University of Pretoria

LLM in International Trade and Investment Law in Africa

Assessing trade dispute resolution mechanisms and the potential of an international trade tribunal in South Africa.

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Faulty of Law

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1 CHAPTER 1

1.1 BACKGROUND OF THE RESEARCH

The world trading system consists of a set of national laws, bilateral agreements and Internationally negotiated multilateral arrangements. The purpose of these laws, agreements and arrangements is to govern the conduct of traders involved in cross-border exchange of goods and services. These laws and agreements provide an international legal framework, in which member states regulate how they exchange goods and services, as part of the world trading system.

South Africa is a member of the World Trade Organisation (WTO)[1] and therefore subjected to the WTO law. The term WTO law refers to all legal provisions in all WTO agreements which include amongst other, General Agreement on Tariffs and Trade (GATT)[2], The General Agreement on Trade in Services (GATS)[3], the Dispute Settlement Understanding (the DSU)[4], the Sanitary and Phytosanitary Measures (the SPS Agreement)[5], the Technical Barriers to Trade (the TBT Agreement)[6] Trade-Related Aspects of Intellectual Property Rights (the TRIPS)[7] and the Anti-Dumping Agreement[8]. It also refers to the decisions of the Dispute Settlement Body[9] which includes the reports of the panels and the Appellant Body[10]. It is imperative to note that South Africa, as a member of the WTO, is bound by the WTO law and should adopt it in its domestic law. This means that, as a member, South Africa has developed a trade policy that is in line with the WTO law. South Africa's trade

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1 South Africa joined WTO in 1st January 1995.

2 The General Agreement on Tariffs and Trade (GATT) is an international trade treaty designed to boost member nation's economic recovery after WWII and it covers international trade in goods.

3 The General Agreement on Trade in Services (GATS) is a treaty of the World Trade Organization (WTO) which entered into force in January 1995 as a result of the Uruguay Round negotiations and cover trade in services.

4 The Dispute Settlement Understanding is the World Trade Organisation (WTO) treaty dealing with how disputes between member states are settled and the procedure followed to settle them.

5 The Agreement on the Application of Sanitary and Phytosanitary Measures (the "SPS Agreement") entered into force with the establishment of the World Trade Organization on 1 January 1995. It concerns the application of food safety and animal and plant health regulations.

6 The Technical Barriers to Trade (TBT) Agreement aims to ensure that technical regulations, standards, and conformity assessment procedures are non-discriminatory and ensures elimination of obstacles to trade.

7 The TRIPS Agreement, which came into effect on 1 January 1995, is to date the most comprehensive multilateral agreement on intellectual property.

8 The Anti-Dumping Agreement is the WTO agreement on how to regulate and prevent dumping in international trade.

9 Dispute Settlement Body (DSB) deals with disputes between WTO members.

10 The Appellate Body was established in 1995 under Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). It is a standing body of seven persons that hears appeals from reports issued by panels in disputes brought by WTO Members.

policy as it relates to WTO law is based on the principle of human rights[11], trade liberation and globalization[12].

In international trade law, only the states can be members of the WTO and this means that states are the only ones entitled to bring disputes before the Dispute Settlement Body of the WTO. Although trade is conducted by companies and individuals, they are excluded from bringing matters of disputes against members of WTO for adjudication by the DSB. The Appellant Body ruled, in one of the cases[13], that "Access to the dispute settlement process of the WTO is limited to Members of the WTO. This access is not available, under the WTO Agreement and the covered agreements as they currently exist, to individuals or small businesses or international organizations, whether governmental or non-governmental"[14] This means that in line with democratic values, member states should ratify the WTO agreements and promulgate national laws to effect international trade.

In South Africa, international trade is regulated, at national level, through the International Trade Administration Act[15] (ITA Act) and its regulations[16]. The ITA Act provides for the establishment of the International Trade Administration Commission of South Africa[17] (ITAC). ITAC is a public entity charged with the duty to foster economic growth and development. The ITA Act gives powers to ITAC to make determinations or decisions in conducting its work[18]. These determinations by ITAC often lead to disputes. The ITA Act provides for the process to be followed when there is a dispute that arise out of any determinations by ITAC. The question that arises is whether the available dispute resolution processes, as provided for by ITA Act, are enough to protect cross border traders, more especially the vulnerable Small, Medium and Micro Enterprises (SMME's).

The powers vested in ITAC by the ITA Act leaves those affected by the determination of ITAC with an option of reviewing those determinations by, first approaching ITAC for a

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[11] Section 22 of the Constitution of South Africa, Act 108 of 1996 provides that every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.
[12] Section 5 of ITA Act provides for the trade policy statements and directives. -The Minister may, by notice in the Gazette and in accordance with procedures and requirements established by the Constitution or any other relevant law, issue Trade Policy Statements or Directives.
[13] United States-Import Prohibition of Certain Shrimp and Shrimp Products WT/DS58? AB/R.
[14] Report of the Appellant Body, 12-10-1998, par 101.
[15] Act No. 71 of 2002
[16] section 59 of ITA Act.
[17] Section 1 of ITA Act.
[18] s 16 of ITA Act.

relief,[19] and approach the High Court of South Africa[20] if one is not satisfied with the ruling of ITAC's internal processes. This proves that anyone affected by the decision of ITAC can't approach an independent body other than ITAC but has to approach the High Court for review of ITAC's decision.[21] The Act provides that the only way to appeal the High court decision is to approach the Supreme Court of Appeals or the Constitutional Court[22]. The purpose of this research is in three folds. Firstly, it is to assess the current trade dispute resolution mechanisms available to cross border traders. Secondly it is to determine whether the current trade dispute resolution mechanism available to cross border traders is adequate enough to assist these traders in dealing with trade related disputes effectively. And thirdly, it is to find out if there is a potential for the South African government to establish an independent international trade tribunal which will cover across all international trade disputes arising from customs administration, international trade administration and any other department and government agency involved in cross border business/trade.

On the other hand, there are other role players in the international trade space which are important players in facilitation of trade in South Africa. For instance, the customs division within the South African Revenue Services (SARS) is responsible for duty collection from importers and exporters, which is also an arm of international trade. Now and then disputes arise between SARS as a customs agency and stakeholders like agents, importers and exporters. The customs legal framework, which is also based on international trade agreements, is part of the whole legal framework involved in international trade and therefore disputes that arise from customs operations and work are of international trade perspective.

This dissertation will look at what trade dispute resolution mechanisms that are existing in South Africa and how effective are those available dispute resolution mechanisms in facilitating trade and fostering economic growth for SMME's and other companies involved in international trade.

There are other institutions, within public administration that are responsible for the regulations of international trade. These institutions include the Department of Agriculture,

[19] ITAC in its institutional structure has an adjudication committee within the Import and Export Control division, which invites applicants to make submission to the committee should ITAC make a determination against an application of an importer or exporter.
[20] s 46(1) of ITA Act.
[21] s 35(1) of ITA Act.
[22] s 47(1) of ITA Act.

Forests and Fisheries (DAFF), through various pieces of legislations[23], the Department of Trade, Industry and Competition, through various trade policy framework[24], the National Regulator for Compulsory Specifications through Standards Act[25], the South African Revenue Services through the Customs Duty Act[26], Customs Control Act[27] and Excise Act[28] and the Department of International Relations and Cooperation through its trade and investment policies.

Since the initiation of economic reforms and the adoption of the trade policy, international trade and South African economy have experienced dramatic growth since 1994.[29] Accordingly, the dawn of democracy in 1994 created turnaround in the South African economic performance. South Africa has the largest GDP within SADC. It has the largest economy, with many well-developed sectors.[30]

Because of the size of her economy, it is imperative to note that, within the SADC region, South Africa is posed to be source for trading goods and services and therefore in addition to the dispute resolution methods provided for by the WTO law, and the regional structures, there should be a trade dispute resolution method at national level, which will deal with cross border trade disputes in an effective and efficient manner.

1.2 PROBLEM STATEMENT

In South Africa, there are a number of Schedule 3A[31] public entities operating as government agencies. These include commissions like the International Trade Administration Commission, Competition Commission, the National Consumer Commission, the Water Commission and many more.[32] These commissions have their own tribunals that adjudicate on complaints against decisions made by these Commissions. In the international trade space, there is no international trade tribunal whereas there is ITAC. This raises the question of, why does ITAC, as a Commission and public entity, does not

[23] There are more than one piece of legislation governing aspects of international trade within the DAFF. These include amongst others the Marine Living Resources Act, the Animal Improvement Act, etc.
[24] South Africa's Trade Policy and Strategy Framework (TPSF).
[25] Act 8 of 2008.
[26] Act 30 of 2014.
[27] Act 31 of 2014.
[28] Act 32 of 2014.
[29] https://tradingeconomics.com/south-africa/gdp-growth-annual#:~:text=GDP%20Annual%20Growth%20Rate%20in,the%20second%20quarter%20of%202020. (Accessed 03-10-2021)
[30] https://ineng.co.za/sadc-countries-by-gdp/ (Accessed on 03-10-2021).
[31] These are national public entities listed under Schedule 3 of the Public Finance Management Act, Act 1 of 1999.
[32] There are 155 public entities listed under Schedule 3A of Public Finance Management Act.

have an independent international trade tribunal? This research will explore/assess the current trade dispute resolution methods, whether they are accessible to cross border traders, any challenges of the current trade dispute methods and how to remedy any inefficiencies in the current trade dispute resolution mechanism.

1.3 RESEARCH OBJECTIVES AND RESEARCH QUESTIONS.

There are many articles and writings about the WTO dispute resolution methods which dissect how trade disputes are resolved. From a South African context and from a policy perspective, little is known of the assessment of the current international trade dispute resolution mechanism. This is because there is no public outreach on the process to be followed when one needs to launch a dispute against another. Although ITAC is authorized by the ITA Act to make such public awareness of the trade programs, little is done in this front. This means that people on the ground remain clueless of the process applicable to international trade dispute resolution mechanism available in South Africa. Therefore, an assessment of the current international trade dispute resolution procedure needs to be conducted and see if there is a need to improve on it.

Objectively, the study seeks to answer the following research questions

- What are existing international trade dispute resolution mechanisms in South Africa and how effective are they in facilitating trade?

This main question will be followed by the following sub-questions: -

- Who are the main players involved in the South African international trade sphere and their role in the international trade institutional framework?
- What is the process followed by the South African government in resolving international trade disputes?
- Are there any weaknesses in the current international trade dispute resolution regime and what are the challenges faced by the current international trade dispute regime?
- Are there any potential ways to improve the trade dispute resolution mechanism in South Africa?

In answering the above mentioned questions, the study will assess the existing dispute resolution mechanism, the authority of the role players involved in trade disputes, the importance of these stakeholders in trade dispute resolution and how these stakeholders

facilitate trade. The study will further assess if there is a connection between the work of different institutions in international trade and how different institutions deal with trade disputes that arise within their respective fields.

The contribution of this study is to answer the fundamental questions as stated above and assess further whether the current legal framework should be reviewed or amended to give effect to the improvement of more accessible and fair dispute resolution method.

1.4 RESEARCH METHODOLOGY

This research shall employ a desktop-based qualitative research methodology. For the entire part of the study, primary and secondary sources will be consulted and analyzed to fulfill the aims and objectives of the study and answer the research questions of the study. Primary sources will include the legal framework under which all institutions in the international trade space are operating, starting with the provisions of the Constitution of Republic of South Africa, the WTO law, World Customs Organisation (WCO), the ITA Act, Customs and Excise Act and any other legislation or regulations that regulate in the international trade space.

The secondary sources will be based on articles, books, journals and internet-based sources that cover the topic of dispute resolution mechanism applicable to international trade.

In order to achieve the set objectives of the study, an assessment of the existing trade dispute resolution methods will be determined and how institutions involved in cross border trade are authorized to deal with trade related disputes. The research will be conducted in an effort to expose any gaps in the current international trade dispute resolution mechanism.

1.5 LIMITATION OF SCOPE AND STRUCTURE

The discussion on the assessment of existing international trade dispute mechanism in South Africa and the potential to establish an international trade tribunal is an important discussion and broadly speaking, this topic cannot be exhausted. The nexus between ITAC work and SARS customs and the mandate of ITAC to regulate import and export will be analysed to give context to the potential need to establish an independent international trade tribunal.

In structure, this study is divided into 5 chapters. The first chapter, is introductory, and is outlining the background, the research question, objectives, methodology, limitation of scope and structure as well as the literature review.

Chapter 2 will discuss the role players in the whole international trade space within the South African context. In this chapter, a swipe on the institutional framework as well as the legal framework will be looked at. These institutions include government department like the DTIC, the DAFF, the DIRCO and other government agencies like NRCS, ITAC, SARS.

Chapter 3 looks at the available international trade dispute resolution mechanisms in South Africa by exploring what mechanisms exist to resolve these disputes. This chapter will be divided into international regime of trade dispute resolution and domestic trade resolution regime.

Chapter 4 will argue the advantages and disadvantages of the existing dispute resolution methods by assessing their strengths and weaknesses and the extent the current dispute resolution mechanism contributes in fostering economic growth and development.

Chapter 5 is a final chapter that concludes the work by summarizing the finding of the research. Methods to strengthen or improve the existing dispute resolution mechanism will be discussed. This chapter will also hold an enquiry whether there is a potential for an independent international trade tribunal in South Africa, as an addition or improvement to the existing dispute resolution mechanisms.

1.6 LITERATURE REVIEW

This research study traces back the available dispute resolution methods applicable to the international trade space and looks at what many writers and scholars have been writing about in the international trade dispute resolution space. The research question can be looked at from several points of view, and thus the intellectual foundation on which the study rests need to be broad enough to coherently address the question. Literature on the potential need to establish an independent international trade tribunal as well as assessment of the existing international trade dispute resolution mechanisms is covered to demonstrate that the research question is real and demands that it should be discussed before embarking on an effort to innovate potential solutions to the research problem.

Professor Gustav Brink[33], in his article titled *"The roles of the Southern African Customs Union Agreement, the international trade administration commission and the minister of trade and industry in the regulation of South Africa's international trade"*, writes about the role of ITAC as an organization, and its mandate to control the movement of goods through its import and export control division. This is the division that issue permits for exportation and importation of certain goods. In the middle of the movement of goods and people, there are traders, who ply their trade, who will be affected by the decisions of ITAC. Professor Brink discusses the various case laws relating to the ways of handling international trade disputes and further argues, in one of his articles[34], the need for a cheaper dispute resolution mechanism.

Professor Corlia van Heerden and Professor Gustav Brink writes about the subject of this research[35]. Their approach in the subject matter is of comparative nature between ITAC as a commission with Competition Commission. Undoubtedly, there are similarities in the work of these commissions but the Competition Commission has a tribunal while ITAC doesn't have. The professors further take it to mention National Consumer Commission which also have a tribunal. My approach to this topic will not per se look at comparing the other commissions but will focus on the assessing the current trade dispute resolution mechanism in South Africa and whether, as part of improving accessibility to dispute mechanisms, there is a potential to establish an "independent" international trade tribunal.

L Smit[36] wrote that individuals do not have access to WTO law in the same way that they Have access to socio-economic rights in South Africa. He argues the link between these socio-economic rights and the international trade and compares the access to WTO law by individuals in national courts, with access to socio-economic rights by individuals in South Africa[37].

Professor Clive Vinti[38] in his article *"Opening Pandora's Box: The 'confidentiality' clause in the International Trade Administration Commission's Amended Tariff Investigations Regulations"* writes about how ITAC treats submission of confidential information by traders and the discretion of ITAC to accept that information as confidential. The moment ITAC, I submit, makes determination that a certain information is or is not confidential may be to

[33] Professor G. Brink is an extraordinary lecturer in Mercantile Law, University of Pretoria.
[34] Professor G. Brink *"The need for an International Trade Tribunal"* 2016 SALJ 409 433.
[35] Professor van Heerden and G Brink "The need for International Trade Tribunal".
[36] Researcher, United Nations Global Compact Office, New York.
[37] L. Smit "The relationship between the access of individuals to WTO law and the socioeconomic rights in the South African Constitution".
[38] Professor C. Vinti is a lecturer in the Department of Public Law at the University of Free State.

the detriment of an SMME as a trader. If the individual trader or small business affected by that determination is unable to review that decision in the High Court because of financial constraints, then it means that, there is justification on the argument of the establishment of an independent international trade tribunal. The enquiry by Professor Vinti should go further and enquire about how to deal with these powers vested on ITAC by ITA Act and what can be done to support small traders who are unable to afford High Court reviews.

The subject of customs disputes has been discussed in many forums, thesis, dissertations and articles. In his thesis[39], Dr. Theo Colesky unpacks the process of dispute resolution process under the Customs and Excise Act and further submits that the process is unfair in the sense that it is short of solving disputes cheaper and faster. I submit that Dr Colesky is correct in his observation and further adds that SARS internal dispute resolution mechanism is not independent. SARS is a player and a referee at the same time. I further submit that since customs issues are of international trade in nature, they also fall within the ambit of the international trade space and not only on SARS internal processes. In this research, an argument to establish that there is a link between customs work and ITAC's work and that they all belong to international trade space will be explored.

2 CHAPTER 2: ROLE-PLAYERS WITHIN INTERNATIONAL TRADE SPACE IN SOUTH AFRICA.

2.1 INTRODUCTION

International trade in South Africa is made possible by various role players within the public sector and private sector. In the public sector, the role of international trade is the responsibility of various government departments. These government departments are empowered through various legislations and policy framework to perform their duties in order to foster trade and development in their respective field of specialization. On the other hand, with the private sector, industries who are involved in trade, organize themselves in a bid to influence the government in trade policy making and have a say on any proposed legislative changes, amendments and/or initiate legislative changes in order to ease business with the outer world. These private sector players include, but not limited, importers, clearing agents, shipping companies, etc. Various industries involved in cross

[39] Dr. Theo Colesky "A comparative study on Customs Tariff Classification" University of Pretoria 2014.

border trade also organize themselves in order to have a voice within the international trade space. These industries include wine growers, farmers, meat industries, steel industries, etc.

2.2 THE INSTITUTIONAL FRAMEWORK FOR INTERNATIONAL TRADE IN SOUTH AFRICA.

The international trade in South Africa is regulated through various government policies and legislations and through various government departments and various public entities. Most of these public entities are creatures of statute and report to the executive authority which runs a department. The following institutions and department are involved in international trade, somehow in their operations.

2.2.1 The Department of Agriculture, Forestry and Fisheries.

Agriculture plays an important role in the process of economic development and can contribute significantly to household food security. The National Development Plan (NDP) sets out a broad vision of eliminating poverty and reducing inequality by 2030.

The Department of Agriculture, Forestry and Fisheries (DAFF) was disestablished in June 2019. The agriculture function was incorporated into the new Department of Agriculture, Land Reform and Rural Development (DALRRD), while the forestry and fisheries functions were incorporated into the new Department of Environment, Forestry and Fisheries.[40]

The importance of the agricultural sector in South Africa cannot be stressed enough. Since the first quarter of 2020, agricultural sector has been a positive contributor to the country's GDP growth with an increase of 28.6%, becoming the strongest performer (15.1%) in the second quarter of 2020 despite the unpleasant conditions of COVID-19 pandemic. Agriculture continued to increase at a rate of 18, 5% in the quarter of 2020[41]. The agricultural sector has three sub-sectors: agriculture, forestry and fishing. The agriculture sub-sector comprises field crops, horticulture and livestock farming. The performance of field crops has a pivotal role in the determination of food security and overall performance of the sector. The most important field crops grown in South Africa are maize, sugar,

[40] https://www.gov.za/about-sa/agriculture.
[41] https://www.namc.co.za/agricultural-sector-contribution-to-south-africas-gross-domestic-product-gdp/. Accessed on 10-08-2021

sunflower and wheat. South Africa is a net exporter of maize and sugar and a net importer of wheat.

The performance in the agricultural sector is also affected by South Africa's participation in different trade agreements. South Africa is a signatory to a number of trade agreements which contributed to the liberalization of the agricultural sector. Participation in global trade agreements reduced distortions which existed from indirect export subsidies such as electricity and transport rebates, export finance and credit guarantees and marketing allowances.

In South Africa, the objective of trade policy in the agricultural sector is to promote the integration of this sector into the world economy in order to encourage greater access to markets, technology, capital as well as competition. All these activities have a direct or indirect impact on economic growth.

DAFF, as a government department carries its obligations through various public entities that report to the Minister of Agriculture. These entities, relevant to international trade, include the Perishable Products Export Control Board which is an entity responsible for the export certification.[42].

2.2.2 The Perishable Products Export Control.

The Perishable Products Exports Control Board (PPECB) is an independent service provider responsible for quality certification of perishable produce and cold store management services for producers and exporters of perishable products. The PPECB is delivering a valuable service to the perishable industry by certifying the exports from South Africa. The organization plays an important role in international trade of agricultural products that are perishable in nature.

2.2.3 The Fisheries department.

Although the fisheries are under the DAFF, its management falls within the new department of environment and fisheries. Marine and Coastal management, a directorate in the fishery

[42] https://ppecb.com/about/overview/.

department, is responsible for the regulatory management of fisheries resources in South Africa. Fisheries in South Africa are managed as a national competence, rather than on a provincial basis. Marine and Coastal Management (MCM) within the Department of Environment Affairs and Fisheries is the regulatory authority responsible for managing all marine and coastal activities, and the issuing of rights to commercial and subsistence fisheries. Marine and Coastal Management issue compliance permits to harvest fish products from South African oceans. Therefore, it is a requirement that all fishery products exportation and importation have a permit issued by the surveillance and monitoring sub directorate of the fishery department.

2.2.4 The South African Reserve Bank.

The SARB was established as the central bank of South Africa in terms of the Currency and Banking Act 31 of 1920[43]. The SARB is currently regulated in terms of the South African Reserve Bank Act[44] (SARB Act) and its position as central bank is entrenched by section 223 of the Constitution of the Republic of South Africa, 1996[45]. The SARB, as central bank, had a diversified mandate prior to the adoption of the Twin Peaks model of financial regulation in South Africa[46]. The SARB's primary purpose was stated in section 3 of the Reserve Bank Act as the protection of the value of the currency of the Republic in the interest of balanced and sustainable economic growth in the Republic.

The SARB's purpose and primary outcomes as an institution beholden to the Republic of South Africa and her people, are constitutionally[47] and statutorily[48] defined. The stipulated mandate, as enshrined in the Constitution, bestows on the SARB the task of protecting the value of the currency in the interest of balanced and sustainable economic growth and contributing to the stability of the financial system

The Minister of Finance of South Africa announced that a new capital flow management framework will be introduced. Under this framework all cross-border transactions will be allowed except for those that are subject to the capital flow management measures and/or

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[43] This Act was later repealed by the South African Reserve Bank Act 29 of 1944. See also De Jager "The South African Reserve Bank: An Evaluation of the Origin, Evolution and Status of a Central Bank (Part 1)" (2006) 18 SA Mercantile Law Journal 159 -174 and De Jager "The South African Reserve Bank: An evaluation of the Origin, Evolution of a Central Bank (Part 2)" (2006) 18 SA Mercantile Law Journal 274-290 for a historical overview of the role of the SARB as central bank of South Africa.

[44] Act 90 of 1989,

[45] De Jager "The South African Reserve Bank: Blowing Winds of Change (Part 2)" (2013) SA Mercantile Law Journal 342.

[46] Van Heerden and Van Niekerk (2018) Twin Peaks in South Africa: a new role for the central bank, Law and Financial Markets Review 3.

[47] Constitution of the Republic of South Africa, s 224.

[48] South African Reserve Bank Act 90 of 1989

pose a high risk of illegitimate cross-border financial flows[49]. Furthermore, red tape on legitimate flows will be reduced while more robust measures will be introduced to detect, deter and disrupt illegitimate cross-border financial flows. New capital flow management regulations will be drafted to effect this framework[50]. The SARB financial surveillance department is responsible for tracking cross border transactions through monitoring of export values in international trade transactions.

2.2.5 The Department of Trade, Industry and Competition.

The Department of Trade Industry and Competition was established after the merger of the Department of Trade and Industry and the Economic Development department. Its main mission is the promotion of structural transformation, towards a dynamic industrial and globally competitive economy, provision of predictable, competitive, equitable and socially responsible environment, conducive to investment, trade and enterprise development, increase participation in the economy to strengthen economic development and improve alignment between economic policies, plans of the state, its agencies, government's political and economic objectives and mandate[51].

The DTIC assist SMME's in various incentive schemes locally, but of relevance to the research is the support of SMME's through Export Marketing & Investment Assistance Scheme, which encourages SMME's to explore export markets outside South Africa and bring in Foreign Direct Investment into South Africa. This is part of DTIC contribution towards encouraging SMME's involvement into international trade.

In its ranks, the DTIC have a Trade Policy, Negotiations and Cooperation division, with a purpose of building an equitable global trading system that facilitates development by strengthening trade and investment links with key economies and fostering African development. The division's main objective centers on negotiating trade and investment agreements with trade partners at bilateral, regional and multilateral levels by expanding export opportunities and protecting domestic industrial capacity and employment[52].

The Division is divided into two business units, namely the African Economic Relations and the International Trade Development. The African Economic Relations is a policy development and negotiating business unit, which focuses on building trade and investment

[49] https://www.resbank.co.za/en/home/what-we-do/financial-surveillance
[50] 2020 Budget Speech,
[51] http://www.thedtic.gov.za/know-the-dtic/department-of-trade-industry-and-competition/
[52] http://www.thedtic.gov.za/rade-policy-negotiations-and-cooperation/.

relations with African economies by promoting continental trade, integration and development. Its main aim is to negotiate trade agreements with the rest of Africa and to facilitate implementation of existing trade agreements[53].

The International Trade Development is a policy development and negotiating business unit, within the DTIC, which seeks to design and implement policies that promote South Africa's integration into the global economy in a manner that supports national development goals. Its purpose is to build trade relations and to negotiate trade and investment agreements at bilateral, regional and multilateral levels, as well as, ensure compliance with international Treaties within the ambit of the Division. It consists of three directorates, namely Bilateral Trade Relations, Trade Negotiations and Non-Proliferation. The Bilateral Trade Relations look at trade negotiations around the world while the Trade Negotiations directorate consists of the units that deal with Market Access, Trade in Services Trade Rules[54].

2.2.6 The Department of International Relations and Co-operations

The Department of International Relations and Cooperation's (DIRCO) vision is championing an African continent, which is prosperous, peaceful, democratic, non-racial, non-sexist and united and which aspires to a world that is just and equitable. Its mission includes the formulation, coordination, implementation and managing of South Africa's foreign policy and international relations by promoting the South African national interests and values[55].

The department achieve this by prioritizing national interests through bilateral and multilateral interactions and conduct and coordinate South Africa's international relations and promote its foreign policy objectives. The department also monitors international developments and advise government on foreign policy and contribute to the formulation of international law and enhance respect for the provisions thereof and promote multilateralism to secure a rule based international system.

The department uses its missions abroad to pursue economic diplomacy and in doing so, it is in a mission to promote South Africa's domestic businesses abroad. These lead to increased value-added exports, attract foreign direct investments in terms of the National

[53] The DTI Annual Report 2018/2019.
[54] http://www.thedtic.gov.za/trade-policy-negotiations-and-cooperation/ Accessed on 22-08-2021.
[55] Dirco's Annual Report 2019-2020.

Development Plan[56] strategy, promote the removal of non-tariff barriers and address skills shortage by importing much needed scarce skills for training and development purposes and transfer of technology purposes[57]

2.2.7 National Regulator for Compulsory Specifications.

The NRCS is an agency of the department of Trade, Industry and Competition established to administer compulsory specifications and other technical regulations with the view to protect human health, safety, the environment and ensure fair trade in accordance with government policies and guidelines[58].

One of the strategic goals of NRCS is to maximise compliance with all specifications and technical regulations. This means that NRCS must increase compliance with compulsory specifications and technical regulations through pre-market approvals, market surveillance and sanctions where there is non-compliance, a risk-based approach, border enforcement strategy, inspection at source should be employed. The compliance with specifications applies also to manufactured goods and imported goods. These interventions will include the on-site inspections and enforcement investigations.

The NRCS provides services within the imports and exports regulatory space to provide equal treatment of local and imported products, and competition on a level playing field, which are fundamental principles of the WTO TBT and SPS agreements. This also applies to the conformity assessment bodies (laboratories and certification schemes) recognized by the NRCS to provide reliable proof of conformity of products to the applicable compulsory specifications. These conformity reports are accepted by the NRCS.

NRCS consults widely and attempts to involve all stakeholders and especially industry in the development of new compulsory specifications and amendments which align local with international regulatory requirements. The same requirements apply to imported and exported commodities assisting local industry to become globally competitive.

NRCS approves products that meet with the requirements of applicable compulsory specifications by issuing Letters of Authority to manufacturers and importers as soon as the requirements have been met, in order that the products can be imported or offered for sale.

[56] The National Development Plan (NDP) is a long term South African development plan, developed by the National Planning Commission in collaboration and consultation with South Africans from all walks of life.
[57] Dirco's Annual Report 2019-2020 p 54.
[58] https://www.nrcs.org.za/content.asp?subID=4

The NRCS Food and Allied Industries (FAI) Department is recognized throughout the world as a leader in food safety, and has been appointed as the certification body for export of frozen marine products to the EU. FAI assists role players to comply with local and international requirements, and is recognized by Authorities in various countries, such as China, Russia and the EU, as the competent authority for the inspection and issue of health guarantees of fish or fishery products destined for Europe. [59].

2.2.8 The South African Revenue Services.

The South African Revenue Service (SARS) is the South Africa's tax collecting authority, which was established in terms of the South African Revenue Service Act[60] as an autonomous agency, responsible for administering the South African tax system and customs service. SARS main objectives are an increased Customs and Excise compliance, increased tax compliance, increased ease and fairness of doing business with SARS, increased Cost effectiveness and Internal Efficiencies and increased public trust and credibility.

The South African Revenue Service (SARS) is mandated to facilitate legitimate trade and protect the economy and society from the illegal importation of goods. SARS is the agency at the forefront of identifying and addressing importers who undervalue their imports. The division within SARS that is tasked with dealing with imports and exports is the Customs Division. It is submitted that in international trade there is always an element of risk in facilitating the movement of goods. Customs administration cannot stop every container or goods entering or leaving their respective areas of control which would include the points of entry, being the airports, borders and the harbours. The SARS mandate is, amongst others, to facilitate legitimate trade. "In terms of the South African Revenue Service Act[61] SARS is mandated to:

- collect all revenues due.
- ensure optimal compliance with tax and customs legislation
- provide a customs service that will optimise revenue collection, protect our

[59] https://www.nrcs.org.za/content.asp?subID=103#1 (Accessed on 19-08-2021).
[60] 34 of 1997.
[61] No. 34 of 1997

borders and facilitate legitimate trade".[62]

The International Relations (IR) division of the South African Revenue Service (SARS) is responsible for creating and enhancing relations, through contact, with international Tax and Customs authorities and international organizations. The IR objectives include, amongst others, to facilitate the management of the risks of illicit cross-border trade and tax avoidance.

The Commissioner for the South African Revenue Service (SARS) is responsible for the administration and enforcement of the Customs and Excise Act[63] and the regulations promulgated under it. The Commissioner for SARS and SARS officers have powers to investigate and impose administrative penalties, which in most cases give rise to disputes and litigations. The Customs and Excise Act also imposes criminal sanctions in the form of a fine, imprisonment, or both. SARS works with the International Trade Administration Commission (ITAC), which is involved in setting customs duties. It also co-operates with other bodies involved in import and export controls for certain categories of products.

2.2.9 The International Trade Administration Commission.

International Trade Administration Commission of South Africa (ITAC) is a juristic person and a statutory body that bears specialist responsibility for the administration of international trade.[64] The International Trade Administration Commission of South Africa is established by the provisions of the International Trade Administration Act (ITA Act).[65] ITAC has jurisdiction throughout the Republic and is a juristic person and accountable to the Constitution.

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[62] South African Revenue Service, Strategic Plan 2012/13 – 2016/17 at 10, http://www.sars.gov.za/AllDocs/SARSEntDoclib/Ent/SARS-Strat-07%20-%20SARS%20Strategic%20Plan%202012%202013%20to%202016%202017. Accessed on 24 August 2020.
[63] 91 of 1964
[64] International Trade Administration Commission v Scaw South Africa (Pty) Ltd and Bridon International Limited, CCT 59/09 [2010] ZACC par 6.
[65] ss 7(1) of ITA Act.

ITAC is the authority responsible for investigating trade remedies. It is an independent statutory entity reporting to the Minister of Trade, Industry and Competition. ITAC conducts investigations on behalf of all the SACU member states.

The mandate of ITAC is to foster economic growth and development in order to raise incomes and promote investment and employment in the Republic and within the Common Customs Area by establishing an efficient and effective system for the administration of international trade subject to the Act, the Constitution and the SACU agreement.[66] ITAC has the function of conducting investigations of anti-dumping protection, countervailing duties to counteract subsidisation in foreign countries, and safeguard measures when a surge of imports is threatening to overwhelm a domestic producer, in accordance with domestic law and regulations and consistent with WTO rules.[67] Thus, the core function of ITAC is to conduct investigations on the following international trade instruments: customs tariffs and rebates; trade remedies (i.e. .anti-dumping; countervailing measures and safeguards); as well as import and export control.[68]

ITAC is the South African national body under the SACU Agreement.[69] The enactment of the ITA Act was followed by the promulgation of detailed anti-dumping regulations in November 2003 to guide ITAC in conducting its anti-dumping investigations. At present all anti-dumping investigations and findings in SACU are undertaken and made by ITAC. ITAC is responsible for decision on trade remedies such as anti-dumping in South Africa and the common customs area. Currently ITAC functions under the enabling clauses in the legislation that allow it to operate as the SACU tariff body pending the full operation of SACU institutions. The SACU antidumping law comprises, the WTO Anti-dumping Agreement[70] the ITA Act, the Antidumping Regulation and the Customs & Excise[71]. South Africa is the only SACU member with anti-dumping law and regulation.[72]

ITAC itself is an independent statutory body responsible for international trade administration, including tariff and rebate applications, trade remedies and import and export control. The ITA Act provides that ITAC is independent and subject only to the Constitution and the law; any Trade Policy Statement or Directive issued by the Minister in

[66] ITAC Annual Report 2019/2020 page 4.
[67] s 26 of ITA Act.
[68] n 63 above.
[69] Article 14 of SACU Agreement.
[70] GATT 1994.
[71] Act 91 of 1964.
[72] Government Gazette 14th November 2003, General Notice, Notice No. 3197 of 2003.

terms of the ITA Act[73]; and any notice issued by the Minister in terms of the ITA Act[74]; and must be impartial and must perform its functions without fear, favour or prejudice[75]. Each organ of state must assist the Commission to maintain its independence and impartiality, and to exercise its authority and carry out its functions effectively.

As an autonomous body ITAC advises the Minister of Trade, Industry and Competition on trade policy for SACU, a function that will, when operational, be taken over by the SACU Tariff Board. Should the Minister of Trade and Industry accept the recommendation of the ITAC Commission it is forwarded to the Minister of Finance for implementation. On acceptance by the Minister of Finance, the Commissioner for Customs is instructed to amend the Schedules in the Customs & Excise Act 91 of 1964 by notice in the Government Gazette.

On completion of any investigation by ITAC, recommendations are made to the Minister of Trade, Industry and Competition, who will accept or reject it or refer it back to ITAC for reconsideration. If the Minister of Trade, Industry and Competition accepts ITAC's recommendation, they will request the Minister of Finance to amend the relevant customs tariff in the relevant schedule to the Customs and Excise Act, which is done with SARS and other SACU customs authorities.

The Customs Division of SARS enforces tariff amendments and ensures compliance with import/export licenses, rebate provisions, and letters of authority. ITAC's evaluation of applications to impose customs duties are informed by the government's industrial policy and economic objectives. ITAC's jurisdiction only extends to customs tariffs and import and export control, i.e., to only part of the regime governing trade in goods. It does not cover trade in services, trade related aspects of intellectual property rights or trade related investment measures, nor the full spectrum of trade in goods. In addition, ITAC has done very little to promote public awareness of what it has to offer and of its instruments.

2.3 THE LEGAL AND REGULATORY FRAMEWORK OF INTERNATIONAL TRADE IN SOUTH AFRICA.

2.3.1 <u>The international and regional trade agreements.</u>

[73] s 5 of ITA Act.
[74] s 6 of ITA Act.
[75] s 7 of ITA Act.

At an international level, various systems have been developed by the WTO and WCO to promote the standardisation of various aspects of trade facilitation, including enforcement methods, dispute resolution mechanisms and customs penalty regime frameworks. These international and regional legal instruments therefore merit specific attention.

The World Trade Organisation

The WTO provides a legal and institutional framework for the implementation and monitoring of these agreements, as well as for settling disputes arising from their interpretation and application. The current body of trade agreements comprising the WTO consists of 16 different multilateral agreements.[76]

The WTO system has made a huge effort to remove barriers to trade and has improved the export and import level between its contracting states. The WTO adopted a single undertaking approach which incorporates all 29 agreements and understandings. The goal of the single undertaking approach is to integrate the multilateral trading system. One of the most important components of the WTO is the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter referred to as 'Dispute Settlement Understanding' or 'DSU'). Dispute settlement became the central pillar of the multilateral trading system and it is one of the most successful contributions of the WTO to the stability of the global economy[77] it became an integral part of the WTO and it is binding for all contracting states.

The WTO dispute settlement system is one of the most effective and binding international instrument. The dispute settlement mechanism ensures the states' rights and the flow of trade by enforcing the WTO rules. After several trade negotiations, states agreed that the WTO's rule-oriented dispute settlement mechanism would be beneficial for all because they ensure that government policies will be more predictability by allowing contracting parties to access foreign markets, they hinder discriminatory trade barriers such as quantitative restrictions, they create a reliable environment for producers, traders and investors and they provide more transparent policy instruments by limiting potential state intervention.[78]

[76] Article II.2 of the Agreement establishing the WTO.
[77] 'Understanding The WTO: Settling Disputes a Unique Contribution' available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm, accessed on 22 August 2021.
[78] The World Trade Organization, World Trade Report 2013: Factors Shaping the Future of World Trade (2013) p 11.

The World Customs Organisation

The International Convention on the Simplification and Harmonization of Customs Procedures commonly known as Kyoto Convention was revised in 1999 and came into force in February 2006.[79] As with The Trade Facilitation Agreement, the Convention has, as its main objective, the provision of predictability and efficiency in the international trade arena. Contracting parties, of which South Africa is one, are bound by the rules set out in the Convention[80]. The provision of easily accessible processes of administrative and judicial review is one such requirement.

The Kyoto Convention consists mainly of the General Annexes and the Specific Annexes which are further divided into chapters which consist of definitions, standards, transitional standards, recommended practices and guidelines.

Under the General Annexes that apply to all contracting parties, the Convention provides, for the following standards concerning decisions made by a customs authority:

- When a decision is made that adversely affects a trader, reasons must be provided as well as an indication of the right to appeal such a decision.[81]
- National legislation must provide for an initial appeal to the customs authority. This indicates that an internal appeal process must be provided for[82].
- When the internal appeal is unsuccessful, provision must be made for a further appeal to a body independent of the customs authority, and
- When the above standards have been exhausted, the appellant will have the right to judicial appeal or review.[83]

In the Specific Annexes, the convention deals specifically with offences and provides clear guidelines to customs regimes regarding the administration of customs offences. This includes the process and procedure to be followed by contracting parties in dealing with customs procedures, customs offences, seizure and detentions of goods and administrative settlement of customs offences. The convention also provides the right to appeal wherein

[79] https://stats.oecd.org/glossary/detail.asp?ID=4874.
[80] https://tfig.unece.org/contents/revised-kyoto-convention.htm,
[81] Standard 9.8 in the General Annex
[82] Standard 10.4 in the General Annex
[83] Standard 10.6 in the general annex

an alleged transgressor must have the right to appeal to a body independent of customs unless the parties have entered into a compromise settlement.[84]

The African Continental Free Trade Area.

The African Continental Free Trade Area (AfCFTA) agreement is an initiative by the AU to achieve their ambition for integration and intra-trade trade within the African continent. The formation of a single market is a vision that the African Union has in pursuit of structural transformation. The AfCFTA agreement, as such, becomes a key programme and initiative to liberalise the movement of goods and services, creating free trade as a result

The Agreement establishing the African Continental Free Trade Area (AfCFTA) is a legal instrument – an agreement among the African Union Member States to create a single market.[85]

One of the objectives in the AfCFTA Agreement is indeed to "establish a mechanism for the settlement of disputes concerning… rights and obligations".[86] The Protocol on Dispute Settlement (DS Protocol) was adopted and signed in Kigali on 21 March 2018, when the AfCFTA was launched. It proclaims dispute settlement to be "a central element in providing security and predictability to the regional trading system".

The AfCFTA contains an institutional framework for its implementation, administration, monitoring and evaluation which is headed by the AU Assembly.[87] The AU Assembly provides strategic guidance and oversight, while the AU Council of Ministers Responsible for Trade, as established by the AU Assembly, is responsible for ensuring the enforcement and implementation of the AfCFTA.[88] In the event that one of the AfCFTA member states fails to perform in terms of an obligation imposed by the agreement, the agreement provides for the possibility to file a dispute against the defaulting state.[89] To this

[84] Chapter 10 of Revised Kyoto Convention.
[85] The Futures Report: Making the AfCFTA Work for Women and Youth page 4.
[86] Erasmus "Dispute Settlement in the African Continental Free Trade Area" (11 July 2019) https://tralac.org/blog/article/14150-dispute-settlement-in-the-african-continental-free-trade-area.html (accessed 21-08-2021).
[87] Art 9 of the AfCFTA Agreement.
[88] Art 10 of the AfCFTA Agreement.
[89] Erasmus "Dispute Settlement in the African Continental Free Trade Area" https://tralac.org/blog/article/14150-dispute-settlement-in-the-african-continental-free-trade-area.html (accessed 21-08-2021).

end, Article 20 of the agreement establishes a Dispute Settlement Mechanism, to be administered in terms of the Protocol on Rules and Procedures on the Settlement of Disputes.[90] The Protocol applies to disputes which arise concerning rights and obligations under the provisions of the agreement.[91] The first step in the dispute settlement process is consultation between the state which initiated the dispute settlement procedure and the state alleged to have breached a provision of the agreement, with the aim of resolving the dispute.[92] The request for consultation is submitted to the Dispute Settlement Body, outlining the reasons for the case, as well as the issues and legal basis of the complaint.[93] Should the state to which the request for consultation was directed not respond within 10 days of having received the request, the state which made the request for consultation may request the establishment of a Panel by the Dispute Settlement Body.[94]

The Southern African Development Community.

Article 9(1) of the Treaty establishing the Southern African Development Community (the SADC Treaty) establishes what may be referred to as the main or primary institutions of the Southern African Development Community (SADC). These are the Summit of Heads of State and/or Government (the Summit), the Council of Ministers (CoM), the Sectoral and Cluster Ministerial Committees (SCMCs), the Standing Committee of Officials (SCO), the Organ on Politics and Defence Cooperation OPDS), the SADC National Committees (SNCs), the Secretariat, and the SADC Tribunal (the Tribunal).[95]

The SADC Treaty makes provision for the establishment of a SADC Tribunal, tasked with, amongst other things, ensuring compliance with the provisions of the SADC Treaty and its protocols and regulations, as well as ensuring the proper interpretation of the provisions thereof.[96] The SADC Tribunal also has the function of adjudicating over disputes between member states.[97] In terms of the Treaty, the decisions of the Tribunal shall be final and binding.[98] In terms of the SADC Treaty, the SADC Tribunal was to be established in terms

[90] Art 20 of AfCFTA Agreement.
[91] Art 3 of the Protocol on Rules and Procedures on the Settlement of Disputes of 2018 (hereafter Protocol on Dispute Settlement).
[92] Art 6:1 of the Protocol on Dispute Settlement.
[93] Art 7:3 of the Protocol on Dispute Settlement.
[94] Art 5 of the Protocol on Dispute Settlement.
[95] Nyathi “Supreme in Letter, Supreme in Spirit, Supreme in Deed: An Exposition of the SADC Summit’s Overarching Powers in the SADC Regional Integration Project” 2017 31 Speculum Juris 166 167.
[96] Phooko R "The Direct Applicability of SADC Community Law in South Africa and Zimbabwe: A Call for Supranationality and the Uniform Application of SADC Community Law" PER / PELJ 2018(21
[97] Art 16.1 of the SADC Treaty.
[98] Art 16:5 of the SADC Treaty.

of a Protocol which would form an integral part of the SADC Treaty.[99] The Tribunal Protocol was signed in 2000, and the work of the Tribunal began in 2005.[100] The Tribunal had the jurisdiction to adjudicate disputes both between SADC member states and between SADC citizens and their respective member states. When Zimbabwe adopted a land reform policy which sought to expropriate the land of farmers without offering any compensation, the matter was challenged in an application brought before the SADC Tribunal in the matter of *Mike Campbell and Others v The Republic of Zimbabwe* (the Campbell case).[101] The Tribunal found in favour of the applicant and against the government of Zimbabwe, subsequent to which Zimbabwe asserted that the Tribunal did not have the jurisdiction to hear the matter as Zimbabwe had not ratified the Tribunal Protocol.[102] In response to the Tribunal's adverse finding against Zimbabwe, SADC states, in support of Zimbabwe, fought back by undergoing a process which resulted in the Tribunal being suspended in 2012.[103] The resolution adopted by SADC states which sought to suspend the Tribunal suggested that a new Protocol be negotiated so as to limit the mandate of the Tribunal to the interpretation of the SADC Treaty and Protocols in relation to disputes between member states.[104] In effect, the intention was to render impossible the ability of citizens to approach the Tribunal in instances where they have grievances against their governments, grievances which often arise as a result of human rights violations. Although some authors have suggested that there were malicious intentions behind the disbandment of the SADC Tribunal, this discourse will not delve into any speculation in this regard, suffice to say that it is unlikely that the hinderance of individuals from having access to a regional court is rooted in innocent intentions. In 2014, a revised Protocol on the SADC Tribunal was signed, confining the Tribunal to adjudicate only over disputes between states and effectively doing away with the ability of individuals to bring their grievances before the Tribunal.[105] The Protocol was set to come into operation 30 days after it had been ratified by two thirds of the SADC member states.[106] The 2014 Tribunal Protocol was dealt a heavy blow before it could come into operation when the Constitutional Court of South Africa ruled that the participation in

[99] Art 16:2 of the SADC Treaty.
[100] Nyathi "Supreme in Letter, Supreme in Spirit, Supreme in Deed: An Exposition of the SADC Summit's Overarching Powers in the SADC Regional Integration Project" 2017 31 Speculum Juris 166 172.
[101] Phooko "No Longer in Suspense: Clarifying the Human Rights Jurisdiction of the SADC Tribunal" 2015 18 PELJ 530 547.
[102] n 93 above.
[103] n 97 above.
[104] Hansungule "The Suspension of the SADC Tribunal" 2013 35 Strategic Review for Southern Africa 135.
[105] Groundup "Court Bid to Reinstate SADC Tribunal" (28 February 2018) https://www.groundup.org.za/article/court-bid-reinstate-sadc-Tribunal/. (Accessed 22-08-2021).
[106] Erasmus "The New Protocol for the SADC Tribunal: Jurisdictional Changes and Implications for SADC Community Law" (21 January 2015) https://www.tralac.org/publications/article/6900-the-new-protocol-for-the-sadc-Tribunal-jurisdictional-changes-and-implications-for-sadc-community-law.html (accessed 22-08-21).

the disbandment of the original Tribunal, as well as the subsequent signing of the new Protocol by then President Jacob Zuma was unconstitutional, unlawful and irrational.[107] In its ruling, the court held that the President did not have the authority to sign away the right of access to justice enshrined in the South African Constitution.[108]

In September 2019, South African President Cyril Ramaphosa withdrew South Africa's support for the new Tribunal Protocol, a move which was greatly welcomed by many legal experts, who viewed the move to suspend the original Tribunal as a retrospective step.[109] In addition, the Tanzanian High Court has ruled that the Tanzanian government violated its obligations under the SADC Treaty by participating in the suspension of the Tribunal and replacing it with the 2014 Protocol which was contrary to the SADC Treaty.[110] Although South Africa remains the only country to have done so, other SADC states which have signed the 2014 protocol will also need to withdraw their signatures in order for the original Tribunal to be revived. Currently the SADC Tribunal exists, albeit only in writing, as it currently has no judges or other staff.[111] It may be necessary for South Africa and Tanzania to convince the nine signatories of the 2014 protocol to withdraw their signatures and resuscitate the original SADC Tribunal.

The SADC Protocol on Trade has attached to it various annexes dealing with, inter alia, rules of origin, customs cooperation, trade documentation and procedures, transit trade and transit facilities, as well as trade development. On closer scrutiny of the Trade Protocol and its annexes, there is no indication of reference or strategy concerning the issue of customs offences, penalties or appeal procedures which makes it difficult for individuals or small businesses to use the SADC trade protocol for trade disputes.

The Southern African Customs Union

In Southern Africa we have the oldest customs union in the world, the Southern African Customs Union ("SACU"), which came into existence in 1910. Current Members are Botswana, Namibia, South Africa, Swaziland and Lesotho. As a customs union, these

[107] TRALAC "South Africa Withdraws its Signature from the Decision to Abolish the SADC Tribunal" (13 September 2019) https://www.tralac.org/blog/article/14240-south-africa-withdraws-its-signature-from-the-decision-to-abolish-the-sadc-Tribunal.html (accessed 23-08-2021).
[108] n 104 ibid.
[109] n 104 above.
[110] Fabricus "Will South Africa Fight for the SADC Tribunal's Revival?" (6 September 2019) https://www.dailymaverick.co.za/article/2019-09-06-will-south-africa-fight-for-the-sadc-tribunals-revival/. (Accessed 22-08-2021).
[111] n 109 ibid.

Members have a common external tariff regime and no customs duties apply to intra union trade.[112] As in the SADC Trade Protocol, the SACU Agreement contains no reference to a recommended standard on customs offences, penalties or appeal procedures.

The establishment of the SACU institutions is an integral part of the achievement of the SACU objectives as outlined in the SACU Agreement.[113] In particular, these institutions underpin the principle of joint decision making on SACU matters. These institutions include the Council of Ministers, Tariff Board, SACU Commissions, Secretariat, Tribunal, National Bodies and Technical Liaison Office. Of relevance to this dissertation is the SACU tribunal.

The 2002 SACU Agreement makes provision for the establishment of an ad hoc Tribunal, which reports directly to the Council. It will adjudicate on any issue concerning the application or interpretation of the 2002 SACU Agreement or any dispute arising there under at the request of the Council. Its determinations will be final and binding. The Tribunal will also, at the request of the Council, consider any issue and furnish the Council with its recommendations. It was anticipated that it will be operational by March 2009.[114] However at the time of writing this paper, it is still not operational. In the interim all disputes have been resolved bilaterally.[115]

2.3.2 The South African legal framework applicable to international trade.

International trade in South Africa is regulated with various pieces of legislations in line with the principle of separation of powers. The point of departure is the constitution which is the supreme law of the republic.

The Constitution of the Republic of South Africa.

The Constitution of the Republic of South Africa is the supreme law of the country and any law or legislation found to be inconsistent with the constitution is invalid[116]. The constitution of South Africa therefore as the supreme law guarantees the rights of anyone who is dealing with the state[117]. The constitution also requires that in interpretation of any

[112] Art 18 of the SACU Agreement.
[113] Art 2 of the SACU Agreement.
[114] SACU Composition: http://www.sacu.int/main.php?include=council_of_ministers.html.
[115] Brink, Gustav (2007), International Trade Dispute Resolution: Lessons from South Africa, ICTSD Dispute Settlement and Legal Aspects of International Trade series, International Centre for Trade and Sustainable Development, Geneva, Switzerland.
[116] s 2 of the Constitution.
[117] Chapter 2 of the Constitution.

legislation, international law must be taken into account and may use foreign law. In this dissertation we will only highlight those provisions that are relevant to international trade law and access to justice.

The Constitution of the Republic of South Africa, 1996 (hereafter referred to as the Constitution) provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair and that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons for such action.[118] The Promotion of Administrative Justice Act[119] (hereafter referred to as PAJA) furthermore guarantees that administrative action which materially and adversely affects the rights and legitimate expectations of any person must be fair.

The right to just administrative action is considered to constitutionalise the rules of natural justice, such as *nemo iudex in propria causa* which means no one may be a judge in his or her own case and *audi alteram partem* which means hear the other side[120]. The right to just administrative action encapsulates the *nemo iudex in propria causa* rule as it indirectly prohibits a person from becoming a judge in his/her own case. This is due to the fact that the Promotion of Administrative Justice Act, which has been enacted to give effect to the constitutional right of just administrative action, provides in sec 6(2)(a)(iii) that bias on the side of the administrator would constitute grounds for review. In addition, the *audi alteram partem* rule is constitutionalised, as the administrator must provide a person with reasonable opportunity to state his/her case.

Section 34 of the South African Constitution provides for the rights of access to courts and for a fair hearing in civil disputes as follows: '*Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'*.
Cappelletti, one of the foremost writers on access to justice, defines the right as that of every individual to require the state to provide a means of dispute resolution that is equally accessible and socially just.[121]

Section 39(2) of the Constitution imposes a duty on the courts, tribunals and forums that, when they interpret any legislation, "the spirit, purport and objects of the Bill of Rights" must be promoted.

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[118] s 33 of the Constitution.
[119] Act 3 of 2000.
[120] Burns Y "Administrative law under the 1996 Constitution". 2nd ed. Durban: Lexis Nexis (2003).
[121] Cappelletti & Garth in Cappelletti & Garth (eds) (1978) Vol 1 op cit at 6.

South Africa follows a dualistic approach. This means that treaties are not directly enforceable in the domestic sphere unless parliament gives such treaty law the force of national law under section 231(4) of the Constitution of the Republic of South Africa, 1996 (the Constitution). Section 231(4) of the Constitution reads as follows:

"Any international agreement becomes law in the Republic when it is enacted into law by national legislation but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament".

Schlemmer asserts that the WTO agreements are binding on South Africa only at an international level because they have been ratified. However, since the provisions of the WTO treaties have not yet been incorporated into national law through an act of parliament, they are not part of South African national law. The statutory enactment of international law in domestic law is the final step in the procedure triggering the applicability of international law in national law.[122]

Sections 233 and 39(1) (b) of the Constitution require all courts to take international law into account when interpreting the Bill of Rights. In this way, courts have an obligation to apply international law, including trade law.

South Africa has also incurred international obligations in terms of the World Trade Organisation Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 1994[123]. The Constitutional Court has also held in the ITAC v SCAW Case that:

"[T]he Anti-Dumping Agreement is binding on the Republic in international law, even though it has not been specifically enacted into municipal law. In order to give effect to the Anti-Dumping Agreement, Parliament has enacted legislation and, in turn, the Minister has prescribed Anti-Dumping Regulations".

In International Trade Administration Commission v SCAW[124], the constitutional court held that South Africa, and hence the international trade administration commission, incurs

[122] Schlemmer 2004 SAYIL 134; Olivier International Law in South African Municipal Law 57.
[123] Progress Office Machines v SARS 2008 (2) SA 13 (SCA) par 6.
[124] International Trade Administration Commission v SCAW South Africa (Pty) Ltd 2010 5 BCLR 457 (CC) par 6.

international obligations as a result of our membership of the WTO[125], while the supreme court of appeal also held in Progress Office Machines case[126] that the WTO agreement is binding on South Africa. The supreme court of appeal, however, made it clear that the international law has not become part of our municipal law and that regard must be had specifically to South African legislation. Although the international trade administration commission appears to regard the agreement as part of international law only, it is submitted that it is in fact part of South Africa's municipal law.

Marketing of Agricultural Products Act, 47 of 1996.

The purpose of this act is to authorise the establishment and enforcement of regulatory measures to intervene in the marketing of agricultural products; introduction of levies on agricultural· products; to establish a National Agricultural Marketing Council; and to provide for matters connected therewith. The Act gives more powers to the Minister of Agriculture to act in any manner that could be detrimental to the stakeholders. These powers include the control of export of Agricultural products[127], the appointment of inspectors to inspect[128] and detain agricultural products destined for export purposes and to prohibit import or export of certain agricultural products[129]. This affects the value chain in the international trade space. The act does not provide for the appeal or review procedure of the decision of the Minister.

Perishable Products Export Control Act, 9 of 1983.

This act aims at providing for the control of perishable products intended for export from the Republic of South Africa and for matters connected therewith. The Act provides for the appointment of a board which oversees the implementation of the provisions of the Act. The board have powers to control the exports, decide on which ship the goods will leave, decides on which port to use and may call on anyone who trades in perishables to provide the board with any information pertaining to the cargo.[130] The Act further provides for the appeal procedure if one is aggrieved by the decisions of the board.[131] The Act provides that an aggrieved person may appeal the decision of the board to the Minister, who holds

[125] n 59 par 25.
[126] Progress Office Machines CC v South African Revenue Services and Others (532/06) [2007] ZASCA 118
[127] s 16 of Marketing of Agricultural Products Act.
[128] s 21 of Marketing of Agricultural Products Act.
[129] s 22 of Marketing of Agricultural Products Act.
[130] s 11 of the Perishable Products Export Control Act.
[131] s 15 of the Perishable Products Export Control Act,

executive authority of the board. Clearly the process is not in line with the principle of not being a referee and a player.

Marine Living Resources Act.

The purpose of this act is to provide for the conservation of the marine ecosystem, the long-term sustainable utilisation of marine living resources and the orderly access to exploitation, utilisation and protection of certain marine living resources; and for these purposes to provide for the exercise of control over marine living resources in a fair and equitable manner to the benefit of all the citizens of South Africa; and to provide for matters connected therewith.

The Act gives powers to the Minister to appoint a forum that will act as advisory committee on issues affected by the implementation of the Act[132]. The Act further provides for the appointment of fishery control officers[133] who are given powers to inspect, enter any vessel, detain any fishery product and seize any product in line with conservation of fisheries products. Section 13 of this act provides that no one may harvest, or fish any fish product without a permit. The purpose of the permit is to control the quantities of fishery goods that are harvested in our shores and the quantities that are exported or imported.

The act further provides for the issuing of fishing licences to foreign vessels and to high seas fishing trawlers. In terms of section 38 of the Act, the international agreements by the national governments may not exceed the quota offered by the department, to harvest the fish products within the South African waters.

Section 80 allows for the appeal to the Minister by anyone affected by the decision of someone acting under this act. The appeal is to the executive authority of the department and therefore doesn't assist the doctrine of separation of powers.

The International Trade Administration Act.

The primary legislation related to trade, and especially international trade, is the International Trade Administration Act, which established the international trade administration commission. The International Trade Administration Act provides that the

[132] s 5 of Marine Living Resources Act.
[133] s 9 of Marine Living Resources Act.

international trade administration commission is responsible for anti-dumping, countervailing, safeguard and customs tariff investigations.[134] The object of the International Trade Administration Act is to foster economic growth and development in order to raise incomes and promote investment and employment in the Republic and within the common customs area by establishing an efficient and effective system for the administration of international trade subject to the act and the Southern African Customs Union agreement.

It further provides that the international trade administration commission "may investigate, evaluate and determine applications and issue or recommend the issuing of permits or certificates" related to rebate and drawback provisions of the Customs and Excise Act. Next, the act provides that a person may, "in the prescribed manner and form", apply to the International Trade Administration Commission for an import or export control permit; for a rebate permit or certificate in terms of the Customs and Excise Act; the amendment of customs duties, including anti-dumping, countervailing and safeguard duties; or the imposition of safeguard measures other than a customs duty amendment.[135]

The Act further provides that the Commissioner of ITAC can make determinations which are in line with the act.[136] In section 35 the Act provides that any one affected by the determinations of the Commissioner may apply for review of that decision in the High Court.

The Customs and Excise Act, No.91 of 1964.

The Customs and Excise Act was enacted in 1964 long before South Africa's new democratic constitutional state came into being in 1994. The 1964 Act may therefore be open to constitutional challenges on many aspects, a point that was evident in the Constitutional Court case of Gaertner v SARS[137] adjudicated in late 2013. Now that the parliamentary legislative process is complete, in the near future, three new Acts, namely the Customs Control Act, No.45 of 2013 ("Control Act"); the Customs Duty Act, No.43 of

[134] s 16 of ITA Act.
[135] Gustav Brink 'The roles of the Southern African Customs Union Agreement, the International Trade Administration Commission and the minister of trade and industry in the regulation of South Africa's international trade' 2013 TSAR 419
[136] s 34 of ITA Act.
[137] Glenister v President of the Republic of South Africa and Others 2011 3 SA 347 CC.

2013 (“Duty Act”) and the Customs and Excise Amendment Bill, No.44 of 2013, were promulgated that will replace this pre-1994 piece of legislation.

2.4 CONCLUSION

It is clear that in South Africa there are so much institutional framework and legal framework to deal with international trade and to deal with any disputes that arise from the international trade. These institutions are backed up with legislations and policies that seek to advance the economic development of South Africa in the international space. From the legal framework, it is submitted that each legislation has its own review or appeal process to be followed when a dispute arises. It is also submitted that, since these various institutions and government departments are regulating international trade within their respective domains, the government may develop a “one stop shop” international trade process that is clear and transparent.

3 AVAILABLE TRADE DISPUTE RESOLUTION MECHANISMS IN SOUTH AFRICA.

3.1 INTRODUCTION.

Chapter 2 of the Constitution of the Republic of South Africa makes provision for alternative dispute resolution (ADR).[138] It grants parties the right to have a dispute resolved by means of a public hearing as an alternative to legal proceedings. Arbitration, mediation, negotiation and adjudication are some of the alternative methods that can be used when

[138] s 34 of the Constitution.

resolving disputes in South Africa. This is, therefore, also applicable to the international trade industry.

3.2 THE IMPORTANCE OF ADR AND ADJUDICATION IN THE CONTEXT OF INTERNATIONAL TRADE IN SOUTH AFRICA.

ADR has a variety of important attributes, including cost effectiveness, time saving, confidentiality, privacy, and the preservation of business relationships. If both parties to a dispute agree to the method of procedure, the process of ADR could be entered into on a voluntary basis. The complex and specialised nature of international trade industry contributes to disputes arising between parties in an investment agreement or trade agreements.

Dispute resolution can be divided into two categories which include adjudication by a public authority and ADR. The former dispute resolution is formal adjudication, performed by courts of law, and the latter include alternative methods of dispute resolution outside the framework of court adjudication.

Adjudication by a public authority can be defined as an institutional method of dispute resolution which serves the court system.[139] Courts form the core of the judicial authority and are primarily entrusted with to obligation to interpret, apply, and enforce social values embodied in substantive legal principles. Adjudication by a public authority has the advantage that a person can be compelled through law to participate in adjudication proceedings. The 1996 Constitution provides that judicial authority is vested in the courts.[140] Courts are compelled to exercise this authority and decide authoritatively and conclusively over controversies which may exist between members of the public or between governmental organs and members of the public. Inter-governmental disputes between different organs of state can however only be referred to a judicial organ if all remedies available are exhausted and the dispute cannot be settled through mechanisms or procedures which are available to the parties. It is thus clear that adjudication by a public authority will only be applicable if all other relevant dispute resolution mechanisms and procedures have been utilized and it may be argued that ADR methods may

[139] Section 166 of the 1996 Constitution provides that the South African judicial authority is exercised by the Constitutional Court (section 167), the Court of Appeal (section 168), the High Court (section 169), Local Courts (section 170) or any other Court which is instituted by an act of Parliament.
[140] s 165 of the Constitution.

alternatively be applied.

In South Africa, the existence of informal methods of ADR can be traced back to the 1960s, when traditional African communities had disputes over food, land and partners.[141] These disputes were often brought before a traditional leader during a meeting of the community. This method of resolving disputes is closely associated with adjudication, mediation or arbitration. In South Africa, arbitration is governed by the Arbitration Act.[142] This Act provides citizens with legal rights to have disputes settled by arbitration tribunals[143]. This Act applies to domestic and international arbitration proceedings and is of the opinion that foreign arbitration awards are accepted in South Africa. When parties agree to submit any dispute arising out of the contract, the dispute has to be referred to one of the official arbitration bodies in South Africa. There are four main arbitration bodies in South Africa:

- The Arbitration Foundation of South Africa (AFSA)[144];
- The Association of Arbitrators (Southern Africa) (AOA)[145];
- The Commission for Conciliation, Mediation and Arbitration (CCMA)[146], and
- Africa Alternative Dispute Resolution (AADR).

Disputes occur in all facets of life. ADR is rapidly expanding into all sectors of the economy, including divorce and child custody, educational settings, as well as commercial (trade), engineering and construction disputes. As some of these disputes are complex in nature and involve large amounts of money, ADR can assist the parties involved to settle, or narrow down the issues of the dispute. It is also beneficial to parties with personal or business relationships that require confidentiality to favour early settlement in order to achieve a positive solution for all involved. The use of ADR methods has established a mechanism to avoid formal court litigation and is expected to have a positive outcome.

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[141] Barrett, J.T. & Barret, and J.P. '*A history of alternative dispute resolution: The story of a political, cultural, and social movement'.* San Francisco, California: Jossey-Bass. (2004) 10.

[142] Act 42 of 1965.

[143] Ntuli, N.N. 'Policy and government's role in constructive ADR developments in Africa'. 2013, Cape Town, pp. 2-3.

[144] AFSA is the body responsible for the administration of disputes in accordance with the Rules, and other procedures or rules agreed upon by the parties. AFSA is composed of an AFSA International Board (the "Board"), an AFSA International Court (the "Court'') and an AFSA International Secretariat (the "Secretariat") led by its Secretary-General (the "Secretary-General").

[145] The Association of Arbitrators (Southern Africa) was formed in 1979 to constitute an organisation to promote arbitration as a means of resolving disputes, to provide a body of competent and experienced arbitrators and Alternative Dispute Resolution (ADR) specialists for appointment as required, to assist arbitrators and ADR specialists in the efficient discharge of their duties, and to make arbitration and ADR more effective.

[146] Commission for Conciliation, Mediation and Arbitration (CCMA) was established in terms of the Labour Relations Act, 1995 as amended. It is mandated to Promote social justice and fairness in the workplace by delivering ethical, qualitative, innovative and cost-effective dispute and resolution services, institution building services, education, training and development and efficient administration.

Trade rules are complex, sometimes open to different interpretations and often contentious. Most global trade, if not all, is governed by WTO framework agreements which regulate trade between WTO members on the "most favored nation" principle[147] and also set the ground rules that apply to WTO bilateral and regional free-trade agreements (FTAs). Below these agreements sit a vast array of national and regional rules and regulations, including tariff and service concession schedules, customs laws and import/export rules. Understanding and complying with these rules can be challenging for businesses, but is vital for the success of import and export activities and international trade, providing services across borders and protecting investments in new markets. In the context of South Africa, we shall discuss the available trade dispute resolution mechanisms, starting with international regimes, then domestic regimes.

3.3 INTERNATIONAL TRADE DISPUTE REGIMES.

South Africa is a member of various international trade regimes, regional free trade areas, bilateral investment treaties and a customs union. Under the multinational agreements, South Africa is the member of the WTO and WCO. Under regional trade agreements, South Africa is a member of AfCFTA, SADC and lastly, South Africa is a member of the South African Customs Union (SACU).

3.3.1 Dispute Settlement within WTO.

South Africa is a founding Member of both the General Agreement on Tariffs and Trade (GATT)[148] and the WTO and actively participates in its negotiation processes.

WTO dispute settlement is inter-governmental in nature since the rules and procedures apply to the settlement of disputes between Members concerning their rights and obligations under the provisions of the WTO Agreement[149]. Only the Members of the WTO are party to the covered agreements and are the primary bearers of the rights and obligations in those agreements. Non-State actors cannot access the dispute settlement mechanism directly, and must go through Member States. In that sense, each WTO Member necessarily acts as a filter of disputes involving its traders and other parties.

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[147] Article I: 1 of GATT 1947.
[148] The 128 countries that had signed GATT by 1994 available at https://www.wto.org/english/thewto_e/gattmem_e.htm. Accessed on 25-08-2021.
[149] https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm Accessed on 27-08-2021.

However, it would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal system. Many of the benefits to members, which are meant to flow as a result of the acceptance of various disciplines under the GATT/WTO, depend on the activity of individual economic operators in the national and global markets. The purpose of many of these disciplines, indeed one of the primary objects of the GATT/WTO as a whole, is to produce certain market conditions which would allow this individual activity to flourish. So, although the WTO dispute settlement system is inter-governmental in nature, it remains true that the real players are the individual operators.

Only states can be WTO members, and therefore only states can bring disputes before the Dispute Settlement Body (DSB). Individual companies and persons are excluded from bringing a case before the WTO.[150] The Appellate Body explained in US Shrimp: 'Access to the dispute settlement process of the WTO is limited to Members of the WTO. This access is not available, under the WTO Agreement and the covered agreements as they currently exist, to individuals or international organizations, whether governmental or non-governmental.' The entities that are most seriously affected by violations of WTO law, however, are the companies in the relevant industries to which the dispute relates. In practice therefore, most cases are brought before the DSB on the initiative of large companies or groups of actors within politically strong sectors of the economy. Whether by lobbying, political pressure or other means, these companies influence the government to bring the case before the WTO on their behalf.[151]

The WTO dispute settlement functioning is supervised by the institutional body called the Dispute Settlement Body ('the DSB')[152]. The DSB is simply the General Council of the WTO and there are representatives of all member states in the DSB.[153] It is the authorized body 'to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements.[154]

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[150] United States – Import Prohibition of Certain Shrimp and Shrimp Products WT/DS58/AB/R, Report of the Appellate Body, 12 October 1998 par 101
[151] G Erasmus 'The incorporation of trade agreements and rules of origin: the extent of constitutional guidance' (2003) 28 SAYIL 157 165.
[152] World Trade Organization, *Guide to the Uruguay Round Agreements* (1999) p 20.
[153] Article 4(3) of the Marrakesh Agreement.
[154] Article 2(1) of DSU.

The WTO dispute settlement function provides five phases: consultations, the panel process, the appellate review process, surveillance of implementation of recommendation and rulings and lastly the compensation and the suspension of concessions.[155]

The WTO Agreement has not become part of the South African municipal law as it has not yet been promulgated into law by parliament. However, the Constitution of South Africa provides those international agreements are binding to the
South Africa has incurred international obligations in terms of the World Trade Organisation (WTO) Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 1994.[156] The Constitutional Court has also held in the ITAC v SCAW[157] Case that the Anti-Dumping Agreement is binding on the Republic in international law, even though it has not been specifically enacted into municipal law.

3.3.2 Dispute Settlement within AfCFTA

South Africa is one of the countries that have taken leadership of the new intra-Africa trade agreement. Article 1 of the Agreement defines the "Agreement" to mean the Agreement Establishing the African Continental Free Trade Area and its Protocols, Annexes and Appendices which shall form an integral part thereof.[158] South Africa has ratified the AfCFTA on 31 January 2019 and is the only country in Africa that has openly and formally rejected international investment arbitration. Following a review of its BIT framework, the South African Government terminated some of the country's 'first generation' BITs, decided to refrain from concluding new BITs in future unless warranted by compelling economic and political reasons, and put in place a domestic policy framework for resolving investment disputes. The Protection of Investment Act,[159] which entered into force in 2018, makes no provision for ISDS and only provides for dispute settlement in domestic courts and state-state arbitration. The act provides that an investor: -

"is not precluded from approaching any competent court, independent tribunal or statutory body within the Republic for the resolution of a dispute relating to an investment".[160]

And subject to the exhaustion of domestic remedies, the South African government

[155] Richard E. Mshomba *Africa and The World Trade Organization* (2009) p 27.
[156] Progress Office Machines v SARS 2008 (2) SA 13 (SCA) par 6).
[157] n 112 par 25.
[158] Art 1 of AfCFTA Agreement.
[159] Act No. 22 of 2015.
[160] s 13(1) of Protection of Investment Act.

"may consent to international arbitration" but "[s]uch arbitration will be conducted between [South Africa] and the home state of the applicable investor".[161]

There is a tendency of African governments not wanting to litigate against each other in trade matters. The big question now is whether the dispute resolution mechanism of the AfCFTA will bring different approach to that. The settlement of disputes under the AfCFTA will be administered in terms of the Protocol on Rules and Procedures of the Settlement of Disputes.[162] It is to a considerable extent based on the Dispute Settlement Understanding (DSU) of the World Trade Organization.

This Protocol is part of the instruments that were signed together with the AfCFTA Agreement and the Protocols on Trade in Goods and Trade in Services in March 2018 in Kigali. The Protocol creates a Dispute Settlement Body (DSB) which will administer all issues relating to dispute settlement when the AfCFTA Agreement enters into force after 22 ratifications.[163] The DSB will have the powers to interpret and apply all AfCFTA legal instruments (Protocols, Annexes, and Appendices) and determine State Parties' rights and obligations under those legal instruments.

The DSB will only hear disputes from State Parties to the AfCFTA Agreement. Since the AfCFTA is a single undertaking,[164] such disputes could be over the application or interpretation of any of AfCFTA legal instruments. Where private parties are of the opinion that a State Party to the AfCFTA has breached an obligation, the only available option is to have their countries of take up the dispute to the DSB.

When a State Party has declared a dispute against another State Party, the first recourse is hold confidential consultations to find an amicable solution.[165] A party which requests to hold consultations will notify the DSB in writing and reasons for the complaint and identify the specific violations.

There are also timelines that parties should respect when a dispute is declared. For instance, a party (respondent) which has been requested to participate in consultations must respond to the request within 10 days after receiving the request and enter into

[161] S 13(5) of Protection of Investment Act.
[162] Art 20 of AfCFTA Agreement.
[163] Art 23 AfCFTA Agreement.
[164] Art 8 AfCFTA Agreement.
[165] Art 7 of the Protocol on Rules and Procedure on the Settlement of Disputes.

consultations within 30 days. In cases of perishable foods and urgent matters, the timeframes are limited to cater for the needs of the affected party. A party will also not have an option to avoid dispute settlement mechanism and frustrate the complaining party.

An important feature of the AfCFTA is the provision of reverse consensus, which stipulates that within sixty days from the date the final Panel report is circulated to the State Parties, the report shall be considered, adopted and signed at a meeting of the DSB convened for that purpose, unless a Party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.[166] This means that even if an aggrieved Party votes against the adoption of the report, the DSB will still adopt the report unless if there is consensus not to adopt it. It is important to note that the decisions of the DSB will be final.

It should be noted that Parties to a dispute will also have an option for arbitration, conciliation, good office and mediation if they prefer such mechanisms. The bottom line is that whatever option they chose, the DSB should be notified in writing through the AfCFTA Secretariat. However, when the consultations fail to resolve the dispute, any party to the dispute will after notifying other party (ies) to the dispute, request the Chairperson of the DSB to establish a formal Panel.[167] Within 15 days after receiving the request, the DSB will then convene a meeting to establish the Panel. The Panel will consist of independent and impartial international trade experts experience in dispute settlement involving integrational agreements.[168] It is important to note that the DSB's decisions to establish a Panel and other decision-making processes are done by consensus except the reverse consensus which applies to the adoption of Panel's or Appellate Body's reports.

After the Panel has been established, the parties will make their submissions and arguments before the Panel within agreed timelines. If a third Party with substantial interest in the matter, it should notify the DSB and will also be allowed to participate by making written submissions before the Panel. A third Party is defined in the Protocol as a State Party with a substantial interest in the dispute. This means that a third party should be State Party not private parties. The main functions of the Panel will be to make an objective assessment of the matter before it, assessment of the facts of the case and the applicability of and conformity with the relevant provisions of the Agreement and make findings to assist the DSB in making recommendations and rulings.

[166] Art 19(4) of AfCFTA Agreement.
[167] Art 9 of the Protocol on Rules and Procedure on the Settlement of Disputes.
[168] Art 10 of the Protocol on Rules and Procedure on the Settlement of Disputes.

The Panel will strive to give the parties an adequate opportunity to develop a mutually satisfactory solution. The Panel will have the right to seek further information or technical advice to determine the dispute and arrive at an objective finding. After the determination of the matter, the Panel will issue a draft report citing if a solution has been found or not. Parties to the dispute will be allowed to make further submissions and arguments on specific contentious issues before the final report is issued.

It should be noted that when the final Panel report has been circulated to the Parties, the DSB will consider the report, adoption and sign it unless if any party to the dispute wants to appeal to the Appellate Body (AB) or if there is consensus not to adopt the report.[169] The AB will hear appeals from parties to the dispute if they decide to appeal against the Panel's final report.

Appeals will be limited to questions of law covered in the Panel report and legal interpretations developed by the Panel. Similarly, Third Parties with substantial interests will also participate in the appeal proceedings. After submissions and arguments have been made, the AB may uphold, modify or reverse the legal findings and conclusions of the Panel and produce a single report reflecting the views of the majority of its members.[170]

When the AB has issued its final report, the DSB should adopt the AB's report.[171] Again, the AB's report is adopted by the DSB unless if there is consensus not to and it should be accepted unconditionally by the Parties. The report becomes final and binding and the measures into conformity with the Agreement. If a party fails to comply with the recommendations of the DSB, the aggrieved party may temporarily suspend concessions and obligations.[172] The concerned Party should inform the DSB of its intention to respect and implement the recommendations and rulings of the DSB. However, where a State Party finds it impracticable to comply immediately with the recommendations and rulings of the DSB, the State Party concerned shall be granted a reasonable period in which to comply.

3.3.3 Dispute Settlement within Southern African Development Community (SADC).

[169] Art 20 of the Protocol on Rules and Procedure on the Settlement of Disputes.
[170] Art 22 of the Protocol on Rules and Procedure on the Settlement of Disputes.
[171] Art 22(9) of the Protocol on Rules and Procedure on the Settlement of Disputes.
[172] Art 44 of the Protocol on Rules and Procedure on the Settlement of Disputes.

The ghost of the now defunct (SADC) Tribunal is likely to complicate discussions about a possible dispute resolution mechanism in the AfCFTA's jurisprudence. Although validly established, the SADC Tribunal[173] had a troubled and very short existence that was marked by jurisdictional challenges and threats from some SADC Member States. Under Article 18 of the Protocol on Tribunal and the Rules of Procedure, natural and legal persons had standing to file claims with the SADC Tribunal. Trouble started when White farmers in Zimbabwe initiated claims challenging Zimbabwe's land reform program and compulsory acquisition of agricultural lands. The SADC Tribunal's decision, in 2008, in favor of the applicants in the case of *Mike Campbell (Pvt) Ltd. and others v. Republic of Zimbabwe* proved to be the straw that finally broke the camel's back. In 2010, the SADC Summit of Heads of State and Government (SADC Summit) effectively suspended the SADC Tribunal when it decided not to renew the terms of the serving Judges or to appoint new Judges.

In 2014, the SADC Summit adopted and signed a new Protocol which explicitly limits the Tribunal's jurisdiction to state-state disputes.[174] The Protocol is yet to gather the ratification it needs to enter into force. In August 2019, South African President, Cyril Ramaphosa, officially withdrew South Africa's signature from the Protocol.[175] (Communique of the 39th SADC Summit (paragraph 20)). South Africa's Constitutional Court had ruled, in 2018, in the case of *Law Society of South Africa and Others v President of the Republic of South Africa and Others*[176] that former President Jacob Zuma's signing of the protocol was unconstitutional, unlawful, and irrational. In sum, although the SADC Tribunal was never formally abolished, it is dead for all intents and purposes. And the dispute settlement dimension of the SADC remains in limbo. Whether South Africa will fight for the revival of t he SADC Tribunal is a question that many are now asking.

When regional integration has grown to the point where effective supra-national institutions (including regional courts and tribunals) have been established and community law has been developed, private parties, including legal persons and SMME's are granted locus standi rights and special remedies, as happens in the European Union. African regional integration has not developed to this level. African States are protective of their sovereignty. And they do not litigate against each other over trade issues. It means African governments will not act on behalf of private parties under their jurisdiction, and pursue claims against other State Parties about unlawful trade measures.

[173] Art 9(f) of SADC Treaty.
[174] Art 33 of SADC Treaty.
[175] SADC Communique of the 39th SADC Summit of Heads of State and Government, Julius Nyerere International Convention Centre, Dar Es Salaam, United Republic of Tanzania held on 17 – 18 August 2019.
[176] Law Society of South Africa and Others v President of the Republic of South Africa and Others [2018] ZACC 51

Zimbabwe's violations over the last number of years of its obligations under the SADC and COMESA Trade Protocols are cases in point. The Zimbabwean surcharges and additional taxes on imported goods did not result in any disputes being declared by affected trading partners. Zimbabwe has a new government and hopefully the rule of law will be respected. Zimbabwe's policies and measures should be monitored.

Some of the Regional Economic Communities (RECs) have established their own courts or tribunals. In the East African Community (EAC) and in the Common Market for Eastern and Southern Africa (COMESA) the respective Courts of Justice have rendered rulings in applications brought by private parties; provided domestic remedies have been exhausted. The judgment by the First Instance Division of the COMESA Court of Justice in *Polytol Paints & Adhesives Manufacturers Co. Ltd versus The Republic of Mauritius* has far-reaching implications for rules-based regional integration in Southern Africa. This regional court accepted, apparently for the first time, an application by a private party to enforce an international agreement and to protect the trade related rights of a private firm.

3.3.4 Dispute Settlement within Southern African Customs Union (SACU).

South Africa has had occasion to deal with a number of regional disputes, within SACU region in particular, having been accused of dumping products, like beer in Namibia and flour in Botswana, into SACU Member States. The approach to settle these disputes is always at a political level as there are no provision for taking anti-dumping measures against a fellow customs union member. The SACU Agreement provides for the development of "policies and instruments to address unfair trade practices between Member States".[177] However, these policies and instruments have not yet been finalized and still need to be addressed on an ad hoc basis.

ITED, a directorate within the DTIC, is responsible for the trade related disputes and process to follow. Within ITED, there is a special unit, the SACU desk that is dedicated to working with and resolving all SACU-related trade issues. The SACU desk staff members, many of whom were involved in the SACU Agreement negotiations, have significant expertise as regards the SACU Agreement, but there is a challenge of technical expertise regarding processes and procedure of dealing with trade remedies. Accordingly, ITED will normally request input from ITAC in trade remedy cases and that of other stakeholders

[177] Art 41 of SACU Agreement.

where necessary. This may include input from, inter alia, Customs and Excise or from the Department of Agriculture. ITED, however, will retain primary responsibility for any consultations, even if other parties may be requested to join in the discussions. The outcome of consultations may be relayed to the relevant division or Department for implementation.

The SACU Agreement makes provision for the establishment of an ad hoc Tribunal to deal with all trade-related disputes. The SACU Agreement provides that the "Tribunal shall adjudicate on … any dispute arising" under the Agreement.[178] To date, however, no ad hoc Tribunal has been established and all disputes have been resolved bilaterally and at most politically.

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.

3.4 DOMESTIC TRADE DISPUTE REGIME.

3.4.1 South African government trade dispute resolution regime.

All trade matters in South Africa are handled by the Department of Trade, Industry and Competition (DTIC), within its different divisions. However, other departments may also be involved. These are the Department of Finance, through South African Revenue Services, and core ministries such as the Department of Agriculture and its agencies and the Department of International Relations and Cooperation. Furthermore, South Africa has a Permanent Mission in Geneva, staffed by DTIC employees and headed by a Deputy Director General, who is ranked as a person second in rank to the Director General of the DTIC and who in turn reports directly to the Minister of Trade, Industry and Competition. The Mission is tasked not only with WTO issues, but has to report on all international issues from Geneva, including the International Labour Organization (ILO) matters and the World Customs Organisation matters.

[178] Article 13(3) of the SACU Agreement.

The process of international trade dispute settlement starts with an official request for consultations by a WTO Member, through notification to the DSB and to the relevant Council or Committee in the WTO by the Mission in Geneva. In theory, the Mission in Geneva should then immediately, after being notified of the dispute, inform the WTO desk of the International Trade and Economic Development Division (ITED)[179] of the DTIC of the request. ITED has primary responsibility for all South Africa's trade negotiations, including all Free Trade and Preferential Trade Agreement negotiations, although it requests input from various other divisions in the DTIC and from other departments. ITED comprises of a staff complement well-versed in the different WTO Agreements, but its staff members are not specialists in the technical aspects of the covered agreements, e.g., agriculture, textiles and trade remedies.

Once the Mission in Geneva has informed ITED of the dispute, ITED should liaise with the relevant divisions of the DTIC and/or the relevant core ministries for the necessary inputs. As all cases to date have involved trade remedies, any defence would therefore have to involve the Trade Remedies unit, which forms a division within the International Trade Administration Commission (ITAC). ITAC itself is an independent statutory body responsible for international trade administration, including tariff and rebate applications, trade remedies and import and export control. It reports to the DTIC via ITED. Where a dispute involves subsidies granted to South African industries by the DTIC, Trade and Investment South Africa (TISA), a division of the DTIC, will also be involved.

Once the relevant divisions and/or departments have been notified of the dispute, these divisions and/or departments should engage in fact-finding to determine the facts that gave rise to the dispute. This requires a proper analysis both of the facts of the matter and the procedure followed, with report-back to ITED. ITED will then decide on the way forward based on the facts, its own evaluation thereof and the political implications of any action taken.

There are not so many disputes registered by DTIC involving South Africa. The few that have been registered were not handled in the discussed process above. In those few cases, other members requested consultations with South Africa arguing that South Africa had either nullified or impaired the rights of that country under one of the Agreements

[179] This is the division within the Department of Trade, Industry and Competition mandated to handle all trade related issues.

covered by the WTO. These disputes related to anti-dumping duties on penicillin from India[180], anti-dumping duties on acrylic fabric from Turkey[181].

3.5 CONCLUSION.

South Africa as a member of the various international organisations, like WTO and WCO, is a key player in terms of resolving disputes between the states. These international organisations don't cater for disputes of individuals but for their member states. Dispute resolution mechanisms employed by these organisations are well documented in the agreements and therefore are legally binding to the member states.

South Africa has a well-developed dispute resolution mechanism which is based on international law and constitutionalism. The process of lodging an international trade dispute is not clearly defined for an ordinary person, although legislations like ITA Act have provisions that allow such institutions like ITAC to conduct public awareness of international trade programs.

4 CHALLENGES OF THE CURRENT DISPUTE RESOLUTION MECHANISM IN SOUTH AFRICA.

4.1 INTRODUCTION.

Every system of the government has its own challenges and hurdles to face. These challenges, when attended to, brings an opportunity to improve the system. Like any other,

[180] South Africa – Anti-Dumping Duties on Imports of Certain Pharmaceutical Products from India WT/DS168/1 (13 April 1999).
[181] South Africa – Definitive Anti-Dumping Duties on Blanketing from Turkey WT/DS288/1 (15 April 2003).

the international trade dispute resolution mechanism of South Africa, had its own fair share of challenges. These challenges include capacity, duplication of work by various departments, political and cost effectiveness. These challenges are the main stumbling block in achieving a smooth dispute resolution method that are user friendly to the traders.

4.1.1 Capacity

In South Africa, the capacity of the government to handle trade dispute matters is limited. The staff within the Department of Trade, Industry and Competition are well vested with the process of trade dispute mechanism but lack the technical know-how of specific trade instruments. The case in point is the handling of the *Acrylic Fabric from Turkey* case.

In this case, South Africa imposed anti-dumping duties on acrylic blankets from China and Turkey and other countries but the exporters in those two countries started exporting acrylic blanketing in roll form, i.e., material that only had to be cut, made and trimmed to produce final blankets, in order to circumvent the antidumping duties.[182] ITAC, without conducting an investigation in conformity with WTO rules,[183] recommended anti-circumvention duties against China and Turkey. Turkey challenged this decision on the basis that this was not provided for in the Anti-Dumping Agreement.[184] After the failure of discussions held in Pretoria, informally, Turkey subsequently initiated a formal dispute and requested consultations with South Africa through notification to the Geneva Mission.

As the Geneva Mission is understaffed, it failed to alert ITED's WTO desk of the request for consultations by Turkey and South Africa accordingly missed the 10-day time limit for agreeing to consultations provided under the WTO rules.[185] ITAC was informed of the consultation and request 14 days after the request had been lodged. It is clear, I submit, that the lack of capacity in the Geneva Mission has led to ITAC not getting informed of the consultation request by Turkey.

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[182] ITAC Report No. 25 Withdrawal of the anti-circumvention duty on acrylic fabric originating in or imported from People's Republic of China and Turkey.
[183] Article 6.2 of the Anti-Dumping Agreement reads as follows:
"Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case. Interested parties shall also have the right" on justification, to present other information orally. "
[184] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.
[185] Article 4.3 of the DSU.

In the matter of Clotrade[186], an organisation representing clothing traders in South Africa, wherein they filed a complaint through ITED, because of the surge in imports for textile, clothing and footwear from China. ITED did not act on the complaint until Clotrade approached ITAC, for safeguarding duties. Another application for safeguarding duties was filed by the union[187] representing workers in the clothing and textile industry, citing loss of jobs in the sector because of cheap clothing and textile imports from China. Because the South African government was hell-bent to negotiate a Free Trade Agreement with China, ITAC did not initiate safeguarding investigations. On the other hand, ITED was concluding informal talks with China without involvement of other important stakeholders like ITAC and labour unions. These talks resulted in an MOU being concluded with China which imposed quotas on certain imports of textiles and clothing from China into South Africa, but not into SACU, in exchange for agreeing not to conduct any special safeguard investigations against China, granting China market economy status and an agreement to cooperate on anti-dumping investigations. This MOU caused upsets with the stakeholders, the SACU region, and manufacturers in the industry as it was believed that the MOU was favoring China and that indicated the distinct lack of expertise and capacity in South Africa to handle these matters.

Currently, the South African Government does not have the necessary capacity or skills internally to initiate dispute settlement against another Member nullifying or impairing its rights under the WTO Agreements, or to defend disputes lodged against South Africa. Such capacity and skills do exist in the private sector, but it is unclear whether or to what extent the South African Government would be willing to make use of such private sector capacity, especially where such capacity relates to ex-civil servants.

4.1.2 <u>Overstepping roles by state departments.</u>

As mentioned above, all trade related matters are handled by the DTIC. However, other departments like DIRCO are involved in trade related dispute from a political and diplomatic angle. Each department have a specific role to play in any dispute which are often overlooked. This was clear in the *Penicillin from India case*,[188] where the Board on Tariffs

[186] A textile industry union responsible for regulating both domestic clothing manufacturers as well as importers.
[187] The South African Clothing and Textile Workers' Union.
[188] South Africa – Anti-Dumping Duties on Imports of Certain Pharmaceutical Products from India WT/DS168/1.

and Trade (BTT),[189] as then it was, held formal consultations with the Indian Trade Representative in South Africa without any intervention from ITED and DTIC. India considered the definition and calculation of the normal values to be inconsistent with the provisions of the WTO and that an erroneous methodology was used for determining the normal value and the resulting margin of dumping. The main issue concerned BTT's refusal to grant an adjustment to the normal value for differences in raw material costs used for domestic and exported products. The fact-finding mission showed that BTT's refusal was based on the determination that there were no differences between the product sold domestically and that exported and that it could not be proven that the lower priced raw material was exclusively used in the production of goods for the export market.[190] It appears that BTT did not inform ITED in this matter because they believed that it is exclusively their mandate, which was wrong.

In the *Acrylic Fabric from Turkey* case,[191] discussed above, ITED was not informed of the consultations, nor was it involved at any stage. It appears to have been a deliberate decision of ITAC not to involve ITED on the basis that the matter dealt with an issue within ITAC's authority, i.e., anti-dumping, but it may also have been based on the fact that ITEDD had failed to deal with the matter originally. What is clear though is that ITAC should have involved ITED in any trade dispute matter.

Another dispute, which was informal, arose when the European Commission (EC) requested informal discussions with ITAC in 2004 regarding the imposition of antidumping duties on carbonless copy paper imported from Belgium, Germany and the United Kingdom. The request was made directly to ITAC.[192] After determining the facts of the matter, it was decided that they were so complex that the Director of Trade Remedies Investigations II should be included in the consultation team. The Chief Commissioner, the Director of Trade Remedies Policy and the Director of Trade Remedies II visited the EC in Brussels in 2004 to engage in consultations regarding the various substantive and procedural issues raised. During these consultations, ITAC was adamant that its investigation process and findings were sound and therefore indicated that it would not recommend any changes to the existing anti-dumping duties. As the matter was not formally pursued, it appears that the EC accepted ITAC's viewpoint. Again, ITED was not involved in the consultations at any stage,

[189] Board on Tariffs and Trade (BTT) was established, through the Board on Tariffs and Trade Act, 1986, and was later succeeded by the establishment of ITAC through the ITA Act in 2003.
[190] K. R. Gupta "*A Study of World Trade Organisation*" Atlantic Publishers and Distributors, 2008 95.
[191] n 181 above.
[192] Gregory Shaffer et al '*Dispute Settlement at the WTO: The Developing Country Experience'* Cambridge University Press 2010 262.

presumably on the basis that the dispute related exclusively to anti-dumping, a matter within ITAC's authority.

In another dispute case of *Wire, Ropes and Cables from South Africa*,[193] in 1998, the EC conducted an anti-dumping investigation against wire, rope and cables imported from South Africa. The South African industry complained about the methodology used by the EC to determine the margin of dumping which they alleged that it was unfair and that it disregarded the substantial differences between two categories of the product. This resulted in an exceptionally high margin of dumping being established. The industry, duly advised of its rights by its Brussels-based lawyers, requested ITAC[194] to initiate dispute settlement proceedings against the EC, but this was denied by ITAC. It seems that the basis for the refusal may have been the fact that South Africa was involved in the negotiations of the SA-EU Free Trade Agreement (TDCA) with the European Union at the time. Another reason for the refusal was that South Africa was afraid that its own anti-dumping procedures would then come under scrutiny and that this could lead to retaliation by the EC. The decision not to initiate a dispute was taken by ITAC without reference to ITED. The reasons for not involving ITED may again relate to the fact that the matter related to anti-dumping which falls within ITAC's mandate and to internal political differences between ITAC and ITED.[195]

It is clear that the correct procedure was not followed in any of the disputes discussed above, as DTIC which is responsible for all political aspects of international trade and for trade negotiations was not involved in any of these instances. Although it may be argued that the specific issues related to matters within ITAC's jurisdiction, as provided for by the (ITA Act), ITAC has the exclusive jurisdiction over anti-dumping and other customs duty investigations. However, this jurisdiction ends at the investigation level and does not include decisions of an international nature such as international trade disputes. It is therefore prudent to accept that the correct procedure would have been for ITAC to refer the matter to DTIC in each instance, but remain involved in the fact-finding aspects and consultation stage in order to give clarity of process and procedure of investigation. The only case where the correct procedure was followed was in the *Automotive Industry Subsidies* case[196] filed by Australia against South Africa.

[193] ITAC Report 288.
[194] Was then still the Board of Tariffs and Trade.
[195] n 179 above 264.
[196] Australia – Subsidies Provided to Producers and Exporters of Automotive Leather WT/DS126/R

4.1.3 SADC, South Africa and the Zimbabwe question.

South Africa is a member of the SADC, so is Zimbabwe. Both countries are bound by the SADC Treaty. These countries had a chance to chair the SADC[197] so that they influence the application of the SADC Treaty. Effective dispute settlement obviously depends on the existence of independent courts and tribunals. The story of the SADC Tribunal demonstrates that the battle for impartial and independent dispute settlement as part of regional integration in Africa, has not been won. SADC was designed with high expectations for rules-based governance. The SADC Treaty speaks of common action; regional policies, respect for the rule of law, human rights and democracy.[198] The Member States undertook to take all steps necessary to ensure the uniform application of the Treaty and to accord it the force of national law.[199]

In 2005 the SADC Tribunal became operational. Its task was to ensure respect for the SADC Treaty and all the subsidiary legal instruments, and to adjudicate disputes referred to it. This Tribunal could render final and binding judgements. It heard about 15 applications bought by private parties, the majority by SADC officials. There were no cases about regional integration or trade. When, in the *Campbell Case*[200] the SADC Tribunal ruled against Zimbabwe for expropriating private land without compensation, the SADC leaders decided to suspend the Tribunal.[201] There have been subsequent efforts to establish a new SADC Tribunal. The resolution adopted by SADC states which sought to suspend the Tribunal suggested that a new Protocol be negotiated so as to limit the mandate of the Tribunal to the interpretation of the SADC Treaty and Protocols in relation to disputes between member states.[202] In effect, the intention was to render impossible the ability of citizens to approach the Tribunal in instances where they have grievances against their governments, grievances which often arise as a result of human rights violations. At the SADC Summit of August 2014, a new Protocol was adopted and signed; providing for a second Tribunal with jurisdiction over inter-state disputes only. The 2014 Tribunal Protocol was dealt a heavy blow before it could come into operation when the Constitutional Court of South Africa ruled that the participation in the disbandment of the original Tribunal, as well as the subsequent signing of the new Protocol by then President Jacob Zuma was unconstitutional, unlawful and irrational.

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[197] H. E. President Ramaphosa became chair of SADC in February 2018 after taking power from former President Jacob Zuma. Former President R. Mugabe was the Chair as from 2015 to 2016.
[198] Art 4 SADC Treaty.
[199] Art 6 SADC Treaty.
[200] Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe (2/2007) [2008] SADCT 2.
[201] The decision was taken at an Extraordinary Summit in May 2011
[202] Hansungule "The Suspension of the SADC Tribunal" 2013 35 Strategic Review for Southern Africa 135.

The Zimbabwean Constitution asserts that an international treaty which has been entered into by the President or under the authority of the President does not bind Zimbabwe until it has been approved by Parliament, and it will not form part of the national law of Zimbabwe unless it has been domesticated into law by national legislation.[203]

In the matter of Gramara Limited v Government of the Republic of Zimbabwe, the applicants approached the Zimbabwean High Court to register and enforce the judgement of the SADC Tribunal in the Campbell case.[204] The Government of Zimbabwe, appearing as respondents in the matter, argued that the SADC Tribunal did not have the jurisdiction to hear the Campbell case and that, subsequently, the judgement of the case cannot be enforced in Zimbabwe. Although the court argued against this point and held that the Tribunal had jurisdiction over Zimbabwe, it was unable to find in favour of the applicant in registering and enforcing the judgement of the Tribunal, citing that the constitution of Zimbabwe is supreme law, and that any judgement which seeks to reverse a constitutionally mandated programme cannot be recognised in Zimbabwe.[205] The court noted the international law rule that a state may not rely on its internal laws to avoid its obligations under international law but, however, asserted that it would be against public policy to undermine a constitutionally approved land reform programme.458

In South Africa, the court held a different view on the matter. When the government of Zimbabwe refused to entertain the SADC Tribunal judgement in the Campbell case, the aggrieved farmers brought this non-compliance to the attention of the Tribunal, resulting in the Tribunal issuing a costs order against Zimbabwe.459 The parties then approached the South African courts in what is now the matter of *Government of the Republic of Zimbabwe v Fick*[206] to register the costs order and attach property belonging to the Government of Zimbabwe situated in South Africa for purposes of giving effect to the costs order against Zimbabwe. After the High Court ruled against the government of Zimbabwe and issued an order for the attachment of their property in pursuance to the court order, Zimbabwe sought to appeal the matter to the Supreme Court of Appeal and subsequently the Constitutional Court.

[203] s 327(2) of the Constitution of Zimbabwe Amendment (No. 20) Act of 2013.
[204] High Court of Zimbabwe (unreported) 2010-01-26 Case no 5483/09.
[205] Phooko "The Direct Applicability of SADC Community Law in South Africa and Zimbabwe: A Call for Supranationality and the Uniform Application of SADC Community Law" 2018 21 PELJ 1 17.
[206] Government of the Republic of Zimbabwe v Fick and Others (CCT 101/12) [2013] ZACC 22.

The main argument submitted by Zimbabwe was that the costs order could not be registered and enforced in South Africa because South Africa had not domesticated the SADC Treaty and SADC Tribunal Protocol as required by the South African Constitution.[207] The court disagreed with this view, stating that South Africa had approved the SADC Treaty and that, consequently, the treaty is "binding on South Africa, at least on the international plane".[208] Surprisingly, the court made no mention of South Africa's dualist tradition and the need to introduce international agreements into domestic law by legislative enactment. In doing so, the court relied on undomesticated provisions of the SADC Treaty and Tribunal Protocol and gave effect to the SADC Tribunal judgement. The court merely held that, in accordance with section 231 of the South African Constitution, South Africa had become party to SADC instruments which placed an obligation on states to give effect to decisions of the SADC Tribunal.[209] Furthermore, the court stated that the rights underpinning the SADC Treaty include the right to rule of law, and that the right is also enshrined in the South African Constitution through the right to access to courts, provided for under section 34 of the Constitution.[210]

4.1.4 Private sector awareness of trade dispute process.

After the integration of South Africa into the world economy, following its first democratic elections,[211] the private sector was not much involved with international trade. This was because of the United Nations (UN) sponsored sanctions against South Africa because of its apartheid policy. Although things have changed for better with the grasp of the international trade realm by private sector, the technical aspects of international trade are still not easily navigated. Some of the big players in South Africa's private sector, e.g., Anglo-American, SAB and Sappi, are already within the realm of international trade but struggle to understand the international trade rules. ITAC is obliged under the provisions of the ITA Act to promote public awareness of the provisions of the ITA Act and what ITAC stands for, ITAC has done very little to cover international trade matters.[212] ITAC's jurisdiction only extends to customs tariffs and import and export control, i.e. to only part of the regime governing trade in goods.[213] It does not cover trade in services, trade related

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[207] n 192 above.
[208] n 192 above.
[209] De Wet "The Case of Government of the Republic of Zimbabwe v Louis Karel Fick: A First Step towards Developing a Doctrine on the Status of International Judgements within the Domestic Legal Order" 2014 17 PELJ 556.
[210] Ibid.
[211] The first democratic elections were held on the 27th April 1994.
[212] s 22(1)(a) of the ITA Act.
[213] s 16 of ITA Act.

aspects of intellectual property rights or trade related investment measures, nor the full spectrum of trade in goods. The National Economic Development and Labour Council (NEDLAC)[214] has been set up to engage on policy discussions and decision-making between government, industry which represent private sector industries and labour which represent workers organized under a union. These policy discussions include but not limited to, international trade and dispute resolution mechanisms involved. It has been an outcry of the private sector industries that government does not take NEDLAC platform seriously and have since limited industry and labour direct access to government as regards policy decisions or international trade matters.

The development of private individuals in the field of international trade has been taken up by some of the institutions in South Africa. There are many capable academics and private practitioners who are capacitated enough to deal with international trade matters on behalf of the government. Several universities in South Africa, have postgraduate courses on international trade and trade law. These universities include, inter alia those of Pretoria, Stellenbosch, the Witwatersrand and the Western Cape. The Trade Law Centre of Southern Africa (Tralac) was also set up in Stellenbosch with the specific aim of building international trade law capacity not only within South Africa, but in the whole of SADC. University of Pretoria, under its faculty of law developed Center for Human Rights which offers amongst other courses the International Trade and Investment Law in Africa (TILA) in collaboration with the University of Western Cape. As regards the capacity of private practitioners to participate in and utilise international trade dispute resolution mechanisms it is important to note that South Africa has produced a number of important players in the international trade sphere. The former WTO Appellate Body member, David Unterhalter[215], is a good example of the quality of private sector individuals produced in South Africa. A number of academics and scholars have also published text books, chapters in text books and articles on aspects of international trade law. There are also several other private international trade and trade law practitioners who have developed the necessary skills to advise both private clients and government on the various aspects of international trade law and dispute settlement.

Whether the government uses the available capacity on issues of international trade in the private sector or not remains their prerogative. However, government should not hesitate

[214] The National Economic Development and Labour Council was established in terms of the National Economic Development and Labour Council Act, 1994, and operates in terms of its own constitution.

[215] Member of the Appellate Body, WTO: 2007 – 2013.

to roll on the private sector on technical aspects of trade disputes as there is evidence of institutional knowledge in the private sector. The use of private sector knowledge by the South African government will prove to be cost effective than utilizing the Geneva based lawyers who charge huge amounts in foreign currency.

4.2 CONCLUSION

Although the procedure for launching a dispute or dealing with a dispute are clear in terms of what to be done, they are seldom followed. In theory, all disputes involving South Africa should be handled by the ITED, after being informed of the dispute by the Mission in Geneva. The challenges facing the mission include lack of capacity, because the mission is understaffed. ITAC as an organisation and a creature of statute takes the responsibility of dealing with trade disputes, without informing ITED. This is wrong because the mandate of ITAC does not include handling trade disputes but rather investigate and make recommendations or determinations. Instead, ITAC has neglected its responsibility under the ITA Act, of public awareness.[216] This public awareness is the one that should inform people of the process and procedure to be followed regarding trade disputes. In addition, considering that lodging and proceeding with dispute settlement can be very expensive, there are little or no chance of the government proceeding with lodging a dispute on behalf of an affected private sector industry unless the industry provides at least a substantial part of the resources and capacity. Even if the private industry has provided resources, the government will still assess its political relations with the other country or status of their existing investment projects and negotiated FTA.

Currently, the South African Government does not have the necessary capacity or skills internally to initiate dispute settlement against another Member nullifying or impairing its rights under the WTO Agreements, or to defend disputes lodged against South Africa. The only way the government can use technical skills in this regard is to approach the private sector, which has proven to be very expensive. This means that the government will be unwilling to take up a matter for the industry through to WTO level.

There are no clear guidelines for lodging trade disputes with government. Although any request for a dispute should be lodged with ITED, there is little or no public awareness of this fact. This means that SMME without knowledge of such process will not be able to lodge the dispute even if there is a justification to do so. In addition, considering that

[216] s 22 (1) ITA Act.

lodging and proceeding with dispute settlement can be very expensive, it is highly unlikely that the South African Government will proceed with lodging a dispute on behalf of an affected industry unless the industry provides at least a substantial part of the resources and capacity. Even if the government do, they will first determine whether any such dispute might negatively affect their political relations with the other member. This brings a discussion of what can be done to improve the current dispute resolution regime in South Africa and whether, as an option, the government should look at streamlining the international trade disputes by establishing a tribunal which will cover all trade related disputes.

5 WAYS TO IMPROVE THE EXISTING TRADE DISPUTE MECHANISM.

5.1 INTRODUCTION.

The world of international trade has evolved over the centuries and, with this process of evolution, unique challenges have emerged over time. International trade, in essence, involves the movement of goods and services across borders; it is conducted mainly by private firms rather than governments.

The suggested role of government is to create an environment that allows for efficient international trade. Such an environment is manifested in the provision of an adequate physical infrastructure and a transparent regulatory environment. This is what was discussed in Chapter 2 above, wherein all institutions involved in international trade were mentioned. This is the reason why today, an organisation such as the World Trade Organization (WTO), whose members are directly involved in bulk of international trade, plays an active role in advancing the agenda of a rules-based international trade regime. This same organization also provides, on an ongoing basis, initiatives directed to improving the facilitation of trade internationally. Examples of trade facilitation initiatives are the Bali-Agreement[217], signed by WTO members in 2013 in Bali, and the Revised Kyoto Convention of the World Customs Organization[218] which has, as its objective, the elimination of barriers to efficient international trade. These international agreements, of which South Africa is a signatory, must be ratified and promulgated into domestic law. It is the domestic laws that create institutions to enforce these laws.

[217] The Trade Facilitation Agreement 2013.
[218] http://www.wcoomd.org/en/topics/facilitation/instrument-and-tools/conventions/pf_revised_kyoto_conv/kyoto_new.aspx (Accessed on 05-09-2021).

The existing international trade dispute resolution mechanisms in South Africa must be based on the text of these international trade instruments. South Africa as a member of these conventions is obliged to apply the principle of strict compliance with the tone and text of the agreements through enactment of domestic legislations. The international trade dispute resolution mechanisms applied in South Africa are based on these agreements and should be in line with what the agreements seek to achieve within the context of international trade. The South African government must try at all times to simplify trade facilitations by creating a conducive environment for cross border trading to happen smoothly and without barriers. This is in line with the spirit of the WTO's trade liberation strategy. In South Africa, an improvement of an international trade dispute resolution method, in addition to the existing mechanisms, can be achieved by, potentially, establishing an independent international trade tribunal and by building capacity. In that way, a constructive criticism of the existing international trade dispute resolution methods available to South Africa is achieved and put the government in a course to improve the already available trade dispute resolution methods.

The challenges of the current international trade dispute regime in South Africa have been highlighted in chapter 4. At the centre of these challenges is an opportunity to learn how to improve the existing dispute resolution method. Challenges are mentioned and in order to address them, there must be a commitment from the authorities to address them. This will not only improve the current mechanism but will also give a chance to develop our dispute resolution system in line with the international world.

5.2 ESTABLISHING AN INDEPENDENT INTERNATIONAL TRADE TRIBUNAL.

In terms of the Constitution, the Constitution is the supreme law of South Africa and any law or conduct which is incompatible with the Constitution is invalid[219] and therefore requires that the obligations imposed by the Constitution must be fulfilled. Chapter 2 of the Constitution contains a highly praised bill of fundamental rights. The protected rights go beyond classical rights and freedoms to include a number of socio-economic rights and other rights not usually found in a bill of rights: the right to information[220] and the right to administrative justice[221] are examples of the latter.

[219] s 2 of the Constitution of the Republic of South Africa.
[220] s 32 of the Constitution of the Republic of South Africa.
[221] s 33 of the Constitution of the Republic of South Africa.

Section 33 contains the fundamental right to just administrative action. The consequence of this right is a duty on the part of the state to act in the required manner and to provide reasons for prejudicial administrative actions. Section 33 stipulates very clearly what "just administrative action" entails and the requirements to be met: action that is lawful, reasonable and procedurally fair. It makes it clear that reasons must be provided where an administrative action affects someone's rights. Section 33 of the Constitution further requires national legislation by Parliament to provide for three matters: the first is review of administrative action by a court or tribunal; the second is place the state under a duty to give full effect to all aspects of the right to just administrative action; and the third is to promote efficient state administration. Parliament has promulgated the Promotion of Administrative Justice Act (PAJA)[222] to give effect to section 33 of the Constitution. The rules and principles of administrative procedure are defined by PAJA, which aims to promote an efficient administration and good governance. PAJA furthermore creates a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function.

All organs of state are bound by the obligations and duties inferred from the right to just administrative action in section 33 of the Constitution and as set out in PAJA. The right to just administrative action therefore has a direct impact on any administrative actions carried out by the state organs, like SARS, ITAC and others. The importance of section 33 and PAJA in the context of international trade law and the conduct of those organs of states involved must not be understated.

The right to "just administrative action" is supported by other rights in the Bill of Rights such as section 34, which stipulates that dispute be settled by a court of law or, where appropriate, another *independent and impartial tribunal or forum*.[223] The interpretation of this section gives us options whether a court of law would be approached OR an independent and impartial tribunal or forum could be approached. This brings us to the duty of the state to make available an independent tribunal or forum as an alternative to the court of law. The tribunals are in their nature, not as costly as approaching a court of law and therefore in the context of international trade, it will be ideally that there is an independent international trade tribunal created to assist those involved in cross border trade with South Africa to have recourse in the form of a less costly tribunal.

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[222] Act 3 of 2000.

[223] s 34 of the Constitution states that "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

The right to "just administrative action" is also supported by section 32, which allows for access to information held by the state, and section 38, which allows for the enforcement of these rights. The rights conferred on natural or juristic persons as they relate to decisions taken by government that affect them directly are comprehensive and therefore require executive action which is transparent and sensitive to such rights.

Reference should also be made to section 195 of the Constitution, which contains an extensive set of basic values and principles governing public administration. These principles are often overlooked in debates about the state of executive action in South Africa. The national legislation that gives practical effect to section 33 of the Constitution is the Promotion of Administrative Justice Act, No.3 of 2000 ("PAJA").

It is important to note that the Constitution supports the establishment of an independent tribunal and therefore the government of South Africa can effectively establish an independent international trade tribunal in South Africa.

From the international front, where South Africa is party to agreements that speak to the establishment of the independent tribunal, we shall discuss the Bali Trade Facilitation Agreement of 2013 and the Revised Kyoto Convention, as relevant instruments that supports the notion of an independent tribunal.

In December 2013, in Bali, WTO members reached an important milestone by concluding the Trade Facilitation Agreement. The preamble of the Agreement sets out a clear vision, which is, firstly, to improve the movement, release and clearance of goods, including goods in transit. Secondly, the aim of the Agreement is to provide support to, especially, least-developed countries (LDCs) and, thirdly, the Agreement aims to promote cooperation amongst WTO members on issues of trade facilitation and customs compliance. This Agreement emphasises the accessibility of information and requires its members to publish information on penalty provisions for breaches of import, export or transit formalities[224] and to publish information on appeal procedures[225]. The availability of this information, it is suggested, will assist traders in being aware of what specifically constitutes a breach of a particular customs law, which form the broader international and cross border trade and, if the traders find themselves in breach of such laws, an understanding of the remedies available to them. Articles 1.2 and 1.3 are, furthermore, very specific in terms of information platforms that must be utilised to improve accessibility (e.g., the internet and enquiry points

[224] Art 1.1(g) of Trade Facilitation Agreement.
[225] Art 1.1(h) of Trade Facilitation Agreement.

at customs offices). Article 4 specifies the minimum requirements for appeal or review procedures where a customs administrative decision is meted out to a trader. Footnote 4 on page 5 of the Agreement defines an administrative decision as "a decision with a legal effect that affects rights and obligations of a specific person in an individual case. It shall be understood that an administrative decision in this Article covers an administrative action within the meaning of Article X of the GATT 1994 or failure to take an administrative action or decision as provided for in a Member's domestic law and legal system. For addressing such failure, Members may maintain an alternative administrative mechanism or judicial recourse to direct the customs authority to promptly issue an administrative decision in place of the right to appeal or review. In short, Article 4 requires that, where an administrative decision has been taken, the trader must have the option of an internal administrative appeal or review process. It is very important that this process must, of course, be administered by officials who were not party to the original decision in order to promote independent decision-making. If such an internal process is not available, the option of judicial appeal or review must be available to the trader. This is surprising because the speedier and more cost-effective option of an internal administrative appeal or review should have been stipulated as a prerequisite instead of an option between internal appeal or review and judicial appeal or review.

As state above, South Africa is signatory to the Revised Kyoto Convention (1999) and is at least bound by the General Annex. Chapters 9 and 10 of the General Annex prescribe the minimum standards required of administrations in respect of any decisions they make. According to these standards, administrations must:

- Provide reasons.[226]
- Provide for internal administrative appeal.[227]
- Provide for further appeal to an independent body.[228]
- Provide for the right to judicial appeal or review.[229]

When comparing the Revised Kyoto Agreement appeal structure to what is envisaged in the Trade Facilitation Agreement of the WTO, it would appear that they almost follow the same principle but responsibility to provide for internal remedies is watered down in the Trade Facilitation Agreement of the WTO.[230]

[226] Standard 9.8 of the Revised Koyoto Agreement.
[227] Standard 10.4 of the Revised Koyoto Agreement.
[228] Standard 10.5 of the Revised Koyoto Agreement.
[229] Standard 10.6 of the Revised Koyoto Agreement.
[230] The Trade Facilitation Agreement (TFA) of the WTO was entered into force on 22 February 2017.

5.2.1 The need to establish a trade tribunal in South Africa.

In South Africa, numerous tribunals have emerged sporadically over the past two centuries. These tribunals were disconnected from each other, as they functioned independently and each had its own set of rules and legislation. The powers that these tribunals possessed varied from judicial and quasi-judicial to administrative. In present-day South Africa, tribunals have evolved and consist of specialised members who are appointed to deliberate specific problems. There are several tribunals scattered across the country that specialise in different areas of law. The main objective of these tribunals is to harmonise and create a unified tribunal system in order to promote efficiency, effectiveness and expediency, and to reduce costs. These tribunals are characterized by the similarities in their rules, procedure and mode of daily operation, which are diverse and are adequately representative of tribunals in South Africa.

The different types of tribunals in south Africa include the Rental Housing Tribunal[231], the National Consumer Tribunal[232], the Companies Tribunal[233], the Competition Tribunal[234] and the Water Tribunal[235].

In South Africa, we have ITAC, which is responsible for implementing the International Trade Administration Act[236]. This means that ITAC is responsible for taking all decisions regarding tariff increases, decreases and industrial rebates; antidumping, countervailing and safeguarding measures; and import and export control. However, unlike in competition

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[231] It is a legal body set up by the Department of Human Settlements to deal with disputes between Landlord and Tenants.
[232] The National Consumer Tribunal (NCT) was established in terms of the National Credit Act, No. 34 of 2005 (the Act). As an independent adjudicative entity, the Tribunal's mandate is to hear and decide on cases involving consumers, service providers, credit providers, debt counsellors and credit bureaux. The NCT is also responsible for reviewing decisions made by the National Credit Regulator and the National Consumer Commission.
[233] The mission of the Companies Tribunal is to adjudicate applications made in terms of Section 195 of the Companies Act (2008) and make orders in respect of such applications, and to facilitate the resolution of company's disputes through conciliation, mediation and arbitration. The Tribunal's mandate is to: adjudicate in relation to any application that may be made to it in terms of the Act and make any order provided for in the Act in respect of any such application; assist in the resolution of disputes; and perform any other function assigned to it by or in terms of the Act.
[234] The Competition Tribunal adjudicates competition matters, in accordance with the Competition Tribunal Act of 1998 and has jurisdiction throughout the Republic of South Africa. It is independent and subject to the Constitution and the law. It must be impartial and perform its functions without fear, favour or prejudice.
[235] The Water Tribunal was established in 1998 to hear appeals against directives and decisions made by responsible authorities, catchment management agencies or water management agencies about matters covered by the National Water Act, Act 36 of 1998, like the issuing of licenses to use water. It is an independent body and can hold hearings anywhere in the country.
[236] 71 of 2002.

or consumer law, no tribunal has been set up to hear reviews of and appeals against ITAC decisions.[237]

It is submitted that there are considerable similarities between ITAC and other commissions like the Competition Commission and the work they do. All are independent institutions subject only to the Constitution and the law, with other state entities obliged to assist in ensuring their independence. They also rule on issues that have a direct impact on competition in the market, with ITAC dealing with matters of international trade and the Competition Commission dealing, inter alia, with matters affecting domestic trade.[238]

The need to establish an independent international trade tribunal should find space in the discussions of access to justice within the cross-border trade space. This is in line with the requirements of the right to be heard, and right to access to court.

5.2.2 Possible characteristics of an international trade tribunal

The establishment of an independent international trade tribunal should have the following characteristics.

(i) The international trade tribunal should be an adjudicative body performing a judicial expertise function. They must be able to deliberate upon matters and perform a judicial expertise function. Similar to the case with judges, a decision is reached because of the particular specialized expertise in a specific field, for example in trade matters or companies matters.

(ii) The trade tribunal should possess the power to determine issues in dispute, but the power is distinct from the court. The tribunal's power to determine issues in dispute is an inquisitorial investigation, whereas in court the parties establish the issues in dispute and the court plays an adversarial role in adjudicating the issues in dispute.

(iii) Tribunals should be more accessible and less formal than courts. The members of the tribunal apply the rules of the court and rules of the tribunal in a more relaxed and flexible manner; that is, if rules are not complied with, they look at the effect and severity of the non-compliance in order to proceed to hearing the matter fully. Courts, on the other hand, are more rigid and inflexible in the application of the rules governing the process of hearing disputes.

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[237] G. Brink 'The need to establish an international trade tribunal' 2016 SALJ 409 410.
[238] n 225 above.

(iv) Tribunal to deal with the relationship between the State and citizens. Through the establishment of trade tribunal, the State provides a medium for citizens to access their rights as protected by the Constitution. This relationship is regulated by government through implementation of legislation protecting specific rights, such as trade/consumer rights.

(vi) Tribunal should be independent of the government department responsible for the area of policy. This reinforces the doctrine of the separation of powers of the legislature, which is distinct from the executive. The courts are also similarly independent from the legislative tier.

In view of the abovementioned characteristics, it appears that the characteristics of courts and tribunals are distinct, despite certain characteristics overlapping. It is submitted that confusion may arise to the users because of their similarity of operation. A distinguishing factor is that, at their core, tribunals have a different structure to the court system

5.3 CAPACITY BUILDING.

In line with the possibility of establishing an independent international trade tribunal, South Africa should embark on an exercise to increase its international dispute settlement skills level. There should be increased inclusion of work with private sector experts and through training programs, or by joining disputes as a third part.

However, this can only be achieved if South Africa has proper procedures in place. It is submitted that the DTIC set up the following proper procedures to deal with the number of trade disputes against and for South Africa and how the private sector, working hand in glove with the government, will assist in lodging an international trade dispute. These procedures should include the following:

(a) Increasing the capacity of the Mission in Geneva to ensure that all dispute settlement meetings in the WTO are monitored and to give the necessary feedback to the WTO desk at ITED, regardless of whether the dispute directly involves South Africa. This is important as there may be disputes in which South Africa may have an interest and where it could join as a third party to gain the necessary trade dispute settlement experience and expertise;

(b) Ensuring that all spheres of government are made aware of the fact that ITED has the primary responsibility for dealing with trade disputes and that all stakeholders have to work with or through ITED in resolving any such disputes;

(c) Embarking on a public or stakeholder awareness programme, through ITAC and other public entities, to ensure that all stakeholders not only understand their rights as regards trade disputes, but are aware of the relevant procedures. This includes:

(i) the person(s) at ITED with whom to lodge any complaints;

(ii) admissibility of complaints, i.e. when may a complaint be lodged and the information required to do so;

(iii) eligibility for lodging a complaint; and

(iv) the basis on which ITED will determine whether to proceed with a formal dispute.

(d) The use of private sector experts to assist in developing the necessary arguments to defend or lodge a trade dispute.

It is submitted that once these guidelines are in place and are followed, and provided use is made of the extensive available pool of private sector skills and expertise, South Africa will be in a position to properly and effectively engage in international trade dispute resolution, both as complainant and as defendant, and to assist in building regional capacity in the field.

5.4 CONCLUSION

The possibility of establishing an independent international trade tribunal, is in line with the rights enshrined in the Constitution of the Republic of South Africa. The trade tribunal will also assist in dealing with small cross border trade disputes that do not need the attention of the WTO process. The trade tribunal will also sharpen the skills needed to defend or part to an international trade tribunal. It will also streamline the process that cross over various government departments and agencies and create a harmonized process of dealing with cross border trade disputes. It will also give credit to the South African legal system, where there is a process followed when one needs to be assisted regarding trade matters. The employment of experts in trade matters within the trade tribunal space will assist in achieving high standards of professionalism and expert knowledge within the space.

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