Global governance and national sovereignty: The World Trade Organisation and South Africa's new constitutional framework

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1 INTRODUCTION

While South Africans were frantically negotiating the interim Constitution and establishing the framework for the final Constitution in 1993, world trade negotiators were rounding off the Uruguay Round of trade negotiations which would establish the World Trade Organisation (WTO) and expand the existing General Agreement on Tariffs and Trade (GATT) in goods to services and intellectual property. On 15 December 1993 the negotiators completed the final touches to the WTO agreement; on exactly the same day the negotiators in South Africa finalised the interim Constitution.[1] Barely two weeks before the first democratic elections in South Africa on 27 April 1994, the Marrakesh Agreement, establishing the WTO, was signed on 15 April 1994 by 123 nations including South Africa.

The proximity of birth of two important new regimes in governance, begs the question of how the two interrelate. At the same time that the interim Constitution was establishing for the first time the sovereignty of the South African people, the new international trade order was signalling a significant milestone in world governance which reduces national sovereignty. As Cameron and Campell euphemistically put it:

> "The WTO inherently limits state sovereignty, as states are required to conduct their affairs with other states in mind."[2]

The broad question that is posed in this paper is what is the fit between new constitutional order and the WTO obligations that South Africa has undertaken. In particular three issues are addressed.

First, how does the undertaking of WTO obligations fit into South Africa's new *democratic* form of governance?

Second, how does the constitutional dispersal of powers between spheres and within spheres affect South Africa's WTO obligations? Because South Africa has been decentralised into "spheres of government" – at national, provincial and local level – the impact of WTO obligations on the federal features in the Constitution should be examined. The converse is equally

1 The Constitution of the Republic of South Africa 1993 Act 200 of 1993.

2 Dugard 1998: 25; Cameron & Campbell 1998: 25.

important; how do, or should, WTO obligations impact on intergovernmental relations and co-operative government between the spheres?

Third, are certain WTO obligations compatible with values and mandates imposed by the Constitution? In particular, could the affirmative action policy with respect of government procurement be affected by WTO obligations?

2 THE WTO AND DEMOCRATIC GOVERNANCE IN SOUTH AFRICA

The first question concerns sovereignty; how is membership of the WTO married to South Africa's new found democracy? When the Marrakesh Declaration was signed on 15 April 1994 by Derek Keys, the Finance Minister of the last apartheid government, two weeks before the interim Constitution took effect of 27 April, the constitutional law, as at it then stood, required no further act of ratification as South Africa was bound by the agreement.[3] Although the African National Congress (ANC), the new government in-waiting, was in full agreement with South Africa's accession to the WTO and was part of the South African delegation to Marrakesh, it was not politically wise to bind the new South Africa by an agreement of such magnitude without the participation and approval of the new institutions of democracy. In a pragmatic move, the WTO Agreement was taken to the new Parliament for a formal act of ratification, which was duly done in March 1995.

The same procedure has to be followed under the 1996 Constitution[4] for any further agreements that are bound to follow. There are a few areas of unfinished business from the Uruguay Rounds, such as the agreement on telecommunications and trade in financial services. Renegotiations of the detail of the Agreements are also built into the WTO system.

In November 1998 the schedule of specific commitments made by South Africa on financial services under the General Agreement on Trade in Services (the GATS) were submitted for ratification to the joint parliamentary Portfolio Committee on Trade and Industry and Finance. At issue was the Fifth Protocol to the GATS which had to be ratified by members before 29 January 1999. Following a report of the Committee, recommending the adoption of South Africa's offers, it was approved by the National Assembly and the National Council of Provinces.

It should be noted that the National Council of Provinces can play an important, and independent, role in the ratification process. Unlike its limited role in vetoing legislation, the National Assembly can always override its rejection by a two third majority,[5] the National Council has a veto power with regard to the ratification of international treaties. The Constitution is clear:

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3 S 6(3)(e) Republic of South Africa Constitution Act 110 of 1983. See Dugard, John (1998) "Public International Law:" in M Chaskalson *et al Constitutional Law of South Africa* chapter 13 (Revision Service 2) (Cape Town Juta).

4 S 231(2) of the Constitution of the Republic of South Africa 1996 Act 108 of 1996 (hereinafter referred to as the Constitution).

5 S 76 of the Constitution.

"An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces".[6]

This veto power could be significant where WTO commitments agreed to by the national executive, impact adversely on provincial interests.

Asserting the role of Parliament of giving the final approval to an agreement is important. It was, after all, the claim of the United States Congress that it, rather than the President, approves the establishment of the International Trade Organisation in 1948, that scuppered the establishment of that organisation.[7] While parliamentary sovereignty appears sound in theory the practice looks different. Parliament is confronted with an all-or-nothing choice; it must either approve or disapprove an agreement. There is no scope for tinkering with the details of an agreement, because those details are the product of complex and interlinked negotiations. Should Parliament have rejected the offer on financial services because it did not agree with, say, one aspect of the insurance commitment, the entire package of commitments would have followed suit.

Because of the impossible choice imposed on it, Parliament has insisted on being informed earlier in the negotiation process. In 1998 the parliamentary Portfolio Committee on Trade and Industry was playing an active role in respect of bi-lateral agreements. With the negotiations of the South Africa-European Union Free Trade Agreement the Portfolio Committee has made a number submissions to the trade negotiations.

In respect of the WTO, the Department of Trade and Industry (DTI) has brought offers to the attention and approval of the Portfolio Committee on Trade and Industry. At present the negotiations on the telecommunications have commenced – unfinished business from the Uruguay Round. At issue is the reduction in tariffs on Information Technology (IT) where negotiations seek to secure zero tariffs by the year 2000. The DTI is seeking to get a mandate from Parliament for its negotiating position.

With multi-lateral agreements it is of course more difficult for Parliament to play the same interventionist role. However, as the *locus* of sovereignty it is duty-bound to seize the initiative to play an active role in shaping foreign trade policy, rather than be confronted with a *fait accompli* of a negotiated deal which leaves it with little or no choice.

3 THE WTO AND SOUTH AFRICA'S DISPERSAL OF STATE POWERS AND COMPETENCIES

A central feature of South Africa's new constitutional dispensation is the vertical dispersal of powers between the different spheres of government, at national, provincial and local levels. In addition there has been a limited horizontal dispersal of powers at the national level to state institutions whose independence from the national government is constitutionally guaranteed, such as the Reserve Bank.[8] The overall effect of this dispersal of powers is

6 S 231(2) of the Constitution.

7 See Jackson Davey & Sykes 1995: 295.

8 S 223 of the Constitution. See Davies: 1996.

that the national government, both the executive and Parliament, is no longer the supreme master of the country. Yet, the national executive, in negotiating an international agreement, and the national Parliament in ratifying such an agreement, binds the Republic, including the provinces. If a ratified agreement impinges on a province's functional areas of concurrent or exclusive legislative competence, is it in violation of the Constitution and thus invalid? This poses the question of how does South Africa's constitutional scheme of the dispersal of powers fits in with its WTO obligations?

This very issue lies at the moment before the Indian Supreme Court. The states of Rajasthan, Orissa and Tamil Nadu have challenged the Union government's accession to the WTO agreement on the basis that the agreement affects their exclusive constitutional powers and forces them to share power with the Union in violation of the basic structure of the Constitution. The thrust of the argument is that the treaty-making power of the Union may dissolve Indian federalism. To date the Indian Supreme Court has not yet pronounced on the issue.[9]

3.1 WTO Rules

Of the founding members of the GATT in 1947 a number were federations, for instance the United States of America, Canada and Australia. They insisted on a 'federal clause' on the argument that in a federal system the central government did not have the constitutional power to control subnational governments with regard to fiscal and other measures.[10] The same arguments prevailed at the Uruguay Rounds. Both the 1947 GATT and the WTO thus cater for countries with federal arrangements in a limited manner.

3.1.1 *GATT 1947*

The 1947 GATT contained the following provision in Article XXIV:12

> "Each contracting party shall take reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories."

In the panel decisions that followed a restrictive interpretation was given to this clause. In a complaint brought by South Africa against Canada, because the province of Ontario refused to allow the selling of Kruger rands, the Panel Report[11] (which was not adopted because of the veto by Canada) gave the purpose of Article XXIV:12 as the following:

> "to qualify the basic obligation to ensure the observance of the General Agreement by regional and local governments in the case of contracting parties with a federal structure".[12]

9 See Dhavan & Goel 1998: 54.

10 Jackson Davey & Sykes 1995: 323.

11 "Canada – Measures Affecting Sale of Gold Coins" L/5863 unadopted report 17 September 1985 §§ 53.

12 § 53.

It allows states to accede to the General Agreement without having to change their federal distribution of competencies. In view of its drafting history, Article XXIV applied, the Report reads,

> "only to those measures taken at the regional or local level which the federal government cannot control because they fall outside its jurisdiction under the constitutional distribution of competence."[13]

In this regard Article XXIV:12 is an exception to the general principle that a party to a treaty may not invoke its internal laws as a justification for not performing a treaty obligation. To minimise the impact of this exception because of the undue imbalance it can cause between unitary and federal states' obligations, 'granting a special right to federal States without giving an offsetting privilege to unitary States',[14] Article XXIV:12 must be interpreted narrowly: it does not exempt subnational units from the application of the GATT obligations; it merely limits the obligation of federal states to secure the implementation of the provisions by subnational units.[15]

Whether a member has taken 'reasonable measures' to secure compliance by subnational units of the GATT obligations, is an objective question. A 1988 Panel Report[16] found that a member state had to demonstrate to other contracting parties that it had taken all reasonable measures available and that it would then be for the other contracting parties to decide whether that was the case.

3.1.2 *GATT 1994*

During the Uruguay Rounds Article XXIV:12 was also subject to negotiations. Some countries sought its repeal while federal states again asserted the importance of its inclusion.[17] In the Understanding on the Interpretation of Article XXIV in GATT 1994, the following gloss was given to subarticle 12:

> "13. Each member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory.
>
> 14. The provision of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked in respect of measures affecting its observance taken by regional or local governments or authorities within the territory of a Member. When the Dispute Settlement Body has ruled that a provision of GATT has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.

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13 § 56.

14 § 63.

15 See also "Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies" Panel Report DS17/R, adopted 18 February 1992; "United States – Measures Affecting Alcoholic and Malt Beverages" Panel Report DS23/R, adopted 19 June 1992.

16 "Canada – Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies" L/6304 adopted on 22 March 1988.

17 WTO 1995 vol 2: 830.

15. Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of GATT 1994 taken within the territory of the former."

Although the general principle of Article XXIV:12 is reiterated, the scope of its application appears to have been significantly reduced. The dispute settlement provisions in Articles XXII and XXIII may be invoked for violations by a subnational unit. If the Dispute Settlement Body has ruled that there has been a violation, the responsible member state must take such reasonable measures available to it to ensure its observance. However, in the 1994 Understanding on Article XXIV:12 the matter is taken a step further. Where it is not possible for a member state to secure observance of the Dispute Resolution Body's ruling, the provisions relating to compensation and suspension of concessions or other obligations apply. The effect is that a country as a whole may be subject to enforcement measures, although only one part of it is in default of the GATT obligations. Indirectly, then, a subnational unit is bound by the obligations taken on by its national state.

3.1.3 *The General Agreement on Trade in Services (GATS)*

The existence of subnational units and other independent bodies in the constitutional arrangements of member states is also recognised in other agreements under the WTO although for different purposes.

The GATS contains a provision similar to that of Article XXIV:12 of GATT 94. Article I:1 of GATS provides that the Agreement applies to all 'measures by Members affecting trade in services', which include measures taken by –

"(i) central, regional or local governments and authorities; and

(ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities."

Again, the duty of the member state is to take 'such reasonable measures as may be available to it to ensure their observance by' these subnational authorities within its territory.

The reference to non-governmental bodies with delegated state power, is significant because it gives recognition to the fact that in many countries the decentralisation of state power to professional bodies or autonomous statutory bodies is an important aspect of state regulation in a modern state. It is important to note that reference is made to 'delegated' powers of non-governmental organisations. It indicates that, unlike constitutionally entrenched federal powers, these powers can be revoked by the national government. Yet, member states are given the leeway of not doing so in recognition of the organisation of the modern state; the dispersal of functions and powers also to non-government bodies. Because of the importance of the autonomy of such bodies from the central government, the obligation of member states is not to bring their laws in conformity with the GATS obligations by doing away with bodies with relative autonomy, but to accommodate them within the system of trade liberalisation.

3.1.4 *The Government Procurement Agreement (GPA)*

Subnational entities also feature prominently in the pluri-lateral GPA under the WTO. Unlike the GATT and the GATS where subnational units provide for

the exception, the aim of the GPA is specifically to bind these subnational units into the liberalisation of government procurement.

The first step in this direction was taken in 1979 when a number of significant countries signed the 1979 GATT Government Procurement Code.[18] The Code applied only to central government procurement of certain goods. The subsequent negotiations during the Uruguay Rounds resulted in the WTO Agreement on Government Procurement (GPA), one of the pluri-lateral agreements applicable only to the signatories.[19] The new agreement now covers not only goods but also construction contracts and procurement of services. Included in principle are subnational units and government-owned utility companies. Attached to each contracting party's accession to the Agreement, is Appendix I containing a list of entities, both at national and subnational level that are bound by the Agreement.[20] The lists of quasi-public institutions and enterprises are instructive regarding both the large number and array of such institutions. The US offer extends coverage to specific procurement by 37 of the 51 states and federally owned utility companies only to bidders from Korea, Israel and Hong Kong, becuase the US was not satisfied with other countries's offers of subnational and government-owned companies.[21]

These provisions in the WTO agreements highlight two important developments in international law. First, the reality that faces international law is that in the case of many contracting parties, the national executive (or even the national legislature in case of ratification), is no longer the all-powerful body which rules that country. Power has been dispersed both vertically and horizontally. Second, the nature of international law obligations has also changed; no longer is it dealing with countries as actors regulating behaviour between them, but focus on how first, countries treat their own citizens through the various human rights instruments, and now, second, how a citizen of one country can do business in another country for the maximisation if his or her own profits. In both cases domestic law and regulation become the focus of attention, but the central state who contracts with other countries, cannot as a matter of law (and often as policy), ensure conformity of domestic law with international obligations so contracted.

3.2 Dispersal of state powers and competencies in South Africa

The WTO's 'federal clause' can have important implications for South Africa, because under the new constitutional dispensation, powers traditionally located in central government have been dispersed in two directions; first, vertically between national, provincial and local sphere of government; and second, horizontally between the central government and other constitutional bodies which operate with a measure of independence from the government. Notably in this context is the Reserve Bank. Apart from the formal constitutional picture, there are also numerous statutory bodies which

18 See generally Dennin & Boucher 1995.

19 The signatories are EU, USA, Canada, Finland, Israel, Japan, Korea, Sweden, Norway, Switzerland.

20 Appendix I.

21 Dennin & Boucher 1995 (Commentary vol 1) Booklet E page 4.

operate with a large degree of autonomy. Although their powers are subject to the will of Parliament, they are nevertheless given a broad discretion in their area of competence.

The question is, then, to what extent, if any, the constitutional dispersal of powers in South Africa will bring the 'federal clauses' into operation.

3.2.1 *Provinces*

Trade in goods and even services falls certainly within the functional competence of provinces. Their regulation of trade would, however, be indirect.

Provinces play an important role in the area of trade, primarily with regard to goods, but to a lesser extent in services. Functional areas *concurrently* exercised with the national government,[22] include trade, industrial promotion, provincial public enterprises, and agriculture. Other functional areas of concurrent jurisdiction that may impact indirectly on trade are consumer protection and environment. Functional areas of *exclusive* provincial legislative competence,[23] are less, but may be significant. They include abattoirs, liquor licences and veterinary services.[24]

The question is, then, whether provinces, in exercising their legislative and executive powers, could impinge on WTO obligations. More directly, can they impose tariffs or other measures which result in unfair competition?

The main concern of the GATT has been the lowering of tariffs. In this area provinces have no power to levy any tariffs on the importation of goods. Section 228(1)(a) of the Constitution provides that a provincial legislature may impose 'taxes, levies and duties other than . . . customs duties'. The direct mposition of customs duties in the form of tariffs is thus not permissible. The imposition of levies or duties could, however, be to the same effect. In this regard the conclusive answer to provinces venturing in the area is that section 228(2) provides that the power to impose taxes, levies, or duties, which in any event must be regulated by an Act of Parliament, 'may not be exercised in a way that materially and unreasonably prejudices national economic policies'. Commitments under the WTO would certainly constitute national economic policy and levies and duties contrary to WTO commitments would prejudice such a policy.

The second string to the WTO bow is to ensure that, in the absence of tariff impositions, there are no internal measures which distort international trade. Take two examples. In order to promote industrial development, a schedule 4 concurrent competence, a province could indulge in an array of subsidisation activities, producing, unfairly, a competitive local product for the international market. The second example would be in exercising a schedule 5 exclusive competency, say, of regulating the granting of liquor licences, with stipulations which would inhibit the sale of foreign wines in the Western Cape.

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22 Listed in Schedule 4 of the Constitution.

23 Listed in Schedule 5 of the Constitution.

24 See the Sanitary and Phytosanitary (SPS) Agreement.

In the case of non-compliance by a province in an area which falls within a functional area of concurrent competence, national legislation may readily override such provincial legislation. National legislation prevails over provincial legislation on a number of grounds. The most likely ground to be used in the override provisions is section 146(3). In terms of this section national legislation prevails over provincial legislation if it is

"aimed at preventing unreasonable action by a province that,

(a) is prejudicial to the economic . . . interest of the country as a whole; or

(b) impedes the implementation of national economic policy."

Where a province's measure may lead to the suspension of concessions against the country as a whole, national prejudice has been established and a strong case can be made out for the override provision. Similar, non-compliance with WTO obligations, which also apply to provincial governments, impedes the implementation of a national economic policy as evidenced by the country's membership of the WTO. The failure of the national government *not* to take such actions would indicate that it has not taken 'reasonable measures' to ensure compliance.

Other override grounds that may be relied upon are that the national legislation prevails if it is necessary for 'the maintenance of economic unity' or 'the protection of the common market respect of the mobility of goods, [and] services'.[25]

Where the provincial measure falls within the exclusive provincial legislative competence of schedule 5, the same grounds as above apply. Parliament may intervene in this area when it is necessary 'to prevent unreasonable action taken by a province which is prejudicial to . . . the country as a whole'.[26] Again, the prospect of the suspension of concessions and other measures against the country as a whole, will constitute prejudice to the country as a whole.

3.2.2 *Local government*

As far as local government is concerned, trade and related matters do not appear to fall within the ambit of its powers.[27] Where they do in an indirect manner, however, there are also override provisions which would invalidate local by-laws that are in conflict with WTO obligations.[28]

3.2.3 *Other non-governmental organisations with delegated state power*

Other non-governmental organisations (used in the narrow sense as not being part of the national executive), which are given a measure of discretion in their area of operation and function with a degree of autonomy, may have an important role to play in ensuring compliance with WTO obligations.

25 S 146(2)(c)(ii) and (iii) of the Constitution.

26 S 44(2) of the Constitution.

27 See Part B of Schedule 4 and Part B of Schedule 5 of the Constitution.

28 S 156(3) read with s 151(4) of the Constitution.

At the hearing before the Portfolio Committee on the ratification of South Africa's commitments under GATS, three officials were present, representing the Department of Trade and Industry (DTI), the Reserve Bank and the Financial Services Board respectively. The presence of the latter two is significant. While the main negotiations were conducted by the DTI, the other two institutions were nevertheless involved.[29] In this case the three institutions were at *idem* that the commitments in the offer were not more than what was reflected in current South African law.

Unanimity of opinion may not always be present among key state actors. This raises the question of the autonomy of the Reserve Bank and that of the Financial Services Board. The Reserve Bank, 'in pursuit of its primary objective', the protection of 'the value of the currency in the interest of balanced and sustainable economic growth',[30] 'must perform its functions independently and without fear, favour or prejudice,' but there must be regular consultation between the Bank and the Minister of Finance.[31] Within its constitutionally protected area of competence, decisions of the national executive or the national Parliament cannot bind the Bank. This is recognised in the GATS, but WTO obligations would nevertheless not be thwarted by measures the Bank may take. While the Financial Services Board,[32] a statutory body which does not enjoy constitutionally protected autonomy, has a measure of independence. In executing its duty of supervising the activities of financial institutions and financial services,[33] it is duty-bound only to consult with the Minister of Finance in the exercise of its powers.[34] Decisions are taken without government interference. Differences of opinion and policy between these institutions and the national government may emerge, including whether WTO obligations are being or should be met.

3.2.4 *Conclusion*

As far as the vertical dispersal of powers are concerned, the limited federal features contained in the Constitution, are unlikely to give rise to claims under Article XXIV:12 of GATT or GATS. In so far as other non-governmental bodies are concerned, the dispersal of powers argument may well arise. However, the WTO may trump any 'federal' claim by allowing sanctions to be imposed against a country where one of its subnational units or non-governmental agencies acts in violation of WTO obligations. The conflict must therefore be resolved within the domestic jurisdiction. In this regard intergovernmental relations, including dispute resolution mechanisms and procedures, have a critical role to play.

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29 'Explanatory Memorandum on the Tabling and Contents of South Africa: Schedule of Specific Commitments, which Reflect South Africa's Offer on Financial Services in the World Trade Organisation (WTO)', submitted to the Parliamentary Portfolio Committee on Trade and Industry 4 November 1998.

30 S 224(1) of the Constitution.

31 S 224(2) of the Constitution. For a discussion on the independence of the Reserve Bank, see Davies 1996.

32 Established by the Financial Services Board Act 97 of 1990.

33 S 3(a).

34 S 18.

3.3 Domestic intergovernmental relations

The fact that no autonomous trade regime in goods or services is possible for provincial or local governments, does not dispose of the matter. International trade regulation may impact profoundly on the well-being of provinces and local authorities. When the national government commits the country to obligations the impact of which will fall also on other spheres of government, it should be done within the context of intergovernmental relations and co-operative governance.

3.3.1 *South African Law*

One of the central principles of co-operative government, is the duty on 'all spheres of government and all organs of state within each sphere', to co-operate within another 'in mutual trust and good faith' by 'informing one another of, and consulting one another on, matters of common interest'.[35] Where WTO commitments made by the national executive may have far reaching consequences for provincial and local governments, a duty falls on the national government both to inform and, more importantly, to consult with the other two spheres. Consultation entails that, before making a decision, the national government informs other interested parties of the pending decision, invites them to comment and considers such comments in good faith. Such a duty should thus be discharged *before* the national government commences or concludes negotiations on various offers to WTO.

3.3.2 *South African practice*

In practice a number of state departments deal with WTO matters. The principal department is the Department of Trade and Industry, which has been responsible for GATT and WTO negotiations and has a permanent representative at the WTO. Another department directly involved is the Department of Agriculture in the light of the specific agreement on Agriculture. The question is thus, how these national departments relate to their counterparts in the provinces.[36]

The present practices of the Department of Trade and Industry (DTI) suggest sound intergovernmental relations, at least as far as the provinces are concerned. The process of consultation with the provinces takes place through three monthly ('MINMEC') meetings between the Minister of Trade and Industry and the provincial Members of the Executive Councils (MECs) responsible of Economic Affairs. These meetings can thus serve both as a forum for information distribution as well as consultation.

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35 S 41(1)(h)(iii) of the Constitution. See generally De Villiers 1997.

36 Incidental to the problem of effective intragovernmental relations should also be mentioned. While the division of the national executive in departments is constitutionally irrelevant, as they all fall under Cabinet governance, the recent Presidential Review Commission Report on the Reform and Transformation of the Public Service (May 1998), indicates that there is, in general, a lack of co-operation between departments. Whether this also holds true for relations between the Departments of Trade and Industry and Agriculture, is unclear. A coherent national approach to multi-lateral trade relations is obviously imperative.

The DTI has also included provincial representation in their delegation to WTO trade negotiations. With the first Ministerial Conference of the WTO in Singapore in December 1996, Minister of Trade and Industry, Alec Erwin, invited two delegates from the provinces to accompany him and one MEC for Economic Affairs in the Eastern Cape, Mr Smuts Ngonyama, accompanied him. At the second Ministerial Conference in Geneva in April 1998, with the focus on the 50th celebration of the GATT/WTO, there was, however, no provincial representative.

The Cinderella of the intergovernmental relations has been local government both in general as well as with respect to international trade. This is a serious omission as the impact of WTO obligations could be very drastic and acutely felt by a local authority. Where much of a town's economic base depends on a single industry or factory, and tariff reductions affect such an industry or factory significantly to the point of closure, the impact falls on the locality with devastating effect on the local authority. Not only is the tax base of the municipality eroded, but increased unemployment places additional strains on its diminished resources. As some industries are concentrated in a few locations, consultations with those municipalities which could be affected by prospective WTO obligations should take place. Their non-voting participation in the National Council of Provinces (NCOP)[37] during the ratification hearings of WTO commitments, will be a case of a little too late.

3.3.3 *Other consultations*

Consultation has also occurred between the national government and its social partners in the National Economic Development and Labour Council (NEDLAC).[38] With the first Ministerial Conference of the WTO in Singapore in December 1996, Minister Alec Erwin also included the general secretary of COSATU in his delegation. Labour was drawn in because the 'social clause' was on the agenda.[39] Consultation with specific sectors of business and labour is also essential when commitments deal with specific sectors of the economy.

4 CONSTITUTIONAL OBLIGATIONS AND POWERS

The final question to be addressed is whether WTO obligations may compromise or impede the implementation of specific constitutionally mandated policies. Specifically, would an affirmative action policy come into conflict with WTO obligations under any of its agreements? The issue was pertinently raised in the parliamentary ratification hearings on South Africa's commitments on the free trade in services, referred to above. The question then is whether the government's 'ten point plan' on affirmative action, based on a constitutional duty to rectify past injustices,[40] comes into conflict with any WTO agreements, in particular the national treatment principle of non-discrimination.

37 S 67 of the Constitution.

38 See Davies 1996.

39 See generally Schoenbaum 1997.

40 See s 217 of the Constitution.

The pluri-lateral Agreement on Government Procurement, although not signed by South Africa, is a case in point. As pointed out earlier, the new agreement covers not only goods but also construction contracts and procurement of services, and included in principle are subnational units and government-owned utility companies. Unlike it predecessor, this Agreement does not incorporate the most favoured nation (MFN) principle, but works on the basis of reciprocity.

Governments are the largest consumers of goods and services[41] and through their procurement policies governments may give effect to various policies, including those which seek to promote disadvantaged groups within a country. Opponent to affirmative action policies argue that the principle of non-discrimination which is the basis of the Agreement,[42] will be offended, because foreign goods cannot, by definition, qualify in terms of a preferable treatment policy for internal groups. One would have thought that a conclusive answer to this argument would be that all parties in a particular country, local as well as foreign, will be judged according to the same affirmative action criteria. Foreign companies are in no different boat than other local companies which may be prejudiced by the preferential treatment policy.

Judging from the conduct of the United State's government, this interpretation of the non-discrimination clause is not adopted. In the US schedule of commitments, it is explicitly stated that "this Agreement will not apply to set asides on behalf of small and minority businesses."[43] The US states were equally explicit and stipulated that programmes "promoting the development of distressed areas and businesses owned by minorities, disabled veterans and women are reserved from coverage."[44] If these policies did not offend against the general principle of national treatment, why make these explicit reservations? It is either an overly cautious approach, or affirmative action policies offend against the general principle of non-discrimination, which must therefore be explicitly excluded to avoid a claim of non-compliance.

A second argument why affirmative action does not conflict with the non-discrimination principle is that the WTO agreements themselves contain affirmative action provisions in the form of "special and differentiated" treatment provisions for developing and least developed countries.[45] These 'special and differential' measures include exemptions from some policy requirements and more generous time frames for implementation.[46] The WTO

41 Dennin & Boucher 1995: 1.

42 Article III:1 reads:

"With respect to all laws, regulations, procedures and practices regarding government procurement covered by this agreement, each Party shall provide immediately and unconditionally to the products and services and suppliers of other Parties offering products or services of the Parties treatment less favourable than:

(a) that accorded to domestic products, services and suppliers; and

(b) that accorded to products and suppliers of any other Party."

43 General Notes para 1.

44 Appendix 2.

45 See United States Reservations Appendix 2 1998; Thomas 1996: 64; Aghatise 1989.

46 See Keet 1998: 41.

trading system should recognise that specific policy initiatives such as affirmative action, is aimed at achieving substantive equality which is a precondition for the full implementation of the principle of non-discrimination.

In light of state practice, the conclusion is inevitable that it is not at all certain that affirmative action policies may not in the future be challenged by international companies trading in services. South Africa should thus include the principle as an exception to its general commitment to an open procurement policy, or, preferably, establish the principle of affirmative action as a general understanding of the relevant WTO obligation.

5 CONCLUSION

The WTO is an important step in the development of global governance. In the parlance of the South African Constitution, of the "fourth sphere of government" at the international level has been given a significant impetus. Increasingly nation states shed sovereignty to supranational institutions. This occurs at both a global and regional level. The European Union is the most advanced example where international law which governs relations between nation states has become part of the constitutional law of the member states. A similar process is envisaged by the various regional economic integration initiatives in Africa. What is important is that the dispersal of powers to international bodies, reflects the sovereign will. In the case of South Africa, this entails that the national executive must consult with Parliament before and during WTO trade negotiations.

Portraying supranational governance as the "fourth sphere of government" not only reflects the actual distribution of power, but also emphasises the imperative of sound intergovernmental relations and cooperative government between all spheres. The four spheres are, in the words of the Constitution, 'distinctive, interdependent and interrelated',[47] and for effective government this requires co-operative governance. In particular the important principle of co-operative government, the duty to consult[48] before decisions are effectively made, must be adhered to. This entails that in practice the national government must, with regard to the WTO trade issues, consult with provincial and, where appropriate, also with local spheres of government.

Sources

Aghatise EA "GATT and developing countries: The Tokyo Round and after" 1 *African Journal of International and Comparative Law* 407 1988.

Cameron James & Karen Campbell "Introduction" in Cameron & Campbell (eds) *Dispute Resolution in the WTO* (London: Cameron & May) 1998.

Davies Robert "Independent institutions concerned with economic policy and democratic participation: The case of the Reserve Bank, Financial and Fiscal Commission and National Economic Development and Labour Council" in Nico Steytler (ed) *Human Rights, Democracy and Economic Development in Southern Africa* (Johannesburg: Lex Patria) 1996.

47 S 40(1) of the Constitution.

48 S 41(1)(h) of the Constitution.

Dennin Joseph F & Boucher Jamie L "1996 WTO Agreement on Government Procurement" in Dennin (ed) *Law and Practice of the World Trade Organisation* (Commentary vol 1) (New York, Oceana Publications Inc) 1995.

De Villiers Bertus "Intergovernmental relations in South Africa" 12 *SA Public Law* 197 1997.

Dhavan Rajeev & Geetanjali Goel "Indian federalism and its discontents: A review" in Gert W Kueck, Sudhir Chandra Mathur and Klaus Schindler (eds) *Federalism and Decentralisation: Centre-State Relations in India and Germany* (New Dehli Mudrit) 1998.

Jackson John H William J Davey & Alan O Sykes *Legal Problems of International Economic Relations* (St Paul Minn West Publishing Co) 1995.

Keet Dot *Integrating the World Community: Political Challenges and Opportunities for Developing Countries* (Bellville, Centre for Southern African Studies at the School of Government UWC) 1998.

Schoenbaum Thomas J "International trade and workers' rights: Should there be a linkage? in Nico Steytler (ed) *Human Rights, Democracy and Economic Development in Southern Africa* (Johannesburg: Lex Patria) 1996.

Thomas RH "Regional arrangements and the World Trade Organisation (WTO): The case of the Southern African Development Community (SADC)" 8 *African Journal of International and Comparative Law* 57 1996.

World Trade Organisation (WTO) *Guide to GATT Law and Practice* (Geneva: WTO) 1995.