT as developing countries wanted more flexibility for themselves and a stricter legal regiment in order to for developed countries to honour their commitments under GATT.[18] This sentiment was apposed by the United States and the then EEC who took up the six places of its member states in the GATT.[19]

11 WT/Min(01)/Dec/1: recital 30.
12 See documents distributed in the TN/DS/W document series. Proposed amendments contained in Compilation of Draft Text Proposals JOB(03)/10/Rev. 2.
13 See Nicholas 1996:39-392; Petersmann 1994:1161-1167.
14 Regarding proposed third party participation in consultations (Article 4): TN/DS/W/36 & TN/DS/12; proposed Article 13(bis) for *amicus curiae* submissions: TN/DS/W/1; public access and transparency: TN/DS/W/13 & TN/DS/W/1.
15 In general see: Nicholas 1996:379-466; Kuyper 1994:227-257; Petersmann 1994: 1157-1244.
16 Nicholas 1996:397.
17 Nicholas 1996:398.
18 Petersmann 1994:1187.
19 See note 17 above.

The third stage played out during the 1970s when the dispute settlement system was largely rebuilt and culminated with adoption of the 1979 Understanding.[20] It contained guidelines aimed at improving and refining the dispute settlement system. A fourth stage during the 1980s yielded more decisions than the previous decades put together. Decisions issued in 1982[21] and 1984[22] further clarified the 1979 Understanding while making some additions to the rules. A more comprehensive Decision was issued in 1989.[23] The early part of the 1990s marked a period of waiting for the conclusion of the Uruguay round of Multilateral Trade Negotiation. Panels delayed making decisions and the Contracting Parties delayed voting on whether to adopt the reports. This latter period signifies the transition from the old to the new, transforming GATT 1947 into the WTO.

5. Objective legalisation and precedents of 'GATT law'

The status of 'GATT law' and the subsequent codification in both the 1979 Understanding and the Understanding on Rules and Procedures governing the Settlement of Disputes[24] (DSU) under the WTO raises more than just a few interesting legal questions. One obvious one is whether a clear hierarchy of norms had evolved that may be seen as some system of precedent.[25] Outside the text of the WTO Agreements ("covered agreements"), no other source of law is as important in WTO dispute settlement as the reported decisions of prior dispute settlement panels. These may include prior reports of GATT panels, WTO panels and now reports of the Appellate body.[26] Whether or not prior practices of panels may be seen, as binding precedent under GATT, is questionable. However, the introduction of an Appellate Body has definitely raised the level of discussion in this regard.

There seems some consensus that panel reports may be seen as "judicial decisions", which in effect may establish some system or precedent. The Appellate Body has pronounced a view that adopted panel decisions do not amount to decisions but consider them as an important part of the GATT *acquis*.[27] It would seem that adopted panel reports are not binding on any panel but may be taken into account should they be relevant to any dispute.[28] Unadopted reports have no legal status in either GATT or the WTO

20 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance of 28 November 1979, GATT BISD, 26th Supplement /1979:210.
21 Declaration on Dispute Settlement Procedures of 29 November 1982, GATT BISD, 29th Supplement/ 1983:9.
22 Decision on Dispute Settlement Procedures adopted at the Fortieth Session, GATT BISD, 31 Supplement/1985:9.
23 Decision on Improvements to the GATT Dispute Settlement Rules and Procedures, GATT BISD, 36 Supplement/1989:61.
24 Annex 2 of the Treaty Establishing the World Trade Organistion.
25 See in general Mavroidis and Palmater 1998:398-413.
26 Mavroidis and Palmeter 1998:400.
27 See *Japan — Taxes on Alcoholic Beverages*, WTO Doc. AB — 1996 — 2/ WT/DS1/AB/R/WT/DS10/AB/R/ WT/DS22/AB/4:15.
28 Mavroidis and Palmater 1998:401.

system since the Contracting Parties or Members of the WTO have not endorsed them through decisions. Yet useful guidance may be contained in such reports.[29] As a whole, panel reports represent some institutional memory based on continuity and consistency. It may also be an important source of legitimacy by creating legitimate expectations among WTO members that like cases will be treated likewise and *vice versa*. For reasons of judicial economy, reinventing the wheel comes at quite an exorbitant ransom. Organisations like SADC and SACU will do well to take note of the requirements of continuity and consistency regarding the process of dispute resolution.

Should the reasoning above be correct, one may conclude that panel decisions bind only the parties thereto. As a practical matter though, it is conceivable that a system of precedent will develop over a period of time that will establish some predictability for litigants. Reports by the Appellate Body have seemingly also been recognised as at least persuasive, if not authoritative.[30] Even the Appellate Body will not lightly depart from their previous decisions. In light of the above discussion it seems that the dispute settlement process has a much more legalistic feel to it.

6. Approach of GATT to dispute settlement

6.1. Introduction

The General Agreement on Tariffs and Trade of 1947 contained no specific provisions concerning dispute settlement panels. Thus, the right to dispute settlement was usually attributed to Articles XXII and XXIII of the General Agreement. Parties were directed by article XXII to consult the other party regarding "all matters affecting the operation of this Agreement."[31] Article XXIII also directed parties to "give sympathetic" consideration to claims that a benefit accruing directly or indirectly pursuant to the General Agreement was being nullified or impaired by some action of another party.[32] Should consultation not yield a satisfactory outcome, the aggrieved party could request the Contracting Parties to investigate the matter and to make recommendations to the parties concerned or to give a ruling.[33]

The Contracting Parties could authorise the aggrieved party to withdraw concessions or obligations that the aggrieved party had given to the violating party pursuant to the General Agreement.[34] Nowhere does the General Agreement articulate the means by which the Contracting Parties should investigate complaints. Through trail and error, or rather through a process of refinement, the Contracting Parties used various methods to investigate

29 *Japan Alcohol Report*:16.
30 *United States — Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WTO Doc. WT/DS33/R: par 7.15 (Jan. 6, 1997).
31 Petersmann 1994:1167.
32 Nicholas 1996:392.
33 General Agreement on Tariffs and Trade of 1947 Article XXIII(2).
34 Nicholas 1996:393.

complaints. At this point it would be appropriate to point out that this stage of development of the GATT dispute settlement system corresponds to the stage of development that regional organisations like SADC and SACU are entering.

6.2. Early dispute settlement process

The earliest method that was used had the chairman of the Contracting Parties issue a ruling. Later, working parties, consisting of the disputing countries, interested parties and a small number of neutral countries, were devised. The reporting system was subject to agreement by the parties.[35] A third method was introduced in 1950 comprised of two disputants and three neutral parties. This experimental working party issued a report even if one of the disputants was not in agreement. This methodology proved to be more rule-oriented and by 1955 a clear preference for this model was expressed in the practice of using dispute settlement panels.[36] These panels consisted of three or five members who were usually attached to governments and selected from the permanent delegations to the GATT.[37]

Direct parallels to this process are mirrored in the SADC Trade Protocol that provides for the appointment of a panel of trade experts.[38] Similar provision is made in the SACUA for members of the Tribunal to be chosen from a pool of names that is kept by the SACU Secretariat.[39]

A very important requirement within the GATT at that time was that Panel members were required to set aside national interests and rule on the dispute in a fair and impartial manner. This requirement was crucial for the emergence of a pool of experts that has no allegiance to their country of origin. These panels were *ad hoc* in nature and no permanent panels were provided for. There are currently proposals for establishing a standing panel body.[40] The European Communities proposed the appointment of 15-24 full-time panelists that are fully independent from government affiliation. This issue is still under discussion and no finality has been reached.

What should be clear from the aforementioned, is that a permanent "court" or "standing panel body" is not a *sine qua non* for a properly functioning dispute resolution system, as long as one of the institutional organs take responsibility for its operation. For a very long time, the WTO Secretariat took responsibility for this function. However, it stands to reason that liberalisation or deeper integration within regional integration schemes will result in more complex analyses, hence the need for a more specialised bodies. This particular dynamic is observable in the GATT/WTO with the establishment of a Dispute Settlement Body. In context of regional organisations like

35 See above.
36 Petersmann 1994:1187.
37 Nicholas 1996:393-394.
38 Article 32(4) & (5) of the SADC Trade Protocol.
39 Article 13(4) of SACUA.
40 TN/DS/W/1 which is a proposal submitted by the EU of 30 May 2002.

SADC and SACU this means that elaborate and costly dispute mechanisms like “courts” or standing bodies are initially not needed. A solid dispute settlement system can be administered by a secretariat.

It would seem that the GATT panel system developed over a substantial period of time and became custom. Article XXIII did not mention this concept, nor set out procedures whereby such panels should operate.[41] Eventually, the Contracting Parties adopted several decisions to provide some guidance to the panels. Collectively these were known as the Decisions and had become part of longstanding practice. The most important of these were eventually memorialised in the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance of 1979.[42]

6.3. Panel process under GATT 1947 and GATT 1994

Complaints could be brought by member states alleging injury as the result of violation of a provision or the General Agreement. The GATT council would refer such issues to a three-person panel who would receive written and oral submissions form the parties, prepare findings of fact, and hold that the measure is or is not in violation of the GATT.[43] However, panel reports became effective as decisions only when approved by the GATT Council (the executive committee of the full membership) acting on the principle of one country — one vote plus unanimity. As a result, it was possible for a losing party before a GATT dispute panel to block adoption of a panel report.[44] It was even possible for a contracting state to block the adopting of a panel report or even delay the appointment of a panel in the first place. This situation gave rise to great unhappiness and was reviewed during the Uruguay multilateral round. On a political level, countries could interfere in the dispute settlement process by blocking the adoption of reports. This danger is ever present within regional organisations.

The result was the Dispute Settlement Understanding (DSU)[45] and the establishment of the Dispute Settlement Body (DSB) who was charged with managing the dispute settlement procedures.[46] A more streamline procedure was introduced covering consultations[47] between member states; the establishment of panels,[48] consideration of panel reports providing for appeals,[49] surveillance and implementation of rulings and recommendations, and the authorisation of retaliatory measures as a last resort.

41 Nicholas 1996:392-397.
42 See note 18 above.
43 Lowenfeld 1995:479.
44 Nicholas 1996:396; Petersmann 1994:1157-1244.
45 Agreement Establishing the World Trade Organisation Annex 2.
46 See Article 2 of the DSU.
47 See Article 4 of the DSU.
48 See Article 6 of the DSU.
49 See Article 17 of the DSU.

All of these processes are tied to very tight timeframes for completion of every stage. As a result of the Uruguay changes, the WTO dispute settlement system became much more robust and consistent. The lesson for the design of a good dispute settlement system is to ensure that firstly, the adjudication process is not unduly delayed by long timeframes; secondly, that decisions are enforceable without or with little political interference from member states. The qasi-automatic adoption of decisions is probably an effective mechanism to ensure that such decisions become binding. However, the danger with such a system is that the margin for error is too great without a higher supervising tribunal or structure of appeal. Hence should the automatic adoption of decision be acceptable, the necessary corollary is the establishment of a process of appeal in order to eliminate or narrow the margin of judicial error for each decision.[50] Once this aspect is secure, the only requirement to the process of appeal is that is should be expeditious. Strict timeframes should be imposed on this process, as a lengthy process of appeal will invariably delay the implementation of the decision.

7. Judicial economy, public access and transparency in the dispute settlement process

7.1 Multiple complainants and third party access

For reasons of judicial economy the DSU also provides for multiple complainants related to the same matter.[51] According to Article 9(1) a single panel will be established, however the rights of each member state must be taken into account. In the days before the DSU, a dispute involving the United States[52] resulted in a panel hearing three complaints regarding a practice by above-mentioned country. The panel allowed each complainant to request separate finding and ruling by the panel. Each complainant would have access to the others' complaints and submissions and would also have the right to be present when the panel heard oral arguments by any of them. This practice has continued under the DSU.

It is also provided that any other third parties with a substantial interest in the matter before a panel can notify the Dispute Settlement Body and would have the opportunity to make written submissions to the panel.[53] Some interesting proposals for the amendment of Article 10 of the DSU have been submitted.[54] If such proposals are carried the panel process will

50 See above.
51 See Article 9 of the DSU.
52 *United States — Taxes on Petroleum and Certain Imported Substances*, 34 Supp. BISD 136, 136-37 (1987).
53 See Article 10 (2) of the DSU.
54 Costa Rica's submission regarding the right of third parties to also attend deliberations of contesting parties, except deliberations of factual confidential information. See TN/DS/W/12/Rev. 1.

become much more transparent. Judicial economy seems to be served by many of the provisions discussed above, in this regard regional integration scheme should take these aspects into account when designing a dispute settlement system.

7.2 Confidentiality and public access to dispute settlement proceedings

Even though the right of third parties to submit written submission to a panel is recognised, these submissions are treated as confidential.[55] However parties are free to disclose statements of their own positions to the public. In certain instances parties are only required to prepare non-confidential summaries for disclosure to the public.[56] Many have suggested in the past that the WTO dispute settlement system is a governmental system where the public has no role to play. Also, due to the sensitivity of the information, any disclosure might comprise the possibility of settlement. The United States submitted a proposal for the amendment of Article 18 to the extent that all documents submitted to any panel or the Appellate Body "shall" be made public, except for confidential information.[57] This particular proposal will bring the deliberation process within the WTO panel system into the public domain and force governments to think more carefully on how they approach a particular dispute. No more will governments be able to hide behind the secrecy of proceedings, while also being more accountable to domestic interest groups.

Another interesting development that may enhance the transparency of the dispute settlement process concerns the EC and US proposals that panel meeting should be open to the public.[58] This proposal is not unique; many international organisations allow public proceedings, most notably the International Court of Justice and the European Court of Justice. In the final analysis all the proposals discussed above will improve public access to processes that have been monopolised by states. This will enhance the overall credibility of the WTO at large and may also provide excellent models that may be reproduced within regional integration schemes.

Finally, a proposed new provision to the Dispute Settlement Understanding addresses the question of *amicus curiae* submissions.[59] Article 13bis par. 2 makes provision for any person, whether natural or legal, other than a party or third party to a dispute, to apply for leave to file such a submission. Such submissions would be accepted if they were directly relevant to the factual and legal issues under consideration. Various other requirements are set to

55 Article 18(2) of the DSU.
56 Both Article 18(2) and Appendix 3(3) of the Dispute Settlement Understanding bear this out.
57 See TN/DS/W/46.
58 See TN/DS/W/13 par 2 and TN/DS/W/1 par 6-7.
59 See Article 13bis of Compilation of Draft Text Proposals JOB(03)/10/Rev. 2/5 March 2003.

standardise procedures for handling amicus briefs. The EC in its proposal has made some practical suggestions on how to accommodate briefs of this nature.[60] Due to the fact that such brief may delay proceedings and also create additional burdens, the process of submission must be tightly controlled. For this purpose the EC proposal stipulates that application for submission must occur within 15 days from the date of composition of the panel or within 5 days from the date of notice of appeal.[61] Other issues such as length of submission, a demonstrable interest and conflict of interest are also dealt with.[62]

A brief assessment of the developments above indicates a move towards greater transparency and public access to the dispute settlement mechanism. It is therefore imperative that regional organisations incorporate these mechanisms into their dispute settlement systems. SADC and SACU need not reinvent the wheel, many excellent example of credible dispute settlement systems exist.

8. Conclusions

The birth of the African Union has impressed upon the average African the importance of democratic principles within the greater framework of the rule of law. Good governance is as important a tool of transformation as respect for human rights. Current processes of economic integration within organisations like SADC, SACU and COMESA have an effect on a large number of stakeholders. Governments have the responsibility to ensure that regional integration agendas are clearly stated and understood. The effects of economic integration within developing countries present an additional challenge due to the possibility of the skewed allocation of benefits within a particular region.

The allocation of scarce resources often gives rise to conflicts. The oft-preferred method of settlement is the protected and secretive domain of diplomatic protocol. Within regional organisations this may give rise to questions of transparency and legitimacy. In order to address such concerns, the article has identified certain principles that may guide the design of more efficient and transparent dispute settlement system, having due regard for effective public participation. The historical context of the development of dispute settlement within the WTO has informed a progressive shift towards a more judicialised or legalised system. This dynamic is reproduced to a large in jurisdictions like the EC and NAFTA. In jurisdictions like SADC and SACU this globalised ethos will slowly start making inroads into dispute settlement mechanisms that will evolve over time.

Current changes to the dispute settlement process at the multilateral level will conceivably filter down to regional organisations. Efficiency, greater transparency, public participation and a dedication to accountable decision-making are all attributes of an excellent dispute settlement system. Hopefully these attributes will be present in future dispute settlement systems in southern Africa and further afield.

60 TN/DS/W/1: par. Iv.
61 TN/DS/W/1: par. 9.
62 See above.

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