

The SACU Tribunal: conceptual and practical issues

Gerhard Erasmus

Introduction: Why this Tribunal?

It is well known that African states do not actively participate in international dispute settlement arrangements such as the Dispute Settlement Understanding (DSU) of the World Trade Organisation (WTO). There are several explanations offered: lack of capacity, expense, the absence of domestic structures in need of international dispute settlement mechanisms, and the preferential arrangements in terms of which they trade with their main partners such as the European Union (EU). The latter are not meant to function through enforceable rules. However, what is the picture in regional trade arrangements involving African states? Do these organisations provide for dispute settlement through their own courts or tribunals?

Africa is not renowned for its jurisprudence in trade dispute resolution: adjudication is hardly practised. However, there seem to be important changes underway and in several regional arrangements in Africa provision is now made for courts or tribunals as part of existing organisations. This has happened in the Southern African Development Community (SADC), the East African Community (EAC) and is also being planned for the Southern African Customs Union (SACU). If this constitutes a new trend it will mark significant change with regard to traditional approaches which preferred dialogue and diplomacy, and not the use of courts capable of giving binding rulings. The present article discusses the provisions in the new SACU Agreement on dispute resolution and on the Tribunal. This institution is provided for but has not yet been established. A critical analysis of the provisions in this Agreement is offered and several lacunae in the conceptual approach as well as the practical aspects are pointed out. The gist of the article is a proposal to develop a new Annex for the Tribunal and to address the problem areas that do exist.

The SACU Agreement of 2002¹ provides for a new legal regime in terms of which the Members of the WTO will conduct their trade and related business. It is a rules-based dispensation of a particular kind, with common institutions and common policies. The Preamble to the Agreement indicates the intention of the Parties to establish an arrangement capable of catering for the needs of the 21st century: it has

¹ It replaced the 1969 Agreement which was rather elementary in terms of institutional arrangements.

to be a democratic arrangement and in line with contemporary approaches to international trade and regional cooperation. As part of this approach SACU also opted for a number of permanent institutions. Article 7 of the Agreement lists these institutions², and one of them is the *ad hoc* Tribunal.

The SACU Agreement has been in force since 2004 and Article 7 'hereby established' its institutions. However, the *ad hoc* Tribunal is not yet in existence; its formal establishment has still to be undertaken. It can in fact be argued that there is an obligation on the Members to establish the Tribunal and to make it operational rather soon. Without the Tribunal SACU cannot function as foreseen. (The same approach has been adopted with regard to the Tariff Board; its establishment is also happening subsequent to the entry into force of the Agreement and a special Annex has been developed for that purpose.³) Article 13 of the Agreement contains basic provisions on the Tribunal but they only constitute the initial framework.

The Tribunal within the framework of the SACU Agreement

The SACU Agreement does not contain a chapter (or 'Part', the term used in the Agreement) on dispute resolution; Article 13 is the only provision and appears in the Part on 'Institutions'. Neither is there a history in SACU for settling disputes through adjudication.

In the Preamble of the Agreement the Member States declare 'that a dispute settlement mechanism will provide a mutually acceptable solution to problems' that may rise between them.⁴ This statement does not in itself explain the nature of the dispute settlement mechanism which they have in mind; it is only when Article 13, providing for a Tribunal to 'settle' disputes, is taken into account that the intention becomes clearer. By agreeing that formal dispute resolution is an acceptable way for settling disputes flowing from the Agreement, there will be predictability and certainty

² They are the Council of Ministers, Customs Union Commission, Secretariat, Tariff Board, Technical Liaison Committees and *ad hoc* Tribunal.

³ Article 42 allows the Council to develop such annexes 'as may be necessary to facilitate the implementation of this Agreement'. All such annexes shall then form an integral part of the Agreement.

⁴ Final paragraph, Preamble.

as to the nature of the legal obligations between them. It will also be a departure from the previous approach under the 1969 Agreement which made no provision for adjudication.

Another implication and important feature of the new SACU is the existence of an objective legal order. The Agreement contains rules and principles on the conduct of the Member States and violations will result in the possibility of “final and binding” rulings by this SACU court.

The new order will also be bolstered by other institutions to perform specialised functions (formerly undertaken by national organs or by the South African authorities⁵) to comply with WTO obligations. The Tariff Board is an example of an independent expert body which will make recommendations (on which Council decisions will be based) with respect to tariffs, trade remedies and related aspects. Article 28 says that Member States shall apply product standards and technical regulations ‘in accordance with the WTO Agreement on Technical Barriers to Trade’. These disciplines are justiciable through the WTO DSU.

The practical implications of an objective legal order and how it will be developed are not spelled out in the Agreement. The Tribunal should make an important impact in this regard and will bring clarity as the adjudicating arm of the system. This introduces other implications: the independence of the Tribunal will have to be secured and the necessary expertise should be available. The manner in which it will function and be administered, its jurisdiction, *locus standi* provisions, its rulings, findings, remedies provided for, as well as the implementation and domestic effect of its rulings will have to be clear and be provided for in the proposed Annex. This Annex will become part of the substantive law in SACU on dispute settlement.

The Tribunal will do more than only apply the SACU Agreement; it will have to interpret and apply it within a specific multilateral and regional context. The SACU States are simultaneously members of the WTO and of SADC. SACU is a Customs

⁵ Under the 1969 Agreement, the South African Tariff and Trade Board had jurisdiction over all matters involving the administration of the common external tariff of SACU. South Africa also determined trade policy and managed the Common Revenue Pool.

Union and as such has a single customs territory with a common external tariff. Article XXIV (8)(a), GATT defines a customs union to mean

the substitution of a single customs territory for two or more customs territories, so that duties and other restrictive regulations of commerce...are eliminated with respect to substantially all the trade between the constituent territories or at least with respect to substantially all the trade in products originating in such territories, and ...substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union.

These features involve objective and justiciable criteria; customs unions are exceptions to the MFN rule and therefore have to function in a particular manner to be compatible with the law of the WTO.⁶ That is why they have to be notified and why other WTO members may bring cases in terms of the DSU in order to enforce compliance with the applicable multilateral rules.⁷

The fact that the Members of SACU have opted for adjudication and a rule-oriented approach to the final settlement of disputes (and not diplomacy) does not mean that there is no room for direct negotiations in the efforts to settle a dispute, as is typical of adjudication through international courts. Merrills (1998: 17) states:

Although negotiation is usually involved at some stage in every international dispute and in that sense is related to all of the other methods of settling disputes we shall be considering, its relation to one of them, adjudication, is particularly significant. Negotiation is a process which allows for the parties to retain the maximum amount of control over their dispute; adjudication, in contrast, takes the dispute entirely out of their hands, at least as regards the court's decision. It is therefore not surprising that defining the point of transition from one to the other, and

⁶ The requirements for making customs unions compatible with the multilateral system of the WTO are listed in Article XXIV, GATT.

⁷ See further Mavroidis (2005). See also the Appellate Body ruling in the *Turkey Textile* case.

establishing the relation between them, have been matters to which states and international courts have to give a good deal of attention.

The SACU Members and the Tribunal will face the same challenges; how will they make the exhaustion of attempts to settle a dispute through direct negotiations a precondition for the jurisdiction of the Tribunal? The SACU Agreement does not address these questions and the proposed Annex will have to address these matters, at least in principle.

The establishment of the Tribunal

The SACU Tribunal does not yet exist despite the fact that Article 7 purports to have 'established' all the SACU institutions. It cannot become operational only on the basis of the existing provisions in Articles 7 and 13. In this regard it is in the same position as the Tariff Board which is also listed in Article 7 and elaborated on in Article 11, but for which a separate Annex has been prepared in order to bring it into operation.

Article 13 of the SACU Agreement reads:

1. Any dispute regarding the interpretation or application of this Agreement, or any dispute arising thereunder at request of Council, shall be settled by an ad hoc Tribunal.
2. The Tribunal shall be composed of three members, accept as otherwise determined by the Council.
3. The Tribunal shall decide by majority vote and its decision shall be final and binding.
4. The Tribunal shall, at the request of the Council, consider any issue and furnish the Council with its recommendations.
5. In any matter referred to the Tribunal, the parties to the dispute shall choose the members of the Tribunal from amongst a pool of names, approved by the Council, and kept by the Secretariat.
6. Member States party to any dispute or difference shall attempt to settle such dispute or difference amicably before referring the matter to the Tribunal.
7. The Tribunal shall be assisted by the Secretariat in its work.

8. The Tribunal shall determine its own rules of procedure.

Important decisions will have to be taken with respect to the Tribunal's jurisdiction, *locus standi* provisions, remedies as well as its practical functioning. Article 13 is not sufficient and does not address all the technical aspects.

What is a dispute for the purposes of Article 13?

A dispute will ensue whenever there is a prima facie violation of an obligation under the Agreement; when there is disagreement regarding the interpretation or application of the Agreement by any Member, SACU institution or party affected by action/inaction in terms of the Agreement or an Annex adopted in terms of Article 42. Note, however, that Article 36 foresees another and quite specific type of dispute. This provision reads as follows:

Any dispute arising out of differences relating to trade data shall first be referred to customs and excise authorities of Member States for resolution. Should the customs authorities fail to resolve such a dispute within thirty (30) days or such longer period as the Member States may agree then any Member State to the dispute shall refer the matter to the Council.

What is the relationship between the jurisdiction of the Tribunal and Article 36? Trade data disputes are not defined. National excise and customs authorities of Member States (parties to such a dispute) are given the responsibility for coming up with a 'resolution during a first round of the settlement procedure for trade data disputes. These national authorities must 'resolve' such disputes and if they fail to do so within thirty days (or an extended period agreed upon) 'then any Member State to the dispute **shall** refer the matter to the Council'.⁸ (Emphasis added.) This may be a formula resulting in permanent strife; especially in light of the fact that the Council takes decisions on the basis of consensus. A party to the dispute can ensure,

⁸ Art. 36. All Member States share from the Revenue Pool and will be affected by solutions or adjustments to the shares. In this way they are all parties to such disputes.

through its opposing vote, that the Council too will not 'resolve'⁹ the matter. A dispute is only resolved when all parties involved accept and abide by the solution found.

It may well be that certain trade data disputes too can ultimately only be resolved through adjudication: that is via the involvement of the Tribunal.¹⁰ The Agreement does not address this specific issue; is the intention that they are disputes with respect to the Common Revenue Pool only¹¹ (as the context seems to indicate¹²) or is a wider effect intended? This aspect has to be clarified in order to prevent arguments that what seem to be 'ordinary' disputes (triggering the involvement of the Tribunal in terms of Article 13) contain trade data elements and therefore fall under Article 36 and its *sui generis* procedure. Trade data are linked to several trade related matters, such as customs procedures and even trade remedies. If the intention was to limit the Article 36 procedure to disputes regarding tariff revenue sharing under Annex 1, it should be put beyond doubt and Article 36 should be restricted to 'pure' tariff revenue allocation issues.

Part of the answer on the question regarding the relationship between 'ordinary' disputes and trade data disputes lies in reading Article 36 in the light of Article 13(6). The latter requires that Member States 'party to any dispute or difference shall attempt to settle such dispute or difference amicably before referring the matter to the Tribunal'. There is no indication in Article 36 that trade data disputes are exempt from the jurisdiction of the Tribunal. The aspect which makes the resolution of trade data disputes different is the requirement in Article 36 that such disputes 'shall' be referred to the Council if the national customs and excise authorities cannot resolve it. It is only with regard to the resolution of trade data disputes that the involvement of the Council is obligatory. Only after the Council has become involved and the matter remains unresolved, is it possible for such a dispute to be referred to the Tribunal. With respect to all other disputes there are two stages only: direct consultations (or whatever method chosen to bring about an amicable settlement), and then

⁹ The Concise Oxford Dictionary defines resolution as 'the action of solving a problem or dispute'.

¹⁰ This could happen when the dispute is about the compatibility of national legislation with SACU norms.

¹¹ This provision appears in Part Seven of the Agreement; which deals with 'revenue sharing'. The share of each Member of the customs component of the Revenue Pool is calculated as a percentage of the value of intra-SACU trade and the final calculation requires that each Member submits the actual data regarding intra-SACU imports and exports. See Annex 1.

¹² Art. 36 forms part of Part Seven of the Agreement which deals with Revenue Sharing.

adjudication through the Tribunal. (The Council may presumably also assist in finding an amicable resolution to 'ordinary' disputes, but that route will not be obligatory; it will be as a method chosen in order to give effect to the obligation in Article 13(6) to settle disputes amicably.)

When is a dispute a 'trade data dispute'? Who determines or declares the existence of a trade data dispute and when are such disputes ripe for reference to the Council? The definitional clause¹³ of the Agreement does not define trade data disputes. These disputes also involve national authorities: allocation of tariff revenue depends on reliable statistics collected nationally and in terms of clear legal frameworks for data compilation.¹⁴ Such legal frameworks are not in place in all Member States or on SACU level and there is no verification procedure.

The present revenue-sharing formula contained in Paragraph 1, Annex 1 provides that Member States must provide 'actual' data on intra-SACU imports and exports. There is also fallback position for States not able to provide actual data.¹⁵ The likelihood of disputes is high and in some instances Member States receive up to 60% of national revenue from the Common Revenue Pool. Such disputes are of a 'systemic' nature and the proportion of the revenue allocated to a particular Member impacts on all the other shares. This makes all Members direct parties to such disputes. To make them judges in their own case via Articles 36 and 17 will not produce a workable dispute resolution mechanism for these disputes.

The meaning and impact of 'differences' also need clarification. Article 15 of the Agreement reads:

¹³ Art. 1.

¹⁴ See in this regard the United Nations *International Merchandise Trade Statistics Compilers Manual*, ST/ESA/STAT/SER.F/87 of 2004, chapter 2. This authoritative publication has the following to say with respect to data compilation on trade in customs unions: 'At the time a customs union is being formed, trade data compilation should take steps to ensure the quality and timeliness of data on trade with third countries. That can be accomplished by supporting and promoting the standardization or streamlining of customs procedures... Coordination among the involved institutions, as in the case of individual countries, is essential. In a customs union, there is normally increased use of trade statistics... In addition to trade statistics compiled by the member states of a customs union, which cover trade with third countries as well as trade with other members states of the customs union, custom union secretariats are encouraged to compile detailed trade statistics with reference to the statistical territory of the union as a whole.'

¹⁵ Paragraph 1 (f), Annex 1.

Any difference or dispute arising out of this Agreement, which does not directly affect the interests of all Member States, may form the subject of direct consultation between the affected parties with a view to finding a solution thereto. Such affected parties shall report the results of their consultations to the Commission before its next meeting.

What is the intention here? Member States are in any case called upon, through Article 13(6), to resolve their disputes amicably and possibly through direct consultations with each other, as is typical in international organisations and in inter-state relations. Such approaches are common and in Article 3.7 of the WTO DSU the same approach is followed. Member States should attempt to settle their disputes amicably before referring them to the Tribunal. However, Article 15 makes consultations optional; in terms of Article 13(6) it is compulsory. The other uncertainty relates to 'differences'. Are 'differences' a separate category compared to 'disputes' or is it a matter of degree?

Structural aspects

The structure (whether permanent or not) of the Tribunal is not clear. Article 13 speaks intermittently of a Tribunal *and ad hoc* Tribunal; the reference in Article 7 is to an *ad hoc* Tribunal. 'Ad hoc' means 'for this special purpose'.¹⁶ In the context of dispute settlement this term is usually used to indicate that the adjudicating body is not a permanent institution; the *ad hoc* Tribunal functions for a specific occasion or case only. It finds application, in other words, in those instances where there is no court or tribunal to serve as a permanent dispute resolution institution. The context here (reading Articles 7 and 13 together) suggests that this is not what is intended with the SACU Tribunal.

The more plausible interpretation favours the establishment of a permanent institution, as confirmed by Article 7 where the Tribunal is listed together with all the

¹⁶ See Black's Law Dictionary (1968: 56). In the Shorter Oxford English Dictionary (2002: 27) it is defined as 'for this particular purpose; specially'.

other permanent institutions of SACU. The parties to a dispute¹⁷ will be able to choose the 'members' (adjudicators or judges) for deciding a specific dispute from a pool of names. This procedure can save costs because the 'judges' will not be permanently appointed; they will serve *ad hoc*. This is also how the WTO panels function, while the Appellate Body has permanent members. The dispute settlement system of the WTO is permanent but the composition of panels differs from case to case. This seems to be the intention behind Article 13 too: to provide for a permanent SACU Tribunal but that the 'bench' for deciding disputes will be done on a case-by-case basis.

The intention to establish a permanent institution for dispute resolution is confirmed in other provisions of the SACU Agreement. Article 13(8) provides that '[T]he Tribunal shall determine its own rules of procedure'. It is inconceivable that the intention was to adopt new rules of procedure each and every time a case has to be decided. It is obvious that a permanent set of rules of procedure must be adopted and that this institution (the Tribunal) will function on a continuous basis and in terms of that set of rules. The fact that the 'ad hoc Tribunal' is listed in Article 7 together with all the permanent institutions of SACU is additional confirmation of its permanent character.

What happens when the parties to a specific dispute cannot agree on the composition of the Tribunal? Who will then step in and decide the composition issue? Article 13 does not tell us. An effective dispute resolution system cannot leave these questions unanswered; such oversights can paralyse the whole endeavour.¹⁸ And the actual decision to refer a dispute to the Tribunal must not be susceptible to the possibility of a 'veto' as a result of the consensus rule.¹⁹

A proper and distinctive title for the members of the Tribunal should also be provided; they will be 'judges' rendering final and binding decisions. In a particular case there will presumably be a presiding 'member'. There should also be a methodology for

¹⁷ For a discussion of who the parties to disputes could be, see below the discussion on jurisdiction and standing.

¹⁸ In the case of the WTO, if the parties fail to agree on the composition of a panel the matter is decided by the Director-General in terms of Art.8.7 of the DSU.

¹⁹ In the WTO this cannot happen and the 'reverse consensus' rule applies with respect to several DSU elements; rulings will e.g. be adopted unless there is consensus not to adopt them.

citing cases and rulings, and the presidential value or not of decisions will have to be determined.

The Secretariat must assist the Tribunal in its 'work'.²⁰ This provision apparently refers to its administration and functioning as a SACU institution, not its work as judicial organ. The Secretariat will presumably also be the depository of its records.²¹ It is not suggested that the Tribunal should be linked so closely to the Secretariat that the latter should take responsibility for all its administrative needs. There should preferably be a permanent registrar (with a small staff) for the Tribunal in order to facilitate its specialised operations and the smooth functioning of its panel-like operations.

Rulings and their effect

Formal dispute resolution mechanisms ensure that the rules and obligations contained in the constituent agreements of international organisations are effective, respected, certain and predictable. Adjudication has to confirm and ensure these qualities. A similar objective is stated in Article 13(3): The Tribunal shall decide by majority vote and its decision shall be final and binding.' Its rulings will be final and binding for the parties to the dispute and will bring certainty as to exactly what the precise meaning and effect of the provision in question is.

Parties to a dispute will have to give effect to such rulings by removing the unlawful measure or by bringing unlawful actions to an end. (Compliance and remedies are discussed below.) International courts and tribunals resolve disputes through rulings on the applicable law which the parties are obligated to comply with. Compliance is not expressly mentioned and will have to be provided for in the Tribunal's Annex. That compliance is intended flows from the wording in Article 13(3), 'decisions' of the Tribunal 'shall be final and binding'.

The relationship between SACU law and the municipal (national) law of Members will have to be determined in order to clarify the effect of rulings within Member States.

²⁰ Art. 13(7).

²¹ Art. 10(10).

This particular aspect requires two sets of provisions: in the SACU legal order and within the domestic legal spheres of the Member States. It should be noted that the South African Trade Administration Act has incorporated the SACU Agreement.

The execution of Tribunal decisions and questions with respect to remedies is complicated but very important. SACU does not have an executive organ. The Commission has to ensure that Council decisions are implemented,²² but the Agreement is silent on the execution of Tribunal decisions. Article 13(3) says that the decisions of the Tribunal 'shall be final and binding'. Not to respect such a decision will constitute a new violation of the Agreement. If there is no satisfactory compliance new challenges will follow. The WTO system is designed to monitor implementation too. If rulings of the Panels or the Appellate Body are not satisfactorily implemented it can give rise to new disputes and new rulings. (Retaliation is possible but often not effective.) The system is designed to ensure that compliance will ultimately follow and that the legal system will function on the basis of respect for the law. Where the execution of judgments is left to the parties alone there is the danger of not respecting judicial findings and power factors start to play a role. This undermines the essential features of a rules-based system. It does not mean that political compromises are without value. In SACU there is sufficient opportunity to solve differences and disputes through prior negotiations and consultations.²³

Many commentators believe that the success of the WTO system is directly related to the fact that there is an appeal procedure and that panel rulings are not final. (This element ensured that the DSU was adopted as part of the WTO Agreement when domestic opposition arose in certain quarters.) Article 13 makes no reference to any appeal possibility; decisions by the Tribunal shall be final and binding. This factor has to be considered when members of the pool are selected and the rules of procedure adopted. The technical expertise of members of the pool should be given due consideration in the selection process and the net should (at least initially) be

²² Art. 9(3).

²³ See e.g. Art. 13(6).

cast wider than only SACU nationals. This will also provide an opportunity for clarifying additional matters such as nationality²⁴, experience, non-affiliation, etc.

In certain international tribunals like the Tribunal for the Law of the Sea final judgments are not given in each and every case. The nature of the dispute and of the remedy involved could necessitate that 'guiding principles' be issued to be followed by the parties in settling the matter. There is room for this approach in areas such as the demarcation of maritime boundaries where prolonged technical procedures are normally required; the court cannot undertake the delimitation function itself. Trade disputes mostly involve domestic measures or failures to give effect to obligations, and trade tribunals find it possible and necessary to address the remedy together with the finding, or at least to direct how domestic rectification has to be structured.

The rules of procedure for the Tribunal will have to deal with all the technical aspects typically required for the operations of international courts and tribunals, including the question as to whether rulings will have any effect as precedents.²⁵

Jurisdiction, standing and other substantive aspects

What is an international tribunal about? When will it qualify as such? The *Encyclopaedia of Public International Law*²⁶ contains the following description of the nature and essence of international courts and tribunals:

International courts and tribunals are permanent judicial bodies, composed of independent judges, whose tasks are to adjudicate international disputes on the basis of international law according to a pre-determined set of rules of procedure, and to render decisions which are binding upon the parties ... The basic idea underlying the creation of international courts and tribunals is for them to function as permanent

²⁴ It may be useful not to limit appointments to the pool of names to nationals of the Member States only. There are regional experts who are not nationals and who may render useful services in the beginning when the new Tribunal becomes operational.

²⁵ Decisions by international courts or tribunals do not, as a rule, follow a *stare decisis* rule. Application of a *res judicata* principle and the development of consistent jurisprudence where previous do play a role in subsequent cases is a different matter, as the DSU practice in the WTO demonstrates.

²⁶ Tomuschat (1995: Volume II, at 1108).

bodies, less subject to considerations connected with the issue at stake, and capable of ensuring a certain degree of continuity of legal reasoning ... the legitimate interests of the parties finding their protection through the generally balanced structure of international courts and tribunals and through strict rules on the independence of judges.

International disputes, which are the subject matter of the adjudicatory functions of international courts and tribunals, are not always confined to inter-State controversies. In accordance with present-day trends in international law, international organizations as well as individuals also qualify as the parties to international disputes, in as much as access to international courts and tribunals has been granted to them ...

In contra-distinction to the principles valid for arbitral tribunals, international courts and tribunals operate within the framework of procedural rules which are, in principle, not established by the parties to a specific dispute and cannot be changed by them. This feature is attributable to a deliberate choice designed to subject the parties to a certain kind of procedural discipline thought to promote the proper exercise of the judicial function.

Whereas [international courts and tribunals] are sometimes invested with advisory functions, their main task is always to give binding decisions on the disputes brought before them. Bodies altogether deprived of the power to render binding decisions do not qualify as international courts and tribunals; on the other hand, a combination of adjudicatory and advisory jurisdiction does not impede the classification of a body as being a judicial one.

Increasingly international tribunals have compulsory jurisdiction and the dispute settlement body is established as part of the founding agreement of the organisation involved. This is for example the case with respect to the WTO and several regional

organisations.²⁷ What is the position with respect to the SACU Tribunal? It enjoys jurisdiction over all disputes regarding the interpretation or implementation of the Agreement. Member States involved in a dispute cannot escape adjudication by refusing to appear before the Tribunal.

The SACU Tribunal obtains its jurisdiction from paragraph 1 in Article 13 which states that 'any dispute regarding the interpretation or application of this Agreement, or any dispute arising thereunder at the request of the Council, **shall** be settled by an ad hoc Tribunal'. (Emphasis added.) This includes disputes about Annexes adopted in terms of Article 42 because they form an integral part of the Agreement.

The difference between advisory and contentious jurisdiction needs clarification. Paragraphs (1) and (3) of Article 13 refer to disputes which shall be settled by the Tribunal in a binding and final matter. Here jurisdiction is contentious of nature. Paragraph (4) states that the Tribunal shall, at the request of the Council, 'consider any issue and furnish the Council with its recommendations'. In this instance the jurisdiction seems to be advisory. The demarcation of these areas is not clear but it is not uncommon for international tribunals (such as the International Court of Justice) to exercise both advisory and contentious jurisdiction.

Traditionally the only parties which could appear before international courts and tribunals were states. This is, for example, the position in the International Court of Justice whose statute was adopted together with the United Nations Charter in 1945. This is no longer the predominant position. International organisations have increasingly granted to their organs and institutions, in addition to the member states, the right of access to courts and tribunals. Even individuals and legal persons have been granted the right to challenge action/inaction in terms of certain international agreements with dispute settlement mechanisms.²⁸

²⁷ Such as the European Union, SADC and other regional organisations in Africa.

²⁸ This can happen with regard to the EU's tribunal, the European Court of Justice and in certain regional arrangements for the protection of human rights. In NAFTA this is possible with respect to investment disputes. In the case of the EAC its organs can bring cases against member states.

Both the SACU Members and the Council must be able to refer disputes to the Tribunal.²⁹ To deny this right to Members (to refer disputes unilaterally in appropriate instances) will make it impossible for disputes to be decided by the Tribunal, given the way decisions are adopted in SACU institutions. (Article 17 requires that decisions are taken on the basis of consensus.) Since the SACU Agreement is a treaty between the five Member States, disputes between them in connection with the interpretation and application of the Agreement will obviously fall under Article 13. Article 13(6) further says that when Member States are parties to a dispute they must attempt to settle their disputes amicably before engaging the Tribunal. This is a separate duty and concerns the general rule in international dispute resolution; it is not about standing.

Article 17 stipulates that SACU institutions take decisions on the basis of consensus. This provision deals with the 'normal' functioning of the SACU institutions, not dispute settlement. Article 13 contains its own and different decision-making provision for the Tribunal. It should not be possible to block referral of disputes to the Tribunal through the application of Article 17. That has been one of the most important lessons learned with the adoption of the WTO Agreement in 1994; it is not possible for a WTO member and party to a dispute to prevent the appointment of panels or the adoption of reports. That is why the reverse consensus principle applies with respect to the appointment of panels or the adoption of panel reports and rulings by the Appellate Body.

Is it possible that disputes with respect to 'the interpretation or application of this Agreement' can involve the organs of SACU, or individuals and legal persons within the Member States? Disputes between institutions of SACU or involving them should in principle also be covered because these institutions exist and function in terms of the Agreement. Questions with respect to alleged *ultra vires* exercises of power will be legal questions. How such 'systemic' disputes will be referred to the Tribunal and the identity of parties involved in such disputes is not clear. Only the Council is mentioned in Article 13.

²⁹ This must be the intention behind Art. 13(1) read together with the final paragraph in the Preamble.

Article 13 disputes can involve the interests of individuals or legal persons under the jurisdiction of the Member States or engaged in certain commercial activities within SACU. One example will be trade remedies, where such private parties will be directly affected. Rulings by National Bodies (such as ITAC) on trade remedies are susceptible to domestic review procedures and administrative and constitutional law principles have to be respected. Once the SACU Tariff Board becomes operational the availability of such remedies will have to be reconsidered. Domestic courts do not, as a rule, have jurisdiction over decisions of international organisations and their organs. The decisions (recommendations) of the Tariff Board will frequently be about matters involving companies and individuals.

All trade related commercial activities (with exceptions such as public procurement) are essentially performed by individuals or legal persons, not states. States do not trade. The actions of SACU Member States in terms of the Agreement can easily affect rights of private individuals or legal persons. Individuals and legal persons will only have interests in disputes where their rights have been affected; they will not be party to disputes involving the organs of SACU directly or those about sensitive 'political' issues between the Members.

How should individuals and legal persons be protected in the present globalised world when they engage in commercial activities abroad? It is not satisfactory to invoke the traditional view and argue that governments can protect their nationals and bring cases on their behalf to exercise so-called diplomatic protection. Governments reserve the discretion to grant diplomatic protection in the light of foreign policy considerations and are mostly not prepared to act on behalf of private parties and risk 'unfriendly' dispute proceedings against foreign governments. Diplomatic protection does not provide nationals with an enforceable right; the right at stake belongs to the state of nationality of the victim. The domestic application of international trade agreements (almost never granted outside the context of sophisticated and advanced regional integration arrangements with supranational institutions³⁰) may provide protection against foreign traders finding themselves

³⁰ All the major trading nations refuse to give direct effect to WTO law. See Peter Van den Bossche *The Law and Policy of the World Trade Organization*, Cambridge University Press, 2005 at 70.

within the jurisdiction of the state of the injured national but will not solve the problem of access to international tribunals. These problems are increasingly solved by allowing individuals to bring applications in their own name.

The alternative possibility is to adopt national legislation to empower governments to act against unfair or unlawful trade practices abroad, of which the American Trade Act is an example.³¹ No SACU State has such legislation in place.

To neglect to act on the new challenges that the activities of SACU organs will bring may have serious domestic constitutional and political consequences. A Government should not be able to take away the right of its citizens to a fair trial or the protection afforded by the rule of law through the conclusion of international agreements or by allowing international organs to rule unchallenged on the rights of its nationals. The obvious solution will be to empower international tribunals to hear applications by nationals in appropriate instances.

Who is responsible for protecting the interests of SACU as organisation and ensuring respect for the objective legal order which the Agreement has established? Article 13 mentions that the Council (which decides on the basis of consensus!) may (also) request the Tribunal to rule on disputes. (The Council may further request the Tribunal to 'consider any issue' and to make recommendations to the Council.³² The latter, however, is about the Tribunal's 'advisory' function, not adjudication.³³)

International courts and tribunals are frequently called upon to pronounce on the lawfulness of national measures. If a particular dispute is about the domestic activities of a particular Member in circumstances where national legislation or executive acts result in violations of the SACU Agreement, the matter will fall under the jurisdiction of the Tribunal. The SACU Agreement is, in principle, not self-executing. It can only have effect through the acts of the Members.

³¹ Art. 301 of the American Trade Act is probably the best known example. See further Matsushita et al. (2006: 135).

³² Art. 13(4).

³³ See also Section 5(3) of the South African Trade Administration Act, 71 of 2002.

The wording of certain provisions in the SACU Agreement creates complications for the functioning of the Tribunal and the integrity of the legal order of SACU. The first example relates to the fact that certain provisions in the previous 1969 Agreement have been taken over quite directly into the new Agreement, apparently without giving sufficient consideration to the fundamental difference between these two Agreements and the legal regime now created. The new Agreement is a rules-based one which provides for a Tribunal and for disputes to be settled through adjudication and through the application of the applicable law. That was not the case under the 1969 Agreement.

Two examples can be cited (and there may be more) demonstrating the nature of the problem that will ensue and the implications for the jurisdiction of the Tribunal. Article 18 provides for the free movement of domestic products within the Common Customs Area. It says that goods grown, produced or manufactured in the Common Customs Area 'shall be free of customs duties and quantitative restrictions, except as provided elsewhere in this Agreement'. Article 18(2) goes on to provide for a right of Member States 'to impose restrictions on imports and exports in accordance with **national** laws and regulations for the protection of health of humans, animals or plants; the environment; treasures of artistic, historic or archaeological value, public morals, intellectual property rights, national security; and exhaustible national resources'. (Emphasis added.)

This clause provides for exceptions reminiscent of Article XX of the GATT. What is missing here, however, is a clear obligation to justify the adoption and implementation of restrictions of the kind that Article 18(2) of the SACU Agreement allows.

It is typical of international trade organisations to allow their members the right to protective measures amounting to exceptions to the normal obligations under the agreement in question. The essential feature of such exceptions is, however, that they have to comply with specific legal requirements in order to be valid. They must be objectively justified in terms of the requirements set by the very agreement allowing the exceptions. The typical manner in which this is done can be found in the *chapeau* of Article XX, GATT. It reads: 'Subject to the requirement that such

measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures ...' The provision then lists the grounds for which the exceptions may be invoked, such as the protection of public morals, human, animal or plant life or health, etc. This approach actually requires more than one justification, for which the state invoking this provision, carries the onus.³⁴

Article 18 of the SACU Agreement does not contain the qualifications which should accompany exceptions to the rules, and its negative impact on the jurisdiction of the SACU Tribunal will have to be addressed. The Agreement must be in line with the logic of a rules-based system. An open-ended discretionary power, such as Article 18(2) seems to allow, will undermine the ability of this Tribunal to enforce the SACU Agreement; it will erode the legal order established by the new Agreement.

Another example appears in Article 25 of the SACU Agreement, dealing with import and export restrictions. It provides in paragraph 1 of Article 25 for 'the right of each Member State to prohibit or restrict the importation into or exportation from its area of any goods for economic, social, cultural or any other reasons as may agreed upon by the Council'.

Article 50, on transitional provisions, contains indications of a realisation that the present Agreement is conceptually new and different. The relevant part reads: 'A commission, technical liaison committee or any other institution, obligation or arrangement of SACU which exists immediately before the entry into force of this agreement shall, to the extent that it is not inconsistent with the provisions of this Agreement, continue to subsist (*sic*), operate or bind Member States of SACU as if it were established or undertaken under this Agreement, until the Council determines otherwise.' (Emphasis added.) This provision also provides the opportunity to affect clarification of the text of the present Agreement (via decisions of the Council) without invoking the formal amendment procedure. The necessary 'cleaning up' of the

³⁴ See further the *Shrimps Case* (1998) where the WTO Appellate Body gave a detailed discussion of the requirements of Art. XX GATT.

Agreement should be given serious consideration now that the Tribunal will become operational. This can prevent complicated interpretational and conceptual problems.

There is another complication with respect to the powers of the Council in terms of this 'right' of the Members as defined in Article 25(1). Does the power of the Council to determine grounds for import and export prohibitions and restrictions constitute an additional requirement for adopting such measures or can Member States only exercise this right in instances where the Council has so agreed? The interpretation that will come closest to one compatible with compulsory dispute resolution will be one where Governments will not exercise this 'right' unilaterally. The Tribunal will face particular problems when confronted by restrictions imposed by Member States in terms of Article 25. They will argue that no violation of an obligation has occurred because the prohibition or restriction was imposed in terms of the 'right' provided for in Article 25.

Procedural matters

Article 13(8) states that the Tribunal 'shall determine its own rules of procedure'. This is a confirmation of the fact that it will function as a true court and in terms of rules confirming judicial independence and the rule of law. The rules and procedures of the Tribunal will be substantive law and form part of the legal regime created by the SACU Agreement. They will also provide an opportunity to address the lacunae in Article 13.

The composition of international courts and tribunals is an important matter. The technical qualities of 'judges', the independence of the institution and the context in which effect to rulings will be given must be clear. These considerations should form the foundation of tribunal's jurisdiction and powers and be stated up front. The structure and functioning of the Tribunal have to be stated without ambiguity. Article 13 only provides for a pool of names, approved by the Council and kept by the Secretariat. The ratio behind this is to save costs, but justice should also be dispensed effectively. The exact criteria for the selection by the Council of the initial pool of persons (lawyers) will have to be determined, including the procedure in terms of which such persons will be identified. Who will propose names, for how long

will they serve, how to ensure judicial independence and prevent conflict of interest? These needs should be accommodated in the proposed Annex. A nationality requirement and the institution of ad hoc judges as allowed in the International Court of Justice may not be suitable approaches for the SACU Tribunal, given the technical nature of the Agreement and its relation to other legal orders. Technical qualifications and experience deserve to be emphasised.

The effective functioning of the SACU dispute settlement system will require infrastructural support and the necessary budgetary arrangements. Technical support through the office of a registrar may be unavoidable.

The rules of procedure are to be drafted 'by the Tribunal'. Exactly who that entity is and how it will perform this task is not clear. Does it mean that all the 'members' approved by the Council will undertake this task? If this is the intention (and they will presumably request technical assistance) then the sequencing of the establishment exercise will have to be planned with care and with clear deadlines in mind.

Rules of procedure should deal with the burden of proof, standard of review, possibility of *amicus curiae* briefs, confidentiality, oral hearings and written submissions, court procedures, publication of decisions, etc. The format in which rulings will be given will have to be stated. Should it be possible for individual opinions and dissenting opinions? What about *amicus curiae* briefs? The concern with respect to separate opinions is that it may become very difficult to discern the essential elements in rulings; decisions become almost submerged by such individual opinions. (The rules of the European Court of Justice do not allow judges to express their concurring or separate opinions. In the case of the WTO panels the same approach is followed.)

The law of other international organisations

In some instances the substantive law of SACU goes beyond the Agreement and incorporates certain specialised WTO agreements. For example, Article 28 of the SACU Agreement provides: 'Member States shall apply product standards and technical regulations in accordance with the WTO Agreement on Technical Barriers

to Trade.’ Article 30 deals with sanitary and phytosanitary (SPS) measures but does not go as far as Article 28 to mention WTO disciplines expressly. The WTO SPS Agreement may however constitute substantive law here because Article 30(2) states that Member States reserve the right to apply SPS measures in accordance with their national SPS laws and international standards.

Several questions arise. Does Article 28 incorporate the TBT Agreement as part of the SACU Agreement? Have all the Members given domestic effect to this obligation? Will both the SACU Tribunal and the DSB of the WTO enjoy jurisdiction in case of a violation of a provision in the TBT Agreement, and will SACU Members have a choice as to the selection of the forum to decide the issue? Can this give rise to an ‘appeal’?

These considerations also apply with respect to Article 29 of the SACU Agreement dealing with the regulation of the marketing of agricultural products. Practice thereunder should comply with the dispute settlement philosophy of the new Agreement.

The SACU Agreement provides for the protection of infant industries in Article 26 and lies down certain requirements, in an asymmetrical fashion, with respect to the right of Botswana, Lesotho, Namibia and Swaziland to protect infant industries. This is another opportunity for applying and enriching the jurisprudence of SACU-- to be developed in the light of other international rules and case law.

The Tariff Board: implications for dispute settlement

A specific problem arises with respect to the new SACU Tariff Board. Its functions will include trade remedies: anti-dumping, countervailing and safeguards. Legal remedies for traders will become part of the actual practice under the SACU Agreement and will involve procedures started on national level.³⁵ In addition, trade remedies can only lawfully be implemented by Member States of the WTO if their domestic procedures comply with the relevant WTO disciplines. In this instance it will

³⁵ National Bodies must be established and national legislation will have to be adopted.

actually mean that SACU, via the instrumentality of the Tariff Board, will have to respect the applicable WTO rules. It should scrutinise the reports emanating from the National Bodies for WTO compliance; the remedies eventually imposed will be SACU remedies and will apply in the common customs territory as a whole. Unless the necessary SACU legal framework is in place, SACU and its Members may be in violation of WTO obligations, triggering disputes under the DSU.

Under the applicable WTO rules, individuals and legal persons have standing and enjoy remedies. This cannot be denied in case of the Tariff Board. The Annex on the Tariff Board should be brought in line with the proposed Tribunal Annex.

Will the activities of the Tariff Board be justiciable and will the SACU Tribunal exercise jurisdiction over such matters? In terms of Article 42 of the Agreement, all Annexes form an integral part of the SACU Agreement. In this sense Annexes may fall under the jurisdiction of the Tribunal as disputes about them will also be disputes 'regarding the interpretation and application of this Agreement'. This aspect, too, needs to be clarified in the proposed Tribunal Annex.

Conclusion and recommendations

Article 13 provides for a typical international court for SACU but all the principles and substantive elements are not expressly and lucidly stated. The proposed Annex will provide an opportunity to start establishing an adjudicating mechanism tailored for local needs. This could be a practical and useful way for addressing the specific problems and difficulties of African States with respect to participation in the dispute settlement system of contemporary trade arrangements. It will also provide an opportunity to correct a rather unfortunate aspect of the new SACU Agreement, namely that this Tribunal is part of a dispensation which in some crucial substantive areas is still based on the 1969 provisions and thinking.

The selection of the names for the pool of Tribunal members is a separate task and will require a prior preparatory process. A procedure for nominating and selecting them is required. The role of the Member States in this process should be addressed, as well as related matters such as remuneration and terms of service.

Administrative support, an office of a Registrar, appointment of support staff and the role of Secretariat are technical issues to be planned for as part of the overall establishment exercise. SACU wants a cost-effective and flexible system and that explains the reason why the judges will not be appointed on a permanent basis. The lack of a permanent bench necessitates sufficient attention to administrative support; to ensure that cases are dealt with promptly and effectively.

The exact nature of the role of the Secretariat in this scheme of things should also be given due consideration. Where should applications be filed and in what format? How will pleadings and judgments be recorded, kept and disseminated?

The opportunity offered in Article 50 for 'cleaning up' the Agreement with respect to those provisions impacting on the jurisdiction of the Tribunal should also be utilised when drafting the Annex. Article 13 is the anchor point for the Tribunal but is rudimentary and not a sufficient framework for a well-functioning adjudicating body. The following specific issues should be considered for inclusion in the Annex: (1) Outstanding substantive issues such as independence and impartiality will have to be explained and stated. (2) The rules on burden of proof, interpretation, and the various stages (written and oral) should be included. (3) Time frames for rulings, implementation, compliance and remedies will have to be decided. (4) Administrative support, office of a Registrar, appointment of staff and the role of Secretariat are specific technical issues to be planned for. (5) The procedure in terms of which the Council will finally approve the pool of names, the criteria for selecting them, the role of the Member States in this process and related matters such as remuneration and duration of terms will have to be developed and approved.

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Gerhard Erasmus

Emeritus Professor, University of Stellenbosch

Senior Researcher, tralac.