

**AFRICAN STATES, AGGRESSIVE
MULTILATERALISM AND THE WTO
DISPUTE SETTLEMENT SYSTEM –
POLITICS, PROCESS, OUTCOMES AND
PROSPECTS**

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ABBREVIATIONS AND SYMBOLS

ACP	African, Caribbean and Pacific Group of States
ADF	African Development Fund
ADR	The African Development Report
AGOA	Africa Growth and Opportunity Act
AIDS	Acquired Immune Deficiency Syndrome
APRM	African Peer Review Mechanism
ATLEs	Africa's Ten Largest Economies
BWIs	Beeton Woods Institutions
COMESA	Common Market for Eastern and Southern Africa
CTD	Committee on Trade and Development
EAC	East African Community
EBA	Everything But Arms
ECCAS	Economic Community of Central African States
ECOWAS	Economic Community of West African States
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
FDI	Foreign direct investment
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GNP	Gross National Product
HIPC	Heavily-Indebted Poor Countries
HIV	Human Immunodeficiency Virus
IMF	International Monetary Fund
LDCs	Least-developed countries
MDGs	Millennium Development Goals
MTAs	Multilateral Trade Agreements on Goods
NEPAD	New Partnership for Africa's Development
PRGF	Poverty Reduction and Growth Facility
PRGF	Poverty reduction and growth facility
PRSP	Poverty Reduction Strategy Paper
RTA	Regional Trade Agreement
SAARC	South Asian Association for Regional Co-operation
SADC	South African Development Community
TRIMs	Trade-Related Investment Measures
UN	United Nations
UNECA	United Nations Economic Commission for Africa
UNCTAD	United Nations Conference on Trade and Development
UNIDO	United Nations Industrial Development Organization
UNSD	United Nations Statistics Division
WTO	World Trade Organization

I. INTRODUCTION

The Understanding on Rules and Procedure Governing the Settlement of Disputes (“DSU”),¹ the agreement that sets out the procedure to govern the dispute settlement mechanism (DSM) of the World Trade Organization (WTO),² is widely regarded as “the bedrock on which the WTO edifice is built.” The DSU arguably guarantees that the letter and the spirit of multilateral trade rules will be respected by weak and powerful countries alike and, when violated, that disputes will be resolved in a fair and impartial manner through a credible, transparent, and readily accessible dispute settlement process in which law reigns over power. Despite some very positive reviews,³ ten years after the establishment of the DSM, serious questions regarding the functioning of the DSU have arisen prompting the WTO Ministerial Conference in 2001 to authorize a review of the DSU⁴ (See **Annex 1 and 2**). African countries are concerned that they are not reaping the benefits of the DSM⁵ and that the more even-handed result the DSU promised has not materialized.⁶ To date, the major users of the system have been developed countries. No African country has successfully carried a complaint to decision. A few African countries have participated in the DSM as third parties⁷ and cases have been initiated against only two African countries.⁸

The goal of this paper is to assess the relevance of the DSM to states in Africa, investigate the reasons for the lack of utilization of the DSM by African states, suggest ways to improve the operation of the DSU in the interest of African states,⁹ and assess strategies outside the context of the WTO that

¹ The DSU is a detailed agreement that sets out the procedure to govern the revised dispute settlement mechanism of the WTO. The DSU exists as annex 2 to the Agreement establishing the WTO. *See*, http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm (visited 1/10/03).

² *See* Marrakesh Agreement Establishing the World Trade Organization, http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm (visited 1/10/04); (1994) 33 I.L.M. 1145. The WTO came into existence as a result of the Uruguay Round of multilateral trade negotiations on 1 January 1995.

³ *See generally* Peter Sutherland *et al.*, THE FUTURE OF THE WTO: ADDRESSING INSTITUTIONAL CHALLENGES IN THE NEW MILLENNIUM 49-59 (2004) (The Sutherland Report).

⁴ Paragraph 30 of the Doha Ministerial Declaration (Doha Declaration) mandates negotiation on the reform of the DSU. Trade Ministers agreed, in Paragraph 30, that negotiations should be concluded no later than May 2003, at which time they will take steps to ensure that the results enter into force as soon as possible thereafter. Paragraph 30 of the Doha Ministerial Declaration (Doha Declaration) mandates negotiation on the reform of the DSU. Trade Ministers agreed in Paragraph 30 to commence “negotiations on improvements and clarifications of the dispute Settlement Understanding.” Trade Ministers further agreed that negotiations should be concluded no later than May 2003, at which time they will take steps to ensure that the results enter into force as soon as possible thereafter. As of May 2003, no concrete agreement had been reached on needed reform. Sadly, the May 2003 deadline stipulated in the Doha Declaration came and went without WTO Members arriving at any consensus on needed modifications. *See* Doha Ministerial Declaration, WT/MIN (01)/DEC/1, 20 November 2001 (adopted on 14 November 2001); available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm (visited 1/10/04).

⁵ Frieder Roessler, *Special and Differential Treatment of Developing Countries under the WTO Dispute Settlement System* (2003) (On file with the author).

⁶ Julio Lacarte-Muró and Petina Gappah, *Developing Countries and the WTO Legal and Dispute Settlement System: A View from the Bench*, 3(3) JOURNAL OF INTERNATIONAL ECONOMIC LAW 395, 395 (2000) (observing that the DSM “is based on the principle that any Member can challenge trade measures taken by any other Member, so that even those countries that are economically weak can challenge the more economically powerful.”).

⁷ E.g., Benin and Chad participated as Third Parties in *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R.

⁸ Cases have been initiated against Egypt and South Africa. *See: Egypt – Anti-dumping Duties on Matches from Pakistan*, WT/DS327/1; *Egypt – Measures Affecting Imports of Textile and Apparel Products*, WT/DS 305/1; *Egypt – Definitive Anti-dumping on Steel Rebar from Turkey*, WT/DS211/5; *South Africa – Definitive Anti-Dumping Measures on Blanketing from Turkey – Request for Consultation by Turkey*, WT/DS288/1; *South Africa – Anti-Dumping Duties on Certain Pharmaceutical Products from India – Request for Consultations by India*, WT/DS168/99.

⁹ “Least Developed Countries” (LDCs) is a term used by the United Nations to describe the 49 poorest countries in the world. The designation of a country as “least developed” is based on three criteria: low national income, high

African states could use to overcome some of the challenges they face in utilizing the DSM. The fact that very little attention has been paid to the absence of African participation in the DSU makes this paper all the more important. In much of the literature on developing countries and the DSM, it is either assumed that Africa does not need the DSM on account of its low volume of trade or the conclusion is hastily reached that Africa has more pressing life and death issues to attend to.¹⁰

Five factors motivate my concern about the functioning of the DSU: *first*, the significant increase in the number of cases now brought against developing countries in the WTO dispute settlement system; *second*, the broad scope of the substance of WTO agreements that fall under the jurisdiction of the DSU; *third*, the expanded scope of substantive obligations within the WTO brought about by the “single undertaking approach” to treaty negotiation; and *fourth*, the WTO requirement of substantial GATT concessions by all Members. The fifth reason is that rationally or irrationally, countries in Africa have overwhelmingly decided to join the WTO. The level of participation of these countries in every aspect of WTO processes is likely to impact the lives of millions in the continent. Out of the fifty-three countries in Africa,¹¹ 41 are members of the WTO. Of the twelve non-members, eight have observer status and have plans to join the organization in due course.¹²

The participation of African countries in the DSM is critical both to the success of the system and to the fuller integration of these countries in the multilateral trading system.”¹³ African countries are unlikely to take on further liberalization obligations unless they have confidence in the ability of the system to protect their interest. The participation of African countries in the DSM also has important implications for the overall success and legitimacy of the WTO as an international institution.¹⁴ A truly multilateral trading system requires the full involvement and participation of both large and weak economies not only in the rule-making process, but also in the dispute settlement process.

African countries also need the DSM and have a stake in on-going review of the DSU for at least four reasons. *First*, whether or not African states participate in the DSM, these countries are bound to be affected by some of the decisions of panels and Appellate Body (AB). *Second*, given the difficulties associated with amending negotiated agreements, participation in the DSM is essential for shaping the interpretation of WTO rules. *Third*, participation in the DSM also provides opportunity for countries to influence the evolving jurisprudence of WTO panels and AB; non-participants are automatically excluded from this important process. *Fourth*, by invoking adjudication, African countries could significantly improve market access opportunities for their export by addressing unfair trade practices of third countries that violate negotiated agreements.

economic vulnerability, and weak human assets. Low national income is determined as below \$900 GDB per capita. Only one LDC has participated in the DSM either as a complainant or a defendant. See *India – Anti-Dumping Measure on Batteries from Bangladesh*, WT/DS306/1, Jan. 28, 2004.

¹⁰ Victor Mosoti, *Does Africa Need The WTO Dispute Settlement System?* (2003) (On file with the author)

¹¹ This number does not include Mayotte and the Saharawi Republic.

¹² In general, observers are required to start accession negotiations within five years of becoming observers.

¹³ Lacarte-Muró and Gappah, *supra* note 6, 395.

¹⁴ Civil society groups and some scholars have long charged that the WTO is facing a fundamental crisis of legitimacy which calls for comprehensive institutional reform. Among the issues of concern are the lack of transparency in WTO deliberations and the perceived undemocratic working methods and systems of decision making in the WTO reflected in the fact that oftentimes developing country Members of the WTO are not participants in WTO deliberations. There is now a growing literature addressing the crisis of legitimacy facing the WTO. See generally, Robert Howse and Kalypso Nicolaidis, *Enhancing WTO legitimacy: Constitutionalization or Global Subsidiarity*, GOVERNANCE, Vol. 16(1) 73 (2003). Steve Charnovitz, "The World Trade Organization and Social Issues," *Journal of World Trade*, vol. 28 (October 1994), pp. 17-34; Robert Howse, "The House that Jackson Built: Restructuring the GATT System," *Michigan Law Review*, vol. 20 (1999), pp. 2329-57. Roger Porter, et al, *Efficiency, Equity, and, Legitimacy: The Multilateral Trading System at the Millennium* (2001); Tony Clarke, *Global economic governance: The WTO's ongoing crisis of legitimacy*, Canada Watch Volume 9 Nos.1–2 55 (September 2002).

One possible option for increasing the participation of African states in the DSM is to amend the DSU to include new provisions that will accord these countries special and differential treatment (S&DT). However, developing countries appear to be generally reluctant to avail themselves of existing S&DT provisions in the DSU.¹⁵ Part of the objective of this paper is to examine the reasons for the non-recourse of the hard-won privileges in the DSU. A close examination of the structure and operation of the DSM suggests that there are systemic reasons for the continuing non-recourse by African states and other developing countries of the S&DT provisions in the DSU. The S&DT provisions in the DSU are not designed to effectively address the core difficulties African countries are likely to encounter in utilizing the DSU nor were they designed to address some of the factors that discourage poor countries from utilizing the DSM.

To meaningfully address the core factors that discourage African countries from participating in the DSM, meaningful reform of the DSU is called for and some changes in the operation of the DSM and negotiated agreements required. However, African countries will also need to explore strategies outside of the context of the WTO to improve their prospects of participating in the DSU and in the MTS generally. Specifically, African countries must work to regain lost market share in primary commodities, diversify their export, and altogether improve their competitiveness in the global economy. They must also create an enabling environment for the private sector and devise meaningful ways to engage the private sector and civil society groups in the task of identifying unfair trade practices of third countries and enforcing multilateral trade rules against violators. In cooperation with the donor organizations, they must devise cost-effective and sustainable ways to train a new generation of trade experts in the continent and develop local expertise in international trade law.

The findings and conclusions in the paper are based on a thorough examination of the proposals submitted by African states as part of the on-going review of the DSU process and on telephone interviews with trade representatives in Geneva. Specifically, I will analyze proposal by the Africa Group, circulated as TN/DS/W/15 (September 25, 2002) and TN/DS/W/42 (24 January, 2003). African countries also submitted proposals as part of the Least Developed Country Group (LDC Group). Consequently, proposals by the LDC Group circulated as TN/DS/W/17 (17 January 2002) and TN/DS/W/37 (22 January, 2003) will be examined as well. This paper is part of an on-going project and does not attempt to address all the possible factors that account for the underutilization of the DSM by states in Africa.

This paper is in ten sections. Section II provides an overview of the development of DSM and highlights the progressive legalization and codification of the DSM culminating in the adoption of the DSU in 1994. The goal of Section III is to demonstrate that for states in Africa, non-participation in the DSM is not an option and to highlight the potential impact on these countries of decisions of panels and AB even when they do not participate in the DSM. Section IV focuses on the reasons why African countries rationally decide not to use the DSM. The section will examine the specific concerns that African countries have regarding the operation of the DSM, critically examine their suggestions for reform, and discuss the present status of these proposals. Section V involves a more detailed analysis of the factors that discourage states in Africa from participating in the system. In Section VI, the S&DT provision of the DSU are critically evaluated and suggestions for reform advanced. The possibility of the evolution of a development-friendly jurisprudence in the DSM is evaluated in Section VII. The relationship between market share and participation in the DSU is addressed in Section VIII. Some recommendations are offered in Section IX. The paper concludes in Section X with some final thoughts.

¹⁵ *Id.* at 5 (noting that “there is a reluctance of developing countries to invoke the DSU provisions according them special privileges and of the judicial organs to give effect to those provisions.”).

II. THE WTO DISPUTE SETTLEMENT PROCESS: PROGRESSIVE CODIFICATION AND LEGALIZATION

Two main articles of the General Agreement on Tariffs and Trade 1947 (“GATT-1947”), Articles XXII and XXIII, dealt with the subject of dispute settlement.¹⁶ From these two articles, a multilateral mechanism for the settlement of trade dispute developed culminating in the establishment of the present DSM in 1995.¹⁷ Although the dispute settlement system under GATT functioned relatively well, a number of factors eventually led to a growing dissatisfaction with the rudimentary system.¹⁸

Between 1947 and 1994, developing countries had little recourse to the GATT dispute settlement mechanism. Some observers have attributed this underutilization to developing countries’ general distrust of the system and general belief that the system catered to the interest of more powerful members of GATT. After a detailed analysis of all GATT cases between 1948 and 1989, Professor Hudec concluded: “[t]he quantitative analysis of individual country performance makes it pretty clear that the GATT dispute settlement system is, at the margin, more responsive to the interests of the strong than to the interest of the weak.”¹⁹ According to Hudec, judged by the rates of success as complainants, the rates of noncompliance as defendants, the quality of outcomes achieved, the extent to which complainants are able to carry complaints forward to decision, it was evident that “the weaker countries encounter significantly greater barriers at the outset of the process.”²⁰ Whether and to what extent the WTO has been successful in addressing the shortcomings of GATT by eliminating the barriers

¹⁶ Article XXII:1 required each contracting party to “accord sympathetic consideration” to representations “as may be made by another contracting party with respect to any matter affecting the operation of this Agreement,” and to “afford adequate opportunity for consultation” regarding such representations as may be made. Article XXIII was triggered when a GATT contracting party considered that any benefit accruing to it directly or indirectly under GATT was being “nullified or impaired” or considered that “the attainment of any objective of the Agreement [was] being impeded” as the result of the failure of another contracting party to carry out its obligations under the Agreement, or the application by another contracting party of any measures or the existence of any other situation.

¹⁷ kim Van der Borgh, *The Review of the WTO Understanding on Dispute Settlement: Some reflections on Current Debate*, 14 AM. U. INT’L L. REV. 1223, 1224 (1999)(noting the incremental development of the GATT/WTO dispute settlement system). For discussions on GATT, see generally: Ernst-Ulrich Petersmann, *The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System since 1948*, 31 COMMON MKT. L. Rev. 1157-1244 (1994); Taunya L. McLarty, *GATT 1994 Dispute Settlement: Sacrificing Diplomacy for Efficiency in the Multilateral Trading System?*, 9 FLA. J INT’L L. 241-275 (1994).

¹⁸ The GATT dispute settlement system was riddled with problems. The four main problems Raj Bhala identified are: delays, blockages, compliance and enforcement through remedial action. Regarding delays, there were no stipulated time frames for the dispute settlement process once it has been invoked. As a result, “cases could – and did – drag on for years.” The dispute settlement system was not automatic. Moreover, proceedings under the dispute settlement mechanism required a consensus among all GATT Contracting Parties. The result was that not only could a party to a case (typically the respondent) effectively block the establishment of a panel needed to adjudicate the dispute, such a party could also block adoption of a panel report and the authorization to retaliate in the event of non-compliance. In effect, the defendant who anticipated losing could block the establishment of a panel and/or block the adoption of adverse GATT panel report. Regarding compliance and enforcement, a major problem was that “there was no obligation on a losing party to explain to either the winning party, or more generally to the contracting party, how it planned to comply with the recommendations set forth in a panel report.” Raj Bhala, *INTERNATIONAL TRADE HANDBOOK*, 198 (2000). There is today, an extensive literature comparing the GATT and the WTO systems. See generally, Roessler, Frieder, *The Scope, Limits and Functions of the GATT Legal System*, *THE WORLD ECONOMY*, 8:287-98 (1985).; Robert H. Hudec, *GATT Dispute Settlement After the Tokyo Round: An Unfinished Business*, *CORNELL JOURNAL OF INTERNATIONAL LAW* 2, 145-203 (1980).

¹⁹ Robert E. Hudec, *ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM* 353 (1993).

²⁰ *Id.*

to poor-country participation in the DSU is a question that has not been fully answered. The jury is still out.

This section offers a brief overview of the WTO dispute settlement system, highlights the changes that the DSU introduced, and the initial assessments on the effectiveness of the DSM.

A. Dispute Settlement Under The WTO: Overview

One far-reaching result of the Uruguay Round negotiations was a dramatic overhaul of the GATT dispute settlement mechanism. Although the DSU builds on Article XXII and XXIII of the GATT,²¹ it brought about a substantial change in the workings of the dispute settlement system.²²

Compared to GATT-1947, the DSU set out in detail, the jurisdictional scope and institutional framework of the DSM. The rules and procedure of the DSU applies to all disputes brought pursuant to the dispute settlement provisions of the agreements listed in Appendix 1 to the DSU (the “covered agreements”). The administration of the DSU is the responsibility of the Dispute Settlement Body (DSB).²³ The DSU also sets out detailed procedure to govern the three phases in the WTO dispute settlement system: the pre-panel consultation/mediation phase; the panel phase, and the post-ruling remedies, compliance and surveillance phase.

1. Pre-Panel Phase (Consultation, Mediation and Conciliation): The DSU provides for an initial informal consultation/ mediation phase.²⁴ A WTO member must first request bilateral consultation if such a member believes that a benefit accruing to it has been nullified or impaired. Only if consultation fails or if a Member does not respond to a request for consultation may an aggrieved Member request the establishment of a panel. Consultations are confidential and Members are urged to attempt to obtain satisfactory adjustment of their problem in the course of consultation.

2. Panel and Appellate Body Phase: Members enjoy an automatic right to a panel.²⁵ Once a complaining party, after satisfying the provisions of Article 4, requests the establishment of a panel, a panel must be created unless the DSB decide by consensus not to establish one. Panels have six months to conduct examination of a case and issue their reports to the parties to the dispute.²⁶ The DSB is authorized to adopt a panel report within 60 days of the date of the circulation of such a panel report to WTO Members unless a party to the dispute formally notifies the DSB that it has decided to appeal or unless the DSB decides by negative consensus not to adopt the report. The AB considers all appeals. AB proceedings are confidential and must be concluded within sixty days. If the AB concludes that a measure is inconsistent with a covered agreement, it recommends that the losing party bring its measures into conformity with the covered agreement in question.

3. Post-Ruling Phase: Remedies; Surveillance and Compliance. The remedies available to a successful complainant under the DSU are limited. Compensation is not mandatory and is only offered in

²¹ See, DSU, *supra* note 1, at para. 3:1 (“Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein.”)

²² Valentina Delich, *Developing Countries and the WTO Dispute Settlement Mechanism*, in TRADE, DEVELOPMENT, AND THE WTO: A HANDBOOK (Bernard Hoekman, Aaditya Mattoo, and Philip English, eds., 2002)

²³ DSU, *supra* note 1, Article 2 (The DSB is authorized 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.”).

²⁴ *Id.*, Article 4:2 (“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 any covered agreement taken within the territory of the former.”).

²⁵ *Id.*, Article 6.1 (“If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel.”).

²⁶ *Id.*, Article 12.8

lieu of compliance. The DSU envisages that a losing party will automatically bring its measures into conformity with the WTO agreement. Where the losing party remains recalcitrant, the last recourse for the complaining party is retaliatory action through the suspension of concessions;²⁷ express authorization of the DSB is required however.

B. The WTO Dispute Settlement Mechanism: Initial Assessment

The DSU created a compulsory jurisdiction, integrated, rule-oriented framework for trade disputes²⁸ and introduced automaticity,²⁹ cross-retaliation,³⁰ strict timetables³¹ and an appellate system.³² The DSU even introduced some limitations on unilateralism³³ and contains provisions that accord special privileges to developing countries.

Initial assessments of the DSU have been very positive.³⁴ Most observers agree that the DSU created a reliable and predictable system for the settlement of trade disputes.³⁵ It has been referred to as “[t]he jewel in the crown of the WTO”³⁶ and “the linchpin of the multilateral trading system.”³⁷ In 2004, the Consultative Board appointed by the WTO Director-General, Supachai Panitchpakdi, to study and clarify the institutional challenges facing the multilateral trading system gave positive reviews to the DSM and cautioned against “dramatic changes” to the system.³⁸ While observing that “there are some grounds for criticism and reform,” in the opinion of the Consultative Board, on the whole, there exists much satisfaction with the practices and performances of the DSM.³⁹

A significant number of WTO Members appear to be generally satisfied with the structure and operation of the DSM.⁴⁰ More and more countries are utilizing the DSU.⁴¹ As of 29 April 2005, a total of 330 cases had been initiated in the DSM. Moreover, developing countries are utilizing the DSM more

²⁷ Delich, *supra* note 22, at 72 (noting that suspension of concession is the last recourse for countries in enforcing compliance with the recommendations and rulings of the DSB).

²⁸ DSU, *supra* note 1, Article 1:1.

²⁹ The DSU eliminated the consensus requirement that created considerable delays and blockages in the past. Although the DSB is required to make decisions by consensus (Article 2:4), consensus is not required for critical stages in the dispute settlement process such as the establishment of a panel, the adoption of a panel or Appellate Body report, or the decision of the DSB concerning compliance. For critical decisions, the DSU introduced a “negative consensus.” See, DSU, *supra* note 1, Articles. 6.1; 16.4; 17.14; & 22.6. See also, Delich, *supra* note 22, at 72 (“This reversal of the consensus rule led to a radical change in the dynamics of dispute settlement, making it more automatic and less dependent on the power of the countries involved in a dispute.”).

³⁰ DSU, *supra* note 1, Articles. 22.3.

³¹ *Id.*, Articles. 4, 5, 6, 8, 12, 16, 17, & 20.

³² *Id.*, Articles 17.

³³ *Id.*, Articles 23.

³⁴ *WTO Dispute Settlement: Praise and Suggestions for Reform*, 47(3) *Int’l & Comparative Law Quarterly* 647, 647 (1998) (“By any objective standard, this system of dispute settlement is a resounding success”).

³⁵ Borgh, *supra* note 17, at 1225

³⁶ Alan Wm. Wolff, *Reflections on WTO Dispute Settlement, Remarks, American Bar Association*, March 26, 1998.

³⁷ TN/DS/W/15.

³⁸ Sutherland Report, *supra* note 3, at 49.

³⁹ *Id.*

⁴⁰ TN/DS/W/1 (“The experience of the last six years (244 cases as of 4 February 2002) has revealed that the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereafter “DSU”), while generally working in a satisfactory manner, can and sometimes needs to be improved on a number of issues.”)

⁴¹ Since 1995, several studies have been carried out to assess the degree of utilization of the DSM by Member states. See generally, Y. Park and G. Umbricht, *WTO Dispute Settlement 1995-2000: A Statistical Analysis*, *Journal of International Economic Law*, vol. 4, no. 1, 213-30 (2001); M. Busch and E. Reinhardt, *Testing International Trade Law: Empirical Studies of GATT/ATO Dispute Settlement*, in D.L.M. Kennedy and J.D. Southwick, eds., *THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOR OF ROBERT HUDEC*, 457-81 (2002).

than ever before; some are now bringing complaints against major industrialized countries (**Table 1**).⁴² Some developing countries view the present mechanism as “a significant step forward” in the settlement of trade disputes.⁴³

Table 1. Participation in the DSM by Income level⁴⁴

	HI	UMI	LMI	LI	TOTAL
CASES AS COMPLAINANT	217 (61.7%)	66 (18.8%)	44 (12.5%)	25 (12.5%)	352 (100%)
CASES AS DEFENDANT	222 (63.1%)	73 (20.7%)	36 (10.2%)	21 (6.0%)	352 (100%)
Percentage of World Trade♣ (1999)	78.70%	6.80%	12.10%	2.30%	100%

Source: Guzman and Simmons (2005)

Judged therefore by the level of participation of developing countries, the DSM an improvement over the GATT system.⁴⁵ This has prompted Lacarte-Muró and Petina Gappah to conclude, perhaps hastily, that “[i]n the WTO, *right* perseveres over *might*.”⁴⁶ As will be shown, not every WTO Member shares endorses this view. As Mosoti rightly notes, “[a]s long as the weakest of the WTO Membership ... remain virtually absent in the dispute settlement process in all senses, the success of the system must not be taken as absolute, even implicitly.”⁴⁷

⁴² The first WTO dispute to reach the panel/ Appellate Body stage was a case brought by two developing countries against the United States. See *United States – Standards for Reformulated and Conventional Gasoline, complaints by Venezuela (WT/DS2)* and *Brazil (WT/DS4)*. See South Center at 2 (noting that the case is symbolic of the changing environment in the WTO in that both complainants were developing countries and that the respondent was the United States). <http://www.southcentre.org/publicatons/trade/trade-04.htm> (12/8/2003).

⁴³ WTO, *Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding: Proposal by Mexico*, TN/DS/W/23 (4 November 2002) (“Mexico believes that the current DSU represents a highly significant step forward in the settlement of trade disputes, particularly in comparison with the rules applied in the GATT days. In our opinion, there are two types of improvements and clarifications that can be made to this Agreement”).

⁴⁴ Income categories were based on per capita incomes and correspond to the World Bank’s income categories: low income (LI), \$735 or less; lower middle income (LMI), \$736 - \$2, 935; upper middle income (UMI), \$2,936 - \$9, 075; and high income (HI), \$9,076 or more.

⁴⁵ Lacarte-Muró and Petina Gappah, *supra* note 6, at 397 (“Of the 28 appeals that have been brought to the Appellate Body since 1996, developing countries have been involved as appellants or appellee in 18. The first appeal decided by the Appellate Body involved a dispute between the United States and two developing countries, Brazil and Venezuela.... A total of 25 different developing countries have appeared before the Appellate Body as third participants.”).

⁴⁶ *Id.* at 401.

⁴⁷ Mosoti, *supra* note 10, 3.

III. THE WTO DISPUTE SETTLEMENT SYSTEM: TO PARTICIPATE OR NOT TO PARTICIPATE?

The goal of this section is to demonstrate that African countries ignore the DSM at their peril and are grossly disadvantaged by their present inability to participate in the system. There are three reasons for this view. First, some of the decisions of panels and AB have systemic effects and countries in Africa are affected by such decisions regardless of whether they participate in the DSM or not. Second, some decisions may lead to the nullification or impairment of benefits that countries in Africa receive either under WTO agreements or under other bilateral arrangements. Third, in view of the difficulties associated with negotiating new rules or amending existing rules,⁴⁸ the DSM is the only real mechanism currently available for filling in gaps and resolving ambiguities in negotiated agreements. States that do not participate in the DSM are inevitably excluded from this creative process and have little opportunity to shape the jurisprudence of the WTO.

To highlight the importance of the DSM to states in Africa and demonstrate the potential impact on these countries of the decisions of WTO panels and AB even when these countries are not involved in disputes, this chapter reviews four recent decisions of the AB. The four cases demonstrate that non-participation does not immunize countries in Africa from the effects of WTO decisions. Second, the cases demonstrate the potential usefulness of the DSM to African countries in their effort to address trade distorting subsidies that inhibit Africa's export or other Non-tariff barriers. Third, the cases demonstrate that it is possible for a developing country to challenge the trade practices of a major player and win. All four cases analyzed in this section were initiated by developing countries, acting alone or as co-complainants, and challenged the trade practices and policies of either the EU or the United States. Fourth, at least one of the cases highlights the fact that for African states, the fault line is not necessarily drawn between developed and developing countries. As will be seen, developing countries are utilizing the DSM in ways that could harm the trade interest of other developing countries. African states must therefore constantly monitor potential threats to their trade interest originating from other developing countries. Finally, these cases demonstrate that non-participation of African countries in the DSM is not as a result of absence of potential trade disputes warranting adjudication. On the contrary, there are many potential trade disputes that countries in Africa can push through the dispute settlement system and many more cases where at the minimum participation as third parties is warranted.

A. *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries (7 April 2004)*⁴⁹

a. **Facts:** A Panel was established, following a request on 19 December 2002, to consider a complaint by India against the European Communities concerning the conditions the European Communities apply to grant tariff preferences to developing countries pursuant to Council Regulation (EC) No. 2501/2001 of 10 December 2001. This Regulation provides for five preferential tariff arrangements: (1) general arrangements described in Article 7 of the Regulation (General Arrangement), (2) special incentive arrangements for the protection of labor rights, (3) special incentive arrangements for the protection of the environment, (4) special arrangements for least-developed countries, and (5) special arrangements to combat drug production and trafficking (Drug Arrangement). India is only a beneficiary of the General Arrangements. India initiated this case against the EU and requested that the Panel find inconsistencies between the Drug Arrangements and Article I:1 of the *GATT*, and also that the Drug Arrangements are not justified by the *Decision on Differential and More Favourable*

⁴⁸ Three-fourths votes of WTO Members is required to obtain a binding interpretation of a negotiated agreement. See Agreement Establishing the WTO, Article X.

⁴⁹ WT/DS246/AB/R

Treatment, Reciprocity, and Fuller Participation of Developing Countries (the “Enabling Clause.”).⁵⁰ Essentially, it was India’s position that the conditions attached to EC GSP scheme were inconsistent with the requirements of the Enabling Clause. No African country participated as a third party.⁵¹

b. Holding: The Panel concluded that India demonstrated that the European Communities’ Drug Arrangements are inconsistent with Article I (1) of GATT 1994, and that the European Communities failed to demonstrate that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause.⁵² Consequently, the Panel concluded, pursuant to Article 3.8 of the DSU, that the European Communities has nullified or impaired benefits accruing to India under GATT 1994.

The AB reversed the Panel’s finding that WTO Members were required to provide identical GSP tariff preferences to all developing countries. However, the AB concluded that the EC had acted consistently with WTO requirements because it failed to set clear criteria as to which countries could be beneficiaries of its drug eradication program. In other words, the EC lost because Regulation 2501/2001 did not define the criteria or standards that a developing country must meet in order to qualify for the Drug Arrangements preferences, and thus there was no basis to determine whether those criteria were discriminatory. The AB therefore upheld the part of the Panel’s conclusion that the EC “failed to demonstrate that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause.”

c. Lesson: This case was brought because India was unhappy about the fact that Pakistan was granted tariff-preferences for its textile exports under the E.C. drug-control scheme.⁵³ Although initially, India had also challenged tariff preferences granted to developing countries that uphold certain environmental and labour standards, it withdrew these challenges in March 2003. The decision will affect Africa on several levels.

First, as recipients of a number of trade preferences, African countries are inevitably affected whenever a country’s administration of unilateral trade preference is challenged on any grounds. Although India challenged only the Drug Arrangement, in the future there is no reason why other basis of distinction cannot be challenged by other developing countries. The panel and AB ruling proves beyond doubt that contrary to conventional wisdom, GSP schemes are subject to dispute settlement and that practices of states under the Enabling Clause is justiciable. It was once thought that GSP schemes were exempt from the requirements of the Article 1 of GATT and fall outside the legal scrutiny at the WTO. This case opens the door to future challenges of GSP schemes. As criticisms about different aspects of GSP schemes intensify, unilateral trade preference schemes will face new challenges in the DSM.

Second, the AB decision that the Enabling Clause permits differentiation among developing countries would have systemic implications for preference-giving nations as well as recipient nations. Arguably, the decision puts too much power in the hands of developed countries which advance purely political agenda. Developed countries could use this new power to indirectly push for changes in environmental and labor standards in developing countries.

Third, this case demonstrates that in the WTO, litigation and negotiation are increasingly intertwined. While negotiation on S&DT for developing countries is proceeding very slowly in the legislative arm of the organization, India chose to force issues through the adjudicatory mechanism. What is not clear is how the AB decision that the Enabling Clause permits differentiation among developing countries will shape future negotiations about the scope of application of S&DT.

⁵⁰ Paragraph 1 of the enabling clause states: “Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties.”

⁵¹ Third parties in this case were: United States, Paraguay, Panama, Costa Rica, and the Andean Community.

⁵² Paragraph 2(a) of the Enabling clause extends the exemption in paragraph 1 to GSP schemes. Paragraph 1 applies to: “Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences.”

⁵³ ICTSD, BRIDGES WEEKLY TRADE NEWS DIGEST, Vol. 7 No. 37, 5 Nov. 2003.

Finally, an important lesson learned is that the DSM is increasingly used by developing countries in ways that affect the trade interest of other developing countries.

B. United States – Subsidies on Upland Cotton (3 March 2005)⁵⁴

In part as a result of government subsidies, U.S.-based multinational corporations have been able to sell key commodities in world market at below cost of production prices. While Benin, Burkina Faso, Mali and Chad, four countries in Africa affected by cotton subsidies, chose to launch the Cotton Initiative⁵⁵ with the hope of resolving the problem of subsidies that diminish their market share and depress world prices, in a rare and very bold move, Brazil chose to initiate a case challenging US subsidies.⁵⁶

a. **Facts:** In this dispute, Brazil requested the establishment of a Panel to challenge “subsidies provided to U.S. producers, users and/or exporters of upland cotton.” Brazil challenged what they referred to as prohibited and actionable subsidies provided by the U.S. to U.S. producers, users and/or exporters of upland cotton, and also the laws and regulations that made such subsidies available. Brazil argued that these U.S. measures were inconsistent with the obligations of the United States under Articles III:4, XVI:1, and XVI:3 of the GATT 1994; Articles 3.3, 7.1, 8, 9.1, and 10.1 of the Agriculture Agreement; and Articles 3.1(a), 3.1(b), 3.2, 5(a), 5(c), 6.3(b), 6.3(c), 6.3(d), and item (j) of the Illustrative List of Export Subsidies of the Subsidies Agreement. Brazil stressed that these subsidies increased and maintained the production of high-cost U.S. upland cotton, increased U.S. upland cotton exports, suppressed U.S., world and Brazilian prices and led to the United States having a more than equitable share of world export trade, and therefore, these subsidies caused serious prejudice to the interests of Brazil. The U.S. answered that its subsidies did not artificially increase supply or depress prices because they were not attached to production, and that U.S. farmers did not get extra handouts for extra cotton, but were paid according to the number of acres they planted and the cotton they produced in the past. Only two of the four African countries affected by U.S. subsidies to cotton growers participated as third parties.

b. **Holding:** The Panel ruled in favor of Brazil, finding that several aspects of the US the U.S. cotton program violated WTO rules and that US subsidies unfairly deflated cotton prices. The panel recommended that the U.S. take steps to remove the unfair measures. The AB upheld the Panel’s ruling that the cotton subsidies were illegal. Interpreting the Agreement on Subsidies and Countervailing Measures (SCM Agreement), the AB found that the SCM Agreement bans subsidies that cause significant price suppression and adversely affect the interests of Brazil.

c. **Lesson:** This was “the most wide-ranging legal challenge yet to the agricultural policies of developed countries.”⁵⁷ The implications of this case are great. First, the elimination of U.S. subsidies in line with the AB decision may lead to increased market share even for countries in Africa that did not participate in the dispute. According to the Institute for Agriculture and Trade Policy (IATP), in 2002, cotton was exported from the United States at an average price of 61 percent below cost of production.⁵⁸ Second, the cotton case opens the door for other countries to embark on similar challenges in other sectors affected by subsidies. The case demonstrates that it is possible to overcome the huge evidentiary burden placed on complainants in subsidy cases. Third, this case could increase the pressure

⁵⁴ WT/DS267/AB/R

⁵⁵ The goal of the Cotton Initiative, launched in May 2003, is to call for the “[r]ecognition of the strategic nature of cotton for development and poverty reduction in many LDCs” and call for the “complete phase-out of support measures for the production and export of cotton.” Essentially, through the Cotton Initiative, Mali, Chad, Burkina Faso and Benin seek a level playing field in the market for cotton undistorted by subsidies. See World Trade Organization, *Poverty Reduction: Sectoral Initiative in Favor of Cotton – Joint Proposal by Benin, Burkina Faso, Chad and Mali*, TN/AG/GEN/4, 16 May 2003.

⁵⁶ Tim Josling, *Unraveling the Cotton Case*, Bridges, No. 4 2 (April 2005)(observing that challenges to agricultural subsidies through the DSM have been rare.).

⁵⁷ *Id.*

⁵⁸ Institute for Agriculture and Trade Policy, *WTO Agreement on Agriculture: A Decade of Dumping* (2005)

on the US to offer reductions during negotiations to the benefit of all countries interested in seeing the complete elimination of cotton subsidies.⁵⁹

C. *European Community – Export Subsidies on Sugar (28 April 2005)*⁶⁰

For years, sugar dumping depressed world market for sugar and made it difficult for sugar growers in developing countries to compete in the market for sugar. While negotiations aimed at addressing rich nation's farm subsidies stall in global trade talks, Thailand, Brazil and Australia took matters to the DSM. In a ruling handed down on April 28, 2005, the AB found that EU sugar subsidies were illegal.

a. **Facts:** This dispute was brought by Australia, Brazil, and Thailand against the European Communities and concerned export subsidies provided by the EC to its sugar industry. In 1968, the EC established the Common Agricultural Policy (CAP) sugar regime. The regulations therein set out various basic rules, including the intervention prices for raw and white sugar, basic prize and minimum price for beet, import and export licenses, levies, export refunds, and import arrangements. The EC sugar regime also provided export refunds to its sugar exporters for certain quantities of sugar, other than C sugar. These refunds were are direct export subsidies, and covered the difference between the European Communities' internal market price and the prevailing world market price for sugar. Australia, Brazil, and Thailand claimed that under the EC sugar regime the EC provided export subsidies for sugar in excess of its reduction commitment levels specified in Section II, Part IV of the European Communities' Schedule, in violation of certain provisions of the SCM Agreement governing export subsidies. Seven African countries participated as third parties as part of the African, Caribbean and Pacific Group of states (ACP Group).⁶¹

b. **Holding:** The panel found that in violation of negotiated agreements, the EU was dumping more than three times the level of subsidized sugar export.⁶² While the EU committed to reduce its subsidized sugar exports to about 1.3 million tonnes per year, the panel found that EU export amounted to 4.1 million tones in 2000/2001. The Panel ruled that the EC's exports of sugar exceeded its commitment levels, and that the producers and exporters of C sugar that exceed the EC's commitment levels receive payments on export by virtue of governmental action in two ways. The first is through sales of beet to sugar producers below their total costs of production, and the second is through transfers of financial resources by cross-subsidization resulting from the operation of the EC sugar regime, within the meaning of Article 9.1(c) of the Agreement on Agriculture. The Panel therefore ruled that the EC acted inconsistently with its obligations under the Agreement on Agriculture by providing export subsidies within the meaning of Articles 9.1(a) and 9.1(c) of the Agreement of Agriculture.

The AB upheld the ruling of the Panel that that the EC exceeded its commitments on export subsidies. The AB said that the Panel exercised false judicial economy by refusing to pursue the case under the SCM Agreement, but therefore declined to complete the legal analysis and to examine the parties' claims under the SCM Agreement left unaddressed by the Panel.

c. **Lessons:** To some anti-poverty campaign groups, this decision is “a major step forward in the fight against unfair agricultural subsidies and export dumping.”⁶³ The ruling “has important political implications that go beyond the specifics of the EU and its sugar subsidies.”⁶⁴ The decision demonstrates that it is possible for poor nations to take on rich nations in the DSM. The ruling also demonstrates that even long-standing practices such as subsidies may nevertheless violate WTO rules and that these violations may not be corrected unless forcefully challenged through a dispute settlement

⁵⁹ Josling, *supra* note 59.

⁶⁰ WT/DS266/21.

⁶¹ As part of the ACP Group, the following African countries participated as third parties: Cote d'Ivoire, Kenya, Madagascar, Malawi, Mauritius, Swaziland, and Tanzania).

⁶² Oxfam International, *An End to EU Sugar Dumping?* Oxfam Briefing Note. 28 April 2005.

⁶³ Oxfam International, *An End to EU Sugar Dumping?* Oxfam Briefing Note. 28 April 2005.

⁶⁴ *Id.*

process. The case also demonstrates that African countries may be indirect beneficiaries of WTO decisions especially where these decisions prompts a developed country to embark on far-reaching reform in a sector of interest to these countries.

The decision could affect African countries negatively. Also attacked were some 1.6 metric tonnes of sugar output from ACP countries that the EU failed to include within its agreed quota limits for subsidized sugar. If the 1.6 metric tonnes is added, it significantly increases the amount of EU-produced sugar. In complying with the AB ruling, the EU may decide to dismantle the preference scheme that some ACP countries currently enjoy. While the panel's suggestion that EU should protect preferential access for ACP countries and India and "fully respect its international commitments with respect to imports, including its commitment to developing countries," would come as a relief to affected ACP countries, it is too early to tell the full implications of the sugar decision and the attendant reform in the EU on states in Africa.

D. United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (7 April 2005)⁶⁵

Antigua is a small developing country of about 68,000 people that relies heavily on tourism for its foreign exchange earnings. More recently, in line with the prescriptions of the WTO and the Bretton Woods institutions, Antigua has attempted to diversify its economy through the development of financial services, electronic commerce and Internet gaming.⁶⁶ To the dismay of Antiguan officials, several federal statutes and some state laws in the US were passed to prohibit the supply of gambling and betting services from other countries to consumers in the US. As a result of the enforcement of the federal and state cross-border betting laws, Antigua experienced serious decline in its foreign exchange earnings and dramatic rise in unemployment as a result of job losses in the service sector. When consultation with US officials failed to resolve matters, Antigua initiated this case with the DSM claiming that the effect of the United States enforcement of its laws "is to hurt the small economy of Antigua and Barbuda which is struggling to survive in a world of intense competition in the trade of goods and services."

a. Facts: Before the Panel, Antigua claimed that certain restrictions imposed by the United States through federal and state laws resulted in a "total prohibition" on the cross-border supply of gambling and betting services from Antigua and that such a "total prohibition" was contrary to obligations of the United States under the *General Agreement on Trade in Services* (the "GATS"). It was Antigua's position that because the US made full market access and national treatment commitments under GATS, in maintaining the measures at issue, the United States violated its obligations under its GATS Schedule, as well as under Articles VI, XI, XVI, and XVII of the GATS.

b. Holding: In November 2004, the Panel ruled that certain US federal and state regulations prohibiting Internet gambling were inconsistent with the obligation of the United States under the General Agreement on Trade in Services (GATS). The panel **first** determined that the US had made market access commitments in the GATS that extended to gambling services. Next, the panel examined the provisions of three federal statutes and some state laws and determined that they placed restrictions of several means of providing gambling services violated the GATS because in effect the US failed to offer services and service providers from Antigua treatment no less favorable than those outlined under the Schedule of commitments made by the US.⁶⁷

⁶⁵ WT/DS285/AB/R

⁶⁶ Statement by Sir Ronald Michael Sanders, Chief Foreign Affairs Representative of Antigua and Barbuda to the Dispute Settlement Body of the World Trade Organization in Geneva, Switzerland in Tuesday, 24th June 2003 (hereinafter Sir Sanders).

⁶⁷ General Agreement on Trade in Services, Article XVI(1) ("With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule").

The Panel also ruled that the US could not rely on the public order/public morality argument provided for under Article XIV of GAT because the challenged laws were not “necessary to protect public morals or to maintain public order”⁶⁸ In the opinion of the Panel, although the laws were measures designed to protect public morals or public order, they were not “necessary” to achieve these ends because the US had not explored and exhausted reasonably available alternatives such as consultation with Antigua to identify WTO-consistent means of addressing the public morality concerns.

The AB upheld the Panel’s finding that the US made a commitment to open gambling services to foreign competition. However, the AB overturned the Panel’s ruling that the US could not rely on the public morality/ public order defense. According to the AB, failure to enter into negotiations with Antigua did not automatically mean that the US measures failed the necessity test.

c. **Lesson:** There are several lessons that may be learned. First, this case demonstrate once again the possibilities that exist in the WTO for small countries to challenge the laws, policies and practices of the major players; whether Antigua is able to secure compliance one a positive ruling is secured is a different matter. According to Sir Ronald Michael Sanders, the Chief Foreign Representative of Antigua and Barbuda, Antigua decided to initiate this case because of the duty of care it owed its citizens too defend their right and the right of the state under international law⁶⁹ and to ensure that the country’s legal rights under WTO rules are respected and upheld

Second, the AB decision has significant implications for the every Member of the WTO.⁷⁰ This case is a fine example of how WTO Members are utilizing the DSM to clarify provisions of negotiated agreements and to resolve ambiguities in these agreements. As one of only two cases decided exclusively under GATS,⁷¹ the case presented the Panel and AB with a rare opportunity to interpret core provisions of the agreement and broaden the jurisprudence of the WTO.⁷² Third, the case demonstrates the problem African states are likely to encounter in future as they try to diversify their exports. In other words, with export diversification, states in Africa are likely to encounter barriers to developed countries markets’ and may need the DSM to the resolve the market access problems that will inevitably arise.

E. Conclusion

a. African States are disadvantaged by Non-Participation

Several conclusions may be drawn. First, the DSM affords opportunities for developing countries to defend their trade interests against encroachment by powerful countries. It is possible for poor countries to use the DSM to protect their trade and development interest. All four cases were initiated by developing countries against major WTO players. The cotton case and the sugar case suggest that while waiting for reduction of subsidies through the WTO negotiation process, a country may nevertheless make full use of existing provisions of relevant agreements to challenge the agricultural policies of another country.

Second, as countries fail to reach agreements on key issues currently under negotiation, Members will increasingly turn to the DSM to correct imbalances in the multilateral trading system and resolve ambiguities in negotiated agreements. Since the DSM is not just about disputes but “about the evolution of the *corpus* of international trade law principles and jurisprudence that will govern multilateral trade

⁶⁸ *Id.*, Article XIV(1).

⁶⁹ Sir Sanders, *supra* note 69 (“... while Antigua and Barbuda respects and upholds international law, my Government also has a duty of care to our population to defend their rights and the rights of the State under international law.”)

⁷⁰ *Id.* (observing that the decision “has significant ramifications not only for the US but for all WTO members”).

⁷¹ *Mexico – Measures Affecting Telecommunications Services*, WT/DS204/8.

⁷² Ellen Gould, *The GATS US-Gambling Decision: A Wakeup Call for WTO Members*, CCPA BRIEFING PAPER, Vol. 5 No. 4 (December 2004)(observing that the GATS is full of ambiguities and rather than negotiating to make its text clear, governments have abandoned the task to WTO panels).

relations for years to come,”⁷³ by not participating, African states lose the opportunity to shape the evolution of legal principles on a whole range of issues that affect them.

Third, whether or not they participate in the DSM, African countries can be seriously affected by decisions of panels and AB. For example, although no African country participated as a complainant in the sugar and cotton case, some countries in Africa stand to benefit or suffer as the full implications of these decisions become known. Countries in Africa will benefit if the decisions rendered in the two subsidy cases bring about meaningful, pro-development changes in the agricultural policies of the U.S. and EU or increases the pressure on developed countries to offer additional reductions in negotiations. However, the ruling in the two subsidy cases may not necessarily translate into increased market share for the poorest countries or facilitate an increase in export from these countries. There is also no guarantee that in implementing needed reform, US or EU will prioritize the interests of countries in Africa. Indeed, reform in the EU may likely result in an erosion of preferential access for poor African countries.⁷⁴ Anti-poverty campaign groups are critical of current EU proposals for sugar reform.⁷⁵

Fourth, the sugar case and the cotton case also buttress the fact that illegal subsidies may be in place for many years without been noticed. It is not always readily apparent when a case is ripe for litigation. Only through pain-staking legal analysis and careful collection and documentation of evidence can a country determine whether or not it has a case that is ripe for adjudication through the WTO dispute settlement process. Preparedness to utilize the DSM start long before potential disputes arises. Undoubtedly, there may be other illegal subsidies involving other products and countries; whether or not it is worthwhile for states in Africa to take on such cases is a different matter.

Fifth, the subsidy cases also teach that African states cannot rely on the WTO political mechanisms such as the Trade Policy Review Mechanism (TPRM) to identify and correct illegal measures adopted by a Member state.⁷⁶ Joseph Francois argues that the TPRM “by subjecting the largest OECD markets to periodic review, shifts the balance of power in the WTO, ever so slightly, in favor of the developing countries,”⁷⁷ in the sense that “it makes it easier for the developing countries to point collectively to the use of dumping duties by the European Union and the US against developing countries.” Although the TPRM ensures that the trade policies of WTO Members are subjected to periodic public peer review, the TPRM is not empowered to pass judgment on the compliance of Members with WTO Obligations.⁷⁸ There is simply no substitute for individual country’s own monitoring mechanisms.

Sixth, the subsidy decisions support developing countries’ claims of hypocrisy and double standard on the part of the big developed countries as far as implementation of negotiated agreements are concerned. Although not direct parties to the subsidy disputes, the AB ruling in both cases gives African

⁷³ Victor Mosoti, *supra* note 10.

⁷⁴ According to Oxfam, at least two groups of developing countries are affected by the AB ruling and any resulting EU sugar reform. These are: (1) large exporters such as Brazil and Thailand whose primary interest is mainly an end to European export dumping; (2) some ACP countries and India that enjoy limited preferential access to EU markets. Many of these countries are high-cost producers, are very dependent on EU market, and are likely to be affected by reform in the EU.

⁷⁵ *Id.* (observing that the July 2004 proposal in which the European Commission proposed to cut prices by 33%, and reduce quota production by 16% over three years fell far short of what will be required to bring EU sugar policies into compliance with WTO rules.). The European Commission will release a new legislative proposal in July 2005.

⁷⁶ Annex 3 of the Marrakesh Agreement provides the legal basis for the TPRM. The goal of the TPRM is to facilitate the smooth functioning of the multilateral trading system by enhancing the transparency of Members’ trade policies. Every WTO is subject to review under the TPRM. The Trade Policy Review Body (TPRB) is carries out the reviews. The TPRB Trade Policy Review Body is the WTO General Council operating under special rules and procedures. It is thus made up of all WTO Members. WTO, Trade Policy Reviews, http://www.wto.org/english/tratop_e/tpr_e/tpr_e.htm (visited 1/1/05).

⁷⁷ Joseph Francois, *Maximizing the Benefits of the Trade Policy Review Mechanism for Developing Countries 2* (February 1999)(On file with the author).

⁷⁸ *Id.*

countries and all affected developing countries “an important moral and legal victory”⁷⁹ and may encourage more similar litigations in the future.

In retrospect, was the launching of the Cotton Initiative the better option for the four countries in Africa affected by US cotton subsidies? Judged by the response so far to the core proposals introduced by the four African countries affected by cotton subsidies, the Cotton Initiative may not produce any tangible benefits for the affected countries. In their joint proposal, the affected countries call for: (i) prompt and complete support measures for the production of cotton; (ii) financial compensation as an emergency and transitional measure to offset lost income. Since 2003 when it was first proposed, the result has been:

- inclusion of the Cotton Initiative as a Cancun Ministerial Conference document. No decision on the Cotton Initiative was reached in Cancun;⁸⁰
- a WTO Secretariat’s 23-34 March 2004 workshop on cotton in Cotonou and Benin;
- mention in the July Package decision of 1 August 2004. Of importance is the promise that cotton will be addressed “ambitiously, expeditiously and specifically” within the agricultural negotiations;⁸¹
- establishment of the Cotton Sub-Committee at the 19 November 2004 meeting of the agricultural negotiations;⁸² and
- possibility of fast-tracking in the negotiations on agriculture.

Overall, it is doubtful that the Cotton Initiative will produce any tangible result. Already the EU has indicated that due to current aid programs it could not contribute to the proposed cotton fund.⁸³

In conclusion, regardless of whether countries in Africa participate in the DSM, the system is increasingly used by WTO Members to fill in gaps and resolve ambiguities in ways that would otherwise be difficult in the negotiating process and in ways that affect the rights and privileges of non-parties. For African states, therefore, non-participation is not an option. The sugar and subsidy dispute witnessed increased participation by states in Africa as third parties. Future involvement in trade disputes must be encouraged.

The conclusions reached is not intended to trivialize the role factors such as market share, financial and human resource costs, and other structural impediments in the DSU play in the decision of a country whether or not to initiate a case in the DSM. Regarding market share, it was not surprising that the two of the complainants were Brazil and Thailand. These countries are large and efficient exporters and compete on the same footing with European exporters. The two countries combined have 33 percent of the world’s market share in sugar.⁸⁴

b. Areas of Potential Trade Dispute

There are a number of other areas where litigation through the DSM may yield positive result for countries in Africa now or in the future. These include: use of tariff peaks and escalation, improper application of sanitary and phytosanitary measures and technical barriers to trade, unfair application of licensing systems, labeling and certification requirements, misuse of anti-dumping (AD), safeguard, and

⁷⁹ *Id.*

⁸⁰ WT/MIN(03)/W/2 and WT/MIN(03)/W/2/Add.1. Although the initiating countries sought a decision on the Cotton Initiative in the Cancun Ministerial Conference as an agenda item titled “Poverty Reduction: Sectoral Initiatives in Favour of Cotton – Joint Proposal by Benin, Burkina Faso, Chad and Mali.” No decision was reached in Cancun.

⁸¹ See *Text of the “July Package” – The General Council Post Cancun Decision*, WT/L/579, 2 Aug. 2004. http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm (visited 1/1/05).

⁸² The purpose of the Sub-Committee is to focus on cotton as a specific issue in the agricultural talks. The Sub-Committee is open to all WTO Members and observer governments. The Sub-Committee is also to work on “all trade distorting policies affecting the sector.”

⁸³ ICTSD, *Agriculture Talks Falter Over Tariff Conversion Methods*, BRIDGES, No. 4 (2005).

⁸⁴ Brazil has 25 percent of the world’s market share while Thailand has 8 percent of the world’s market share in sugar.

countervailing (CVD) measures, as well as more restrictive use of rules of origin, for example, in the textile and clothing sector.

Regarding anti-dumping, Miranda, Torres and Ruiz have show that since 1995, the MTS has seen a resurgence of anti-dumping actions particularly among developing countries (**Table 2**).⁸⁵ This conclusion is supported by more recent research by Finger and Zlate who find that antidumping has gained increasingly popularity among developing countries (**Table 3**).⁸⁶ In the future, as African countries attempt to regain lost market share and become more competitive, they may become the focus of anti-dumping procedures which may necessitate resort to the DSM to preserve gains achieved through market access negotiations and other trade preferences.

Table 2: Anti-dumping investigations by groups of reporting countries and countries investigated, 1987-97

Reporting country group	Affected country group			Total
	Developed	Developing	Economies in Transition	
Developed	570	591	340	1,501
Developing	249	216	205	670
Economies in Transition	24	0	1	25
Total	843	807	546	2,196

Source: Miranda, Torres and Ruiz (1998)

The Agreement on Agriculture (AoA) is another area that is bound to continue to be the focus of considerable trade disputes. Although much of the battle would be waged in the political bodies as Members negotiate for further liberalization in the sector, the DSM will nevertheless be used by Members to challenge unfair trade practices of Member states and fill in gaps and resolve ambiguities in the AoA relating to such issues as subsidies and domestic support. Studies by the Institute for Agricultural and Trade Policy (IATP) demonstrate that cotton and sugar are not the only commodities that are dumped in the world market by big corporations. According to the IATP, in 2003, wheat was exported from the U.S. at an average price of 28 percent below cost of production, soybeans were exported at an average price of 10 percent below the cost of production, and rice was exported at an average price of 26 percent cost of production. It is worth investigation to what extent the dumping of these commodities is a direct result of US government subsidies. All three commodities are subjects of potential trade dispute in the WTO.

⁸⁵ Miranda, J., R. Torres and M. Ruiz, *The International Use of Antidumping: 1987-1997*, Journal of World Trade, Vol. 32 No. 5, 5-71 (1998).

⁸⁶ J. Michael Finger and Andrei Zlate, *WTO Rules that Allow New Trade Restrictions: The Public Interest is a Bastard Child*. Paper Prepared for the U.N. Millenium Project Task Force in Trade (2003) (Their studies demonstrate that 58 per cent of all antidumping initiations are against developing economies and that developing economy antidumping application “is as much aimed at developing economy exporters as is developed economy application.”)

Table 3: Numbers and Percentages of Antidumping Initiation by Initiating Economic Group, 1995 – 2002 June

Initiated against → By ↓	Industrial Economies / a	Developing Economies / b	China, PRC / c	Transition Economies / d	All Economies
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Number of Antidumping Initiations

Industrial Economies / a	198	494	104	127	819
Developing Economies	357	649	172	138	1144
Transition Economies	4	6	2	6	16
All Economies	559	1149	278	271	1979

Percentages of Antidumping Initiations

Industrial Economies / a	24	60	13	16	100
Developing Economies	31	57	15	12	100
Transition Economies	25	38	13	37	100
All Economies	28	58	14	14	100

Source: Finger and Zlate (2004)

Finally, as states in African states diversify their export base, others areas such as manufactures, services and intellectual property are likely to become the focus of potential trade disputes.

In conclusion, for states in Africa, the DSM may be useful in any effort to: address unfair and illegal quality standards or health and safety standards; address any future misuse of antidumping and countervailing provisions; address export subsidies; effectuate the S&DT provisions of negotiated agreements; institutionalize a pro-development interpretive culture in the WTO and obtain relief when bullied by more powerful WTO Members. The challenge is to identify the core factors that account for the underutilization of the DSM by states in Africa and to consider ways to address these factors.

IV. AFRICAN STATES AND THE WTO DISPUTE SETTLEMENT SYSTEM: CONCERNS AND PROPOSALS FOR REFORM

Although some developing countries are making increasingly use of the DSM, it is a stretch to conclude that the current system works to the advantage of all Members, but especially weaker Members.⁸⁷ African countries have not been active participants in the DSM.⁸⁸ To date, no African state

⁸⁷ Lacarte-Muró and Petina Gappah, *supra* note 6, at 400 (“This system works to the advantage of all Member but it especially gives security to the weaker Members who often, in the past, lacked the political or economic clout to enforce their rights and to protect their interests.”)

⁸⁸ TN/DS/W/15.

has participated in the DSM as a complainant.⁸⁹ Likewise, no LDC Member has sought to resolve a trade dispute through the DSM.⁹⁰ According to the African Group, “[t]his diminutive participation is not because they have never had occasion to want to enforce their rights, or the obligations of other Members, but due to structural difficulties of the [system].”⁹¹ The LDC Group are also quick to point out that the failure of LDCs to use the DSM is not because these countries have had no concerns worth referring to the DSM but as a result of “the structural and other difficulties that are posed by the system itself.”⁹²

The reasons advanced by states in Africa for why they do not use the DSM are examined in this section. A critically analysis of some of the proposals for reform put forth by these countries is undertaken. The fate of the suggestions for reform made by the Africa Group will be examined. On May 16 2003, the Chairman of the Special Session, the body responsible for reviewing the DSM and making suggestions for reform issued a consolidated Chairman’s Text (Balas Text) which contained some but not all the proposals submitted by WTO Members. *See Annex 3*). Going forward, the Chairman’s Text was to form the basis for agreement.⁹³ A revised version of the Chairman’s Text was issued on 28 May 2003. As will be shown, while some of the suggestions advanced by the Africa Group and the LDC Group appear in the Chairman’s Text, many promising suggestions have been left out.

A. Concerns and Proposals for Reform

In this section, specific concerns that states in Africa have regarding the functioning of the DSM are examined and the merit and demerits of their suggestions for reform evaluated. The concerns have been arranged to correspond with the three phases of the WTO dispute settlement process (consultation phase, panel and Appellate Body phase, and implementation phase).

In assessing the proposals put forth by the Africa Group, several questions are asked: Would the proposals actually enhance the functioning of the DSU or would it impair or hinder its functioning? Do the proposals call for dramatic changes in the system? Would proposal make the dispute settlement mechanism more or less accessible to developing countries? Will suggested amendments diminish the security and predictability that the DSU currently offers? Would proposal result in an overly complex process which would make the system much more complicated and ultimately inaccessible to many Members? Analysis reveal that while some proposals introduce ideas that could significantly improve access to the DSM, other proposals for reform are vague and do not specify the specific changes countries in African want to see in place. Moreover, some proposals may not necessarily make the DSU more attractive to poor countries.

1. Pre-Panel Stage (Consultation and ADR Phase):

Consultations are widely regarded as flexible and effective means of settling international disputes. Concern of African states about this phase of the dispute settlement process relate to the absence of any remedy for loss that arise when a GATT-inconsistent measure is withdrawn by a responding state before, or in the course, of consultation and the rigidity of the rules on third party participation. As part of the LDC Group, some countries are concerned about the general failure of the DSU to address the problems LDCs are likely to encounter at the consultation phase.

a. Measures Withdrawn Before Finalization of Proceedings - Articles 3.6, 21, 22 of the DSU: The DSU does not address the problems that may arise for a complaining developing-country member in cases where a WTO-inconsistent measures complained of is withdrawn before the

⁸⁹ *Id.*

⁹⁰ TN/DS/W/17

⁹¹ TN/DS/W/15

⁹² TN/DS/W/17

⁹³ *See* Job (03)/91.

finalization of the proceedings.⁹⁴ Because the economies of most developing-country Members are small, “measures restricting their exports even if imposed for short periods will cause them serious injury or severe nullification and impairment of benefits.”

The African Group proposal calls for an amendment to the DSU to require compensation for cases where measures are withdrawn either prior to the commencement of proceedings⁹⁵ or in the course of consultations.⁹⁶ Under this proposal, only developed countries will be required to pay compensation for measures withdrawn before or during consultation.

The proposal for retroactive compensation would certainly make the DSM more attractive to poor countries. The proposal however introduces a new element in the WTO and is not likely to elicit considerable support from developed countries that are the direct target. It is not clear why developing countries are exempt from the requirement to pay compensation. The proposal does not address serious injury that states in Africa may suffer as a result of measures imposed by other developing countries. Exempting developing countries from the obligation to pay compensation could send a wrong signal to developing countries and could be interpreted as a license to adopt trade-restrictive measures.

The Chairman’s Text is silent on the question of retroactive compensation.

b. Inadequate Consideration of problems and interests of LDCs at

the Consultation Phase: As part of the LDC Group, some African countries have expressed concern that some of the provisions of the DSU do not specifically highlight and address the special problems of LDCs. For example, although Article 4:10 calls on WTO Members to give attention to the particular problems of developing countries during consultation, it is not LDC specific. The LDC Group proposed an amendment to Article 4:10 that will require that WTO Members “*give special attention to the particular problems and interests of developing countries Members especially those of least-developed country Members.*” Very few concrete suggestions for reform are advanced, however. The only concrete proposal was the suggestion that where a LDC is involved in the consultations, “due consideration should be given to the possibility of holding such consultations and other meetings in the capitals of LDCs.”

The Chairman’s Text incorporated the proposals advanced by the LDC Group regarding the possibility of holding consultations in the capital of a least-developed country Member when such a Member is a respondent in a case. It is not clear why the proposal does not extend to situations where a least developed country is a complainant. Nevertheless, this proposal if accepted will address the human and financial cost of participating in the DSM. For countries without a permanent mission in Geneva or countries with skeletal staff in Geneva, this proposal could result in significant cost savings. The proposal is likely to be accepted by the developed countries because it imposes very minimal obligation on them.

2. Panel and Appellate Body Phase:

Issues raised regarding this phase in the dispute settlement process are varied and include: concerns about the composition of panel, concerns about the unrestricted and interpretive power of panels and AB, and concerns about third party rights or lack thereof.

a. The Composition of Panels – Article 8:10: African states are concerned about the “still unbalanced representation of Africa on the panels and the Appellate Body.” They demand the presence of

⁹⁴ DSU, *supra* note 1, Articles 3.6, 21 and 22.

⁹⁵ TN/DS/W/15 (“There should be a further rule requiring that: measures withdrawn without or prior to the commencement of any proceedings under the DSU shall entitle a Member to compensation that shall be enforceable under the DSU at the instance of the Members affected.”)

⁹⁶ *Id.* (“There should be a rule providing that: measures withdrawn by Members in the course of consultations, shall be notified to the DSB as mutually agreed solutions in accordance with Article 3.6. Where the mutually agreed solutions are notified, the DSB shall recommend compensation of injury suffered by the Member.”)

a panelist from a developing country whenever there is a dispute involving a developing country. Although, Article 8.10 of the DSU provides for the participation of panelist from developing countries in disputes involving a developing country, it is demand-driven meaning that a country wishing to avail itself of this privilege must request it. The LDC Group proposed a modification of Article 8.10 to make it mandatory to have at least one panelist from a developing country whenever there is a dispute involving a developing country.⁹⁷

The proposal has two advantages. First, it obliges the WTO Secretariat to maintain on the roster of prospective panelists, trade experts from developing and least developed countries. Second, by making it automatic for Secretariat to include panelist from developing countries on the panel, the proposal could potentially shield countries wishing to utilize the provision from possible intimidation or embarrassment.

The Chairman's Text adopted some of the suggestions. Under the Chairman's Text, it will be mandatory to include a panelist from a developing country whenever a dispute is between a developing country and a developed Country Member "unless the developing country Member agrees otherwise." Equally, when a least-developed country Member is the respondent in a case, it shall be mandatory to have on the panel a panelist from a least-developed Country Member.

The repeated demand for inclusion of trade experts from developing world on panels in cases involving developing countries is based on the belief that the interest of developing countries will be better safeguarded if panelists from developing countries are involved in disputes involving developing countries. It is not entirely certain that having individuals from developing countries on panel will guarantee positive outcome for developing countries. While such a practice may enhance the credibility and legitimacy of the DSM, it may do nothing in terms of ensuring that a pro-development interpretive culture is institutionalized in the WTO. Furthermore, any advantage that could flow from having panelists from developing countries participate in cases involving developing countries is seriously undermined by the absence of opportunities for dissenting opinions or separate opinion. This is an area that calls for further studies. There is a need to identify, through a thorough analysis of decided cases, whether there are any noticeable differences in decisions of panel based on their composition.

b. Third Party Rights – Article 10 of the DSU: African states want clearer and more relaxed rules on third party participation. One problem relates to the qualification for admission as third parties in disputes before the WTO. To be admitted as a third party, a Member must demonstrate "substantial interest" in the matter before the panel. The Africa Group proposed an amendment to Article 10:2 to remove for developing-country Members, the requirement to demonstrate substantial interest in the matter as a precondition for admission as third parties. They also want developing-country Members to be admitted as third parties at whatever stage a case may be.

It is easy to see why African countries want the requirement of substantial trade interest to be removed. Given limited market share, it may be difficult for countries in Africa to demonstrate that they have "substantial interest" in matters before WTO panels.⁹⁸ While there is broad consensus on the need to enhance third party rights, it is unlikely that the suggestions advanced by the Africa Group will be accepted by the major users of the DSM. An amendment of the DSU to allow countries to be admitted as third parties at whatever stage a case may be may introduce considerable delay in a process that is already quite lengthy. Moreover, to remove the requirement for countries to demonstrate trade interest as a precondition for admission as third parties may create an unmanageable crisis for panels and the AB.

⁹⁷ TN/DS/W/17. The LDC proposed that Article 8.10 should be modified to read as follows:

"When a dispute is between a developing-country Member and a developed-country Member the panel shall include one panelist from a developing-country Member, and if the developing-country Member so requests, there shall be a second panelist from a developing-country Member."

⁹⁸ Cf. Mosoti, *supra* note 10, at 23 ("There will be very few disputes ... that a single African country cannot show a legitimate and sufficient trade interest.").

Although the Chairman's Text contains improvements to the right of third parties,⁹⁹ it is silent on the two proposals advanced by the Africa Group. The proposal concerning admittance as third parties at any stage of the proceeding, is addressed somewhat in Article 17.4 which stipulates: “[**Any Member not having notified its substantial interest pursuant to Article 10.2, but having subsequently notified its substantial interest to the Appellate Body and the DSB within 10 days after the date of the notice of appeal, shall also have an opportunity to be heard and to make written submissions to the Appellate Body.**.]”

The proposed amendment introduces some flexibility regarding third party participation as it allows a later participation as third party at the appellate phase of a dispute. It does not provide a license for inaction, however. Timely notification of intention to participate at this later stage is still needed.

3. Remedy and Implementation Phase

The lack of participation of African states and LDCs in the DSM has been linked to the inadequacies and structural rigidities of the remedies available to poor countries that successfully litigate a dispute before the DSM.¹⁰⁰ The absence of an effective implementation system also discourages weaker states from participating in the DSM.

a. **Inadequate Remedy -Articles 19.1, 21.8, 22.1, 22.2 of the DSU:** The remedy available to countries that successfully litigate a dispute before the DSM is very limited. Compensation is not mandatory and depends on mutual agreement between the particular countries involved in a dispute. African states are concerned that “the provisions and practice of compensation have not satisfactorily reflected the interests and injury suffered by industries of developing-country Members.”¹⁰¹ Loss suffered by a WTO Member as a result of, and for the duration of, the measures in breach of WTO obligations is not compensated. The African Group is of the view that compensation should be paid pending and until the withdrawal of the measures in breach of WTO obligations.

The proposal submitted by the LDC Group is along the same line. LDCs want the compensation provision under Article 22:2 to be made mandatory.¹⁰² They also make a strong case for monetary compensation.¹⁰³ Such monetary compensation, they argue, “should be equal to the loss or injury suffered and directly arising from the offending measure or foreseeable under the offending measure.”¹⁰⁴

⁹⁹ E.g., the Chairman's Text provides that panels “shall give third parties the opportunity to be present at the substantive meetings of the panels with the parties to the dispute preceding the issuance of the interim report to the parties.”

¹⁰⁰ TN/DS/W/17 (“The question of little or no utilization of the DS by developing and least-developed country Members has been linked to the inadequacies and structural rigidities of the remedies available to poor countries that successfully litigate a dispute before the DS. This amounts to disenfranchisement.”)

¹⁰¹ TN/DS/W/15.

¹⁰² TN/DS/W/17 (“In the light of the foregoing, LDCs propose that compensation under Article 22.2 should be made mandatory by the elimination of the phrase “if so requested” in that paragraph.”)

¹⁰³ TN/DS/W/17 (“This remedy is important for developing and least developed countries, and for any economy that suffers for the time that an offending measure remains in place. There is a need to clarify this provision to the effect that compensation should not take the form of enhanced market access if this will prejudice other Members and that monetary compensation is to be preferred.”)

¹⁰⁴ The proposal also reads:

There is a need to clarify this provision to the effect that compensation should not take the form of enhanced market access if this will prejudice other Members and that monetary compensation is to be preferred. Such monetary compensation should be equal to the loss or injury suffered and directly arising from the offending measure or foreseeable under the offending measure. The quantification of loss or injury to be compensated should always commence from the date the Member in breach adopted the offending measure. The panels and Appellate Body should be called upon to put to use the substantial experience of the DS system in calculating the level of nullification and impairment in effecting a transition to a monetary compensation system.”

Compensation is a very controversial issue in the WTO. From a practical standpoint, several questions arise. Who will be responsible for quantifying the injury? Are WTO panels and the AB qualified to calculate the level of nullification and impairment a country has suffered and the appropriate monetary compensation that need to be paid? What happens when the offending measure is adopted by a developing country? Would developing countries exempt from obligation to pay monetary compensation and why? What is the implication of a negative finding against an African state or a LDC? The issue of compensation is analyzed in detail in the succeeding section.

Under the Chairman's Text, at the request of a complaining party, the losing party would be obliged to "enter into consultation with a view to agreeing on a mutually acceptable trade or other compensation." Within a specified time-frame (20 or 30 days under the proposed amendment), the losing Member is expected to submit to the complaining Member, a proposal for mutually acceptable trade or other compensation.

Where the complaining party is a developing country Member, the proposal should take into account all relevant circumstances and considerations relating to the application of the measure and its impact on the trade of that developing country Member. In such cases, the suitable form of compensation should also be an important consideration. Where the complaining party is a least developed country Member, special consideration shall be given to the specific constraints that may be faced by such countries in finding effective means of action through the possible withdrawal of concessions or other obligations.

This falls far short of the proposal for compensation put forth by African states. There is no automatic right to compensation. It is also not very clear the nature of obligation this imposes on the losing party. Is this a "best efforts" obligation or is supervision of the DSB envisaged?

b. **Lack of Effective Enforcement – Article 22.2, 22.3 of the DSU:** Under the DSU, the ultimate mechanism for inducing compliance is the suspension of concession by the winning party. African states are of the view that the compliance mechanism is skewed against poor countries because the ultimate sanction allowed against an offending state is impracticable for poor countries.¹⁰⁵ The African Group suggests an amendment of the DSU to provide for "collective retaliation" against developed country Members along the following lines:

... in the resort to the suspension of concessions, all WTO Members shall be authorized to collectively suspend concessions to a developed Member that adopts measures in breach of WTO obligations against a developing Member, notwithstanding the requirement that suspension of concessions is to be based on the equivalent level of nullification and impairment of benefits.¹⁰⁶

Under this principle, all WTO Members would collectively have the right and responsibility to enforce the recommendations of the DSB. In the case where a developing or least-developed country Member has been a successful complainant, collective retaliation should be available automatically, as a matter of special and differential treatment.

While collective enforcement has been raised in academic circles and in the DSU review process, there is at present no consensus in the WTO on the subject. The Chairman's Text does not address collective enforcement and it is unlikely that the more powerful members of the WTO will agree to any radical reform of the system.

¹⁰⁵ TN/DS/W/15 ("However, realities are such that developing-country Members cannot practically utilize this ultimate sanction, as individual countries, against developed country Members. They would probably suffer further injury if they adopted retaliatory measures.")

¹⁰⁶ *Id.*

4. A Costly and Complicated System – Article 2 of DSU: African states are also concerned about the cost of utilizing the DSM.¹⁰⁷ Most countries in the region lack the financial, human and technical capacity to meaningfully access the system. To address the problem of cost, the Africa Group proposed the establishment of a permanent standing fund financed from the regular WTO budget and extra budgetary sources.¹⁰⁸ The establishment of a permanent standing fund would require an amendment of the institutional provisions of the DSU and is a move that is likely to be resisted by some powerful members.

Article 28 of the Chairman’s Text introduces the possibility of attorney fees. This proposal, if accepted would be welcomed by most developing countries. The proposal will undoubtedly encourage law firms to accept cases perhaps on a contingency basis. Article 28 reads:

[Members shall bear their own costs in procedures brought under this Understanding. However, a panel or the Appellate Body may decide to award, at the request of [the parties][one of the parties] to a dispute, an amount for litigation costs, taking into account the specific circumstances of the case, the respective conditions of the parties concerned and special and differential treatment to developing country Members. Where a panel or the Appellate Body decides to grant such costs, it shall be guided by principles to be determined in a decision by the DSB.]

First, the proposed Article 28 does not provide a right to recover litigation cost. Second, it is not clear if cost incurred at the pre-panel consultation phase is recoverable. While panels and AB will have considerable discretion in determining when to award litigation costs, much will depend on the guideline the DSB ultimately formulates. Although special and differential treatment to developing countries is listed as one of the factors to be taking into account, this article if accepted is likely to generate considerable debate regarding which country developing country will qualify and which will not. It will be up to individual countries in Africa to specifically demand the award of litigation costs and advance necessary justification for such a demand.

B. Conclusion

In conclusion, the concerns of African countries fall into five broad categories. First, are concerns relating to the human and material cost of accessing the DSM; second are concerns regarding the quality of remedies available under the DSU; third are concerns relating to compliance and implementation of favoring decisions once they have been secured. Fourth are concerns relating to the scope and effectiveness of existing S&DT provisions in the DSU. A final concern is the perceived insensitivity of the system to the development concerns of poor countries. Some of these concerns are addressed in greater detail in succeeding sections of this paper.

While some proposals put forth by the Africa Group lack specificity, some introduce novel ideas (e.g. compensation and collective retaliation) and are likely to be resisted. On the other hands, some proposals hold much promise and should have been included in the Chairman’s Text. Although the Chairman’s Text touched on a number of issues raised in the proposals by the Africa Group, many

¹⁰⁷ TN/DS/W/15 (para 3) “The DS is complicated and overly expensive, which has institutional and human resource as well as financial implications.”

¹⁰⁸ The Africa Group propose a new Article 28 in the following terms:

1. There shall be a fund on dispute settlement to facilitate the effective utilization by developing and least-developed country Members of this Understanding in the settlement of disputes arising from the covered agreements.

promising suggestions were ignored.¹⁰⁹ This is not surprising. Given the widely held perception in some circles that the DSM is working generally well, fundamental reform is unlikely at this point.¹¹⁰ The necessary political incentive needed to orchestrate fundamental reform simply does not exist. Indeed, in the Sutherland Report, the Consultative Board appointment by the WTO Director-General stressed that “an important underlying concern is, or should be, to not ‘do any harm’ to the existing system since it has so many valuable attributes.”¹¹¹ The fear is that the carefully-crafted judicialized dispute settlement system would be diluted and that some reforms would inject politics and diplomacy into the system. According to the Sutherland Report:

Some of the ideas for reform would create a sort of “diplomatic veto” or opportunity for specific disputants to “nullify” or change aspects of the final adopted report following a full dispute settlement procedure. To inject the opportunity for political or diplomatic activity to interfere with the basic results so carefully arrived at by the relatively intense dispute settlement procedure, would shift the emphasis away from reasoned advocacy, *with all sides having an equal and fair opportunity to their arguments and ideas*. For these reasons, the Consultative Board would strongly advise against any such measures as part of a reform package.¹¹²

V. CRITICAL ANALYSIS OF KEY BARRIERS TO EFFECTIVE UTILIZATION OF THE DSM

Three main factors that appear to discourage countries in Africa from participating in the DSM: cost/capacity constraints, the system’s rules on remedies or lack thereof, and the absence of effective mechanism for ensuring compliance. Although other developing countries share the concerns states in Africa have regarding the operation of the DSU, these countries are nevertheless attempting to utilize the system. It is therefore not fully known why some developing countries attempt to overcome some of the barriers to the effective utilization of the DSM and others do not. For example, India, a low-income economy according to World Bank classification has initiated sixteen cases in the DSM while South Africa, a lower-middle-income economy, is yet to initiate its first dispute. Although Egypt and Thailand are both classified as lower-middle income economies, Egypt is yet to initiate its first case while Thailand has initiated eleven disputes. Although the number of African countries participating as third parties is improving, the record is still low.¹¹³ Overall, statistics from the WTO show that developing countries are making increasing use of the DSM:

The first eight and a half years of the operation of the (WTO) dispute settlement system (from January 1995 to June 2003) have produced the following numbers. In total,

¹⁰⁹ Other issues addressed in the Chairman’s Text include: third party rights, consultation proceedings, compensation for litigation costs, sequencing of retaliation, remand authority of the Appellate Body, compliance procedure, and some aspects of Special and Differential Treatment for developing countries

¹¹⁰ Sutherland Report, *supra* note 3, 56 (observing that there are “a number of views-points expressed by governments and non-governmental observers that suggest a general sense of satisfaction with the dispute settlement system.”).

¹¹¹ *Id.* (emphasis omitted).

¹¹² *Id.* (bold emphasis in original omitted; italicized emphasis added.).

¹¹³ As part of the African, Caribbean, and Pacific Group of States (ACP Group), seven African countries participated as Third Parties in *EC-Export Subsidies on Sugar* (WT/DS266/21). The countries are: cote d’Ivoire, Kenya, Madagascar, Malawi, Mauritius, Swaziland and Tanzania.). Two countries (Benin and Chad) participated as Third Parties in *United States – Subsidies on Upland Cotton* (WT/DS267/AB/R).

Members have filed 295 requests for consultations over that period. In 124 of those 295 disputes, or in 42% of the cases, a developing country Member was the complainant. Since 2000, developing country Members were the complainants in nearly two thirds of all complaints (69 out of 110). In one year, 2001, developing country Members filed three quarters of all requests for consultations.¹¹⁴

Given the fact that some developing countries are making increasing use of the DSM, do cost concerns, absence of compensation and ineffective compliance mechanism sufficiently explain why no African country has initiated a case in the DSM and why only a few have participated as third parties? To the extent that they are indeed good explanations for the underutilization of the DSM, how are other developing countries addressing these problems? There are no easy answers to these questions. Empirical work on the DSM is in its infancy. While some recent studies shed some light on the different factors that influence the decision of developing countries about whether to participate in the DSM or not, more work in this area is called for.

Interviews with trade representatives of some developing countries that have utilized the DSM suggest that although cost is a concern and does affect decision whether or no to initiate a case, cost is only one of several key factors considered before a decision is made whether or not to initiate a case. Furthermore, some countries appear to have found creative ways to address the cost factor by, for example, involving the private sector and making effective use of the Advisory Centre on WTO Law (ACWL).¹¹⁵ Regarding technical capacity or lack thereof, some countries are also devising sustainable ways to achieve technical ability and train the next generation of trade experts. The idea here is not to trivialize the structural impediments developing countries face in utilizing the DSM or to suggest that fundamental reform of the DSU and other multilateral trade agreements is not urgently needed, but to highlight efforts by some countries to overcome these impediments. The ultimate goal is that there are useful lessons African countries can learn from the experiences of developing countries that have used the system. One lesson is the need for a country creative, cost-effective ways to address some of the problems they face in utilizing the DSM.

This section focuses particularly on cost (financial, technical and human) as a key factor that discourages poor countries from participating in the DSM. The paper will also reflect briefly on how the absence of appropriate remedies and a weak mechanism for ensuring compliance with panels and AB ruling operate to discourage economically weak countries from utilizing the system. Although very important factors, detailed discussion of remedies and compliance is beyond the scope of this paper.

A. Cost and Capacity Constraints

The DSM is resource-intensive and places a large premium on financial and legal capacity and technical expertise. To successfully identify disputes, a country must have the resources and expertise to consistently monitor and investigate activities of key trade partners. The problem is that most African countries do not have the financial, human and technical capacity to successfully identify and analyze disputes or initiate and pursue a case to conclusion.¹¹⁶ Out of the 41 African WTO Members, three are classified as upper-middle-income economies, seven as lower-middle-income-economies, and thirty one

¹¹⁴ WTO, *Dispute Settlement System Training Module: Chapter 12 (Evaluation of the WTO Dispute Settlement System – Results to Date*, http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c12s1p1_e.htm (1/1/05).

¹¹⁵ http://www.acwl.ch/e/members/members_e.aspx

¹¹⁶ Christina L. Davis and Sarah Blodgett Bermeo, *Who Files? Developing Country Participation in WTO Adjudication* (2005)(observing that on average, the developing countries who initiate WTO disputes have higher income than those who do not and that among other developing countries, “the median per capita GDP for those that have initiated a case is \$5,864 compared with \$4,895 for those that have never initiated a case.”).

as low-income economies. No African country falls into the high-income economic grouping. Additionally, Seventeen countries in Africa are classified as severely indebted, eleven are moderately indebted, twelve are classified as less-indebted, and one (Namibia) is not classified by indebtedness.

1. Studies Supporting Capacity Constraint Theory

Several studies support the claim that lack of capacity influences decisions about participation in the DSU. Guzman and Simmons argue that capacity constraints more than power symmetries feature in the calculation of developing countries whether to initiate a case. Contrary to the claim that power asymmetries strongly influence in the decision of developing countries whether or not to initiate a case, they found that “meager means produces highly targeted complaints aimed at the largest markets.” According to the authors;

“Where the ability to effectively detect and prosecute violators is low, governments will pursue only the largest cases involving the most lucrative markets. Surprisingly, limitations on a government’s capacity to litigate seem to be more important than the fear of political or economic retributions. Controlling for many alternative explanations, poorer complainants have tended to focus on the big targets, a strategy that is consistent with a tight capacity constraint rather than the fear of retaliation.”

The capacity constraint argument also finds support in the work of Busch and Reinhardt. The authors set out to investigate whether developing countries have secured more favorable trade policy outcomes in the WTO versus the GATT dispute settlement and the explanations for any differences in the outcomes realized by developed countries, as opposed to developing countries. They demonstrate convincingly that rich countries acting as complainants are more likely to extract concessions from defendants than are poor countries acting as complainants although the complaints income has no impact on the likelihood of winning before a panel or AB. They conclude that poor countries are affected by lack of capacity, but only in the pre-panel consultation/negotiation phase.¹¹⁷ They also conclude that “the move to the WTO has not actually reduced a poor complainant’s prospects of inducing concessions from a defendant; it has merely left behind the poorest complainants.”¹¹⁸ According to the authors:

“The complainant’s level of development speak directly to its capacity for recognizing, and aggressively pursuing, legal opportunities as a complainant. Having this capacity, a complainant is in a much better position to hit the right legal buttons in the request for consultations, to pressure the defendant on its weakest legal points during consultations, and to give the impression that the issue might well be pushed to a successful conclusion.”

The good news is that “legal capacity, as evidenced by level of development, ... matters less once the parties resolve to litigate, rather than settle,”¹¹⁹ the bad news is that a majority of the cases are resolved and meaningful concessions obtained at the pre-panel stage or before the final decision of a Panel.¹²⁰ Another bad news is that owing to capacity constraints, even when they participate in the DSM,

¹¹⁷ Marc L. Busch and Eric Reinhardt, *Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement*, *Journal of World Trade* 37(4): 719-735 (2003)(“Hence, the primary difficulty, from the poor complainant’s standpoint, lies early in a dispute’s origin, not in litigation once embarked upon, nor in the retaliatory endgame, despite the oft-noted (and valid) point that weak market power severely curtails a complainant’s leverage, even if it wins a ruling.”).

¹¹⁸ *Id.*, at 734,

¹¹⁹ *Id.*, at 732.

¹²⁰ *Id.*, at 733 (observing that wealthier nations realize more favorable outcomes that these gains are largely being made in advance of a ruling.).

developing countries tend to engage in “survival” litigation and can rarely afford to initiate and pursue cases for their value as precedent or their value in reputation building.¹²¹

Interviews with trade diplomats in Geneva confirm that cost is an issue. According to one official from the delegation of India in Geneva, key considerations in India’s decision regarding whether or not to initiate a dispute were trade interest and the industry affected.¹²² This official however noted that there were times when these prerequisites were satisfied and his country nevertheless chose not to initiate a case because of the financial implications of bringing the case. He gives example of a potential dispute in the textile sector. Even though there is a clear legal opinion suggesting that the country may have a good case, no decision has been made to proceed with the case. While this official is not sure the full reasons for the delay in initiating this case, he suspects that the delay may be because the finance ministry has not found the money. An official with the mission of Peru in Geneva also informed the author that key considerations in Peru’s decision whether or not to initiate a case included, the relative strength of the case, the financial implications and the volume of work involved.¹²³ This official pointed out the Peru had a small delegation in Geneva. Only four people focus on WTO matters and three of these four have additional responsibility to cover issues at the United Nations. For Brazil, key consideration in decision whether to initiate a case are: the legal and technical soundness of the case; the importance of the case in defending Brazil’s interests (private sector interest as well as national interest); and the relevance of the matter to be brought to the WTO taking into account the mandate of the organization and the need to avoid frivolous lawsuits because of the systemic implications of such actions.¹²⁴ Although cost is an issue, Brazil is finding creative ways to address the problem.

For many developing countries, therefore, lack of capacity is one of many factors that affect the decision whether or not to initiate a dispute. The good news is that where the necessary political will exists, the problem of lack of capacity could be easily remedied. What could be done?

i. At the global level:

a. Targeted Technical Assistance and Capacity Building: One lesson learned is that capacity matters not just in litigation before a Panel or AB but more especially in the pre-panel consultation phase.¹²⁵ There is genuine need for technical assistance and capacity building (TACB) directed at enhancing capacity particularly at the pre-panel phase of the dispute resolution process. Currently, developing countries receive minimal help at the initial pre-panel stage when help is seriously needed. Governments also devote the least money to the pre-litigation stage of the dispute process and are more likely to send own legal staff instead of hiring an outside attorney.

b. Address Factors that Exacerbate Capacity Constraints: Several factors exacerbate the capacity constraints African countries experience and need to be addressed either as part of the reform of the DSU or in the design of any TACB initiative. These include: growing complexity of trade law; the

Although Members filed 295 requests for consultations between the January 1995 and June 2003, the DSB ultimately established 110 panels between January 1995 and June 2003, showing the efficacy of consultation in the negotiating concessions. WTO, *Dispute Settlement System Training Module: Chapter 12 (Evaluation of the WTO Dispute Settlement System – Results to Date*, http://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c12s1p1_e.htm (1/1/05).

¹²¹ Guzman and Simmons, *supra* note 112, at 24. (observing that In other words, capacity constraints “relegate developing countries to tactical rather than strategic players in the international trade regime. Their necessary obsession with immediate net gains means they will likely be regime takers rather than regime makers for the foreseeable future.”)

¹²² Official of the Mission of India in Geneva. Telephone Interview by author. May 2005.

¹²³ Official of the Mission of Peru in Geneva. Telephone Interview by author. June 2005.

¹²⁴ Official of the Mission of Brazil in Geneva. Telephone Interview by author. June 2005

¹²⁵ *Id.* (Guzman and Simmons conclude that “developing countries are using the DSU in a way that reflects their current incapacity to launch effective legal cases against potential trade law violators.” Much of the difficulty developing countries face “is at the pre-complaint phase where a lack of human and technical resources reduces the ability to detect and develop a credible complaint.”)

growing length of panel and AB decisions; the duration of disputes; the depth and scope of negotiated agreements; the complexity of litigation; the absence of any provision for attorney fees or compensation.

Some of these problems could be addressed through better delivery of TACB. Others require that the S&DT provisions in the DSU and covered agreement be clarified and strengthened. The proposal in the Chairman's Text for the possible award of litigation costs will also go a long way in addressing these exacerbating factors.

c. **Devise Indicators for Measuring Capacity:** There is a need for appropriate indicators for measuring capacity. Currently, capacity is measured differently by different actors. However, some measure of standard can guide TACB efforts and may provide some guidance to panels and AB in those instances when they need to take into account the special situation of a developing country.

Some obvious indicators of capacity include: the financial resources available for dispute resolution, the quantity and quality of staff in Geneva; the quality and quantity of staff devoted to monitoring and identifying ripe cases at home; the quality of a country's bureaucracy.¹²⁶ Other possible indicators of capacity may not be too obvious and must not be ignored. Examples include: the number of colleges and graduate schools that offer courses in international trade law and international organizations more generally, the opportunities that for citizens to obtain first hand knowledge of the operations of the WTO, and the number of citizens that are ex-employees of the WTO Secretariat.

d. **An Independent Analytical and Enforcement Body:** Concerned by the fact that WTO-inconsistent cotton subsidies went unnoticed for a long time, Pedro de Camargo Neto asks whether the multilateral trading system needs an independent body with analytical and enforcement capabilities to ensure that agreements are actually followed.¹²⁷ Hoekman and Mavroidis also suggest the creation of an independent 'Special Prosecutor' as a way to 'multilateralize' the dispute settlement process.¹²⁸ Under their proposal, the independent prosecutor would have the mandate to identify and contest potential WTO violations on behalf of developing countries.

These ideas have some merit and should not be readily dismissed. As already noted in Section III, the Trade Policy Review Mechanism is not mandated nor is it equipped to identify country violations of negotiated agreements. An independent investigative and enforcement body will address some of the financial and human resource constraints associated with monitoring and identifying violators of negotiated agreement. The position of an independent prosecutor could also address the power concerns that may discourage a poor country from initiating a case against an economically powerful state.

Already burdened with the obligation to support on-going technical assistance and capacity building programs of the WTO, it is doubtful that developed countries will go along with any new plan that would impose new financial burden on them. Moreover, there is a possibility that such a system may become politicized and become polarized along the North-South divide on matters such as staffing, priorities and accountability. Developing countries could consider the possibility of establishing such an office on their own initiative.

ii. **Action at the Domestic Level:** There is a lot that states in Africa can do to address the resource constraints associated with utilizing the DSM. They could:

a. **Build experience Through Participation that Involve Lower Transaction Cost.** Practice makes perfect. This wisdom holds even for involvement in the WTO dispute settlement system. Participation is not an all or nothing endeavor. There are three different levels of participation: participation as a third party, participation as a co-complainant, and participation as the sole complainant.

Participating as a third party is the least costly form of participation in terms of time cost and financial cost. While some countries hire attorneys to represent the, many do not and are represented by

¹²⁶ *Id.*, at 14.

¹²⁷ Pedro de Camargo Neto, *What Next for the Cotton Trade? A View from Brazil*, BRIDGES, No. 4 (2005)

¹²⁸ Bernard M. Hoekman and Petros Mavroidis, *WTO Dispute Settlement, Transparency and Surveillance*, November 19, 1999.

own staff. Participating at this level will help African countries gain experience, build confidence, and, perhaps, influence the evolving jurisprudence of panels and AB.

For a country reluctant to initiate a case against a major trading party, joining in a dispute already initiated by others may reduce the legal, financial and political cost of litigation. It could also translate into more market power for enforcement and increase the chances of securing compliance since more countries are involved. This is essentially collective enforcement through the back-door.

b. **Tap into the resources and expertise of non-governmental organizations.** Some non-governmental organizations (NGOs) have the capacity to provide needed technical and legal expertise on subjects that fall within their mandate. They can help research complex technical and scientific issues. As the unofficial watch-dog of the MTS, NGOs can also be useful in educating the public about important disputes before the WTO and the details of negotiated agreements. The problem with this suggestion is that many governments in Africa do not have good relationship with civil society groups, domestic as well as international.

c. **National Plan of Action:** Working with all relevant domestic constituency and stakeholders, African leaders need to create awareness of multilateral trade rules and encourage private sector participation in the monitoring and enforcement of these rules. To do these, there is a need for governments to carefully articulate the role of trade in national development efforts and to effectively communicate these goals to domestic constituencies. In conjunction with civil society groups and the private sector, governments must also develop a national agenda for capacity building.

To help governments to better articulate the place of trade in national development efforts, develop national agenda for technical assistance and capacity building, develop local capacity for effective participation in WTO law, and establish viable relationship with the private sector, a checklist of issues is attached. (**Annex 4**). The list is not comprehensive or exhaustive and is still under construction.

(d) **Achieving Technical Ability in International Trade Law:** To effectively utilize the DSM now and in the future, strong, specialized and high quality bureaucracies are needed. In the short term, African countries could address the human resource constraint by utilizing the services of the ACWL, by hiring expertise from abroad, and by availing themselves of the training courses offered through different TACB initiatives. In the long term, these countries, perhaps in cooperation with donor organizations, must find cost-effective and sustainable ways to build a critical mass of local trade law experts. Brazil's new internship program deserves to be mentioned. Since 2003, Brazil has offered internship opportunities in Geneva to students.¹²⁹ The goal is to train and develop a critical mass of people with understanding of WTO law and processes. Interns are responsible for their stay in Geneva. The internship offers opportunity for candidates to be immersed in WTO proceedings. Interns have the opportunity to accompany government officials to WTO proceedings. There is no reason why states in Africa cannot develop innovative cost-effective training programs in order to create a critical mass of people with expertise in WTO Law. Brazil's example could be adapted in the light of African realities.

A hitherto neglected source of expertise in WTO Law is the African diaspora. Trained in some of the best schools in Europe and North America, many Africans in the diaspora have expertise in different aspects of WTO rules and are willing and ready to contribute their expertise to their governments but have so far been ignored. Such waste of human capital must have to stop. For a start, the different African embassies in Europe and North America could create a database of Africans with expertise in all the relevant fields.

e. **Effective Utilization of the ACWL:** Established in 2001, the purpose of the ACWL is to "provide legal training, support and advice on WTO law and dispute settlement procedure to developing countries." The ACWL offers legal advice on WTO law and support parties and even third parties in the WTO dispute settlement proceedings. It appears that there is a general satisfaction with the quality of work offered by the ACWL. The official from the Mission of Peru had nothing but praise for the ACWL. This official noted that the ACWL staff are always careful in preparing cases and that the quality of their

¹²⁹ Official of the Mission of Brazil in Geneva. Telephone Interview by author. June 2005.

work was excellent and quite comparable to those of the best law firms anywhere.¹³⁰ Equally the official from the Mission of India expressed satisfaction with the work of the ACWL noting that compared to hiring a law firm in Brussels or Washington, the close proximity of the ACWL was a big plus.¹³¹

Although the services of the ACWL are not free, least developed countries are given preference whenever a conflict of interest arises and are entitled to very reduced fees. It is not clear why African countries have not made effective use of the ACWL. Currently, only a handful of countries in Africa are members of the ACWL¹³². Although it is possible that countries are discouraged from becoming members by the one-time financial contribution to the Endowment Fund that is required of most Members, it is not a very plausible explanation for Africa's demonstrated disinterest in the services offered by the organization. There is a need for further investigation to understand better the reasons for this disinterest in the ACWL.

2. Democratic Orientation as Explanation for Under Utilization of the DSM

New studies suggest that the political orientation of a country could also explain variation in the use of the DSM by developing countries. Davis and Bermeo argue that democracies are more likely to use the DSM "because they have greater familiarity with judicial processes of dispute resolution and are more responsive to business pressures."¹³³ In agreement with similar findings in the literature, Marc Busch argues that democracies make greater use of formal third-party adjudication.¹³⁴ He finds, however, that although these dyads prefer third-party adjudication, "they are no more likely than other dyads to make concessions as a result." On the contrary, highly democratic dyads are more likely to make concessions, but only in the consultation phase and not in the panel phase of the dispute settlement process.

The finding about the influence of political orientation on decision to initiate a case in the DSU is interesting. It does appear that democratic governance not only provides incentive for political leaders to be more responsive to business pressures but ensures that governments invest in building relationships with the private sector. My interviews with diplomats show that most often the decision to initiate a dispute is a direct result of domestic pressure from a specific export interest harmed by the activities of a foreign government. There are two advantages that could flow from improved relations between the government and the private sector. First, the private sector can provide the government with timely and cheap information about unfair trade practices of a third country. Second, the private sector can bear the cost of litigating a case to conclusion in the DSU.

a. **Formal and Informal Monitoring and Enforcement Mechanisms:** The private sector is in a good position to provide governments with timely information about unfair trade practices of third countries. The private sector plays a big role in the decision of numerous countries regarding whether to initiate a dispute or not. According to the official with the delegation of India in Geneva, except for the Shrimp case, all the sixteen cases India has initiated came to the government's attention from the affected industry.¹³⁵ The private sector also plays a significant role in bringing unfair foreign trade practices to the attention of the Brazilian government. Although the government does not have formal mechanisms for receiving complaints about unfair foreign trade practices, there are informal mechanisms for business interests to complain to the government.¹³⁶

A government is seriously handicapped if relationship with the private sector is non-existent and communication channels are weak. Shaffer has demonstrated the strong influence of private interests in

¹³⁰ Official of the Mission of Peru in Geneva. Telephone Interview by author. June 2005.

¹³¹ Official of the Mission of India in Geneva. Telephone Interview by author. May 2005.

¹³² A least developed country as designated by the United Nations as Least Developed Countries is entitled to the services of the ACWL without being a Member provided the country is a member of the WTO.

¹³³ Davis and Bermeo, *Who Files? Developing Country Participation in WTO Adjudication* (2005).

¹³⁴ Marc L. Busch, *Democracy, Consultation, and the Paneling of Disputes under GATT*, *The Journal of Conflict Resolution*, Vol. 44 No. 4, 425-446 (August 2000).

¹³⁵ Official of India's delegation in Geneva. Telephone Interview by author. May 2005.

¹³⁶ Official of the Mission of Brazil in Geneva. Telephone Interview by author. June 2005.

the decision of the U.S. government to initiate a case in the DSU and their role in the conduct of cases once they have been initiated.¹³⁷ He rightly notes that in the EC and the United States, formal and informal legal mechanisms exist to enable the respective governments identify foreign trade barriers, to prioritize them according to their impact, and to mobilize resources for participation in the DSM. Marco Bronckers demonstrates that although excluded from the WTO processes, the private sector can participate in the enforcement of WTO law.¹³⁸

The European Community Trade Barriers Regulation is a good example the use of legal mechanism to involve the private sector in the enforcement of WTO law.¹³⁹ The Trade Barrier Regulation is a Community mechanism for identifying and responding to foreign unfair trade practices. Very similar to Section 301 compliant procedure in the United States,¹⁴⁰ under the Regulation, private parties can complain about illegal practices of third countries and request the EC authorities to intervene.¹⁴¹ By fine-tuning the procedural and substantive requirements of the complaint procedure, a government can inexpensively gather credible and very specific information about the unfair trade practices of third countries and legal arguments about specific violations of WTO rules. Substantively such a complaint procedure can be limited to cases of violation of multilateral agreements as opposed to practices that are simply unfair.

a. **True Financial Partnership:** African states need to establish better relationship with the private sector. The Government of Pakistan also depends on the private sector to bring potential disputes to the attention of the government.¹⁴² Not only has the private sector brought cases to the governments attention, the private sector has also helped pay for the cost of hiring attorneys. In one case the affected sector bore 50 percent of the legal costs.¹⁴³ Peru has initiated two cases in the WTO and in both cases the private sector involved hired and paid for the attorneys that represented the country.¹⁴⁴ The private sector also takes care of the legal expenses in most of the cases Brazil has initiated. Under the Brazilian model, the private sectors hires a law firm even before approaching the government and offers the services of the law firm to the government. In other words, the government has no involvement in hiring lawyers no does the government ever see the bill.

In conclusion, studies demonstrating the influence of political orientation on decision whether or not to participate in the DSM are also very illuminating. These studies point to the need for governments in Africa to: establish a democratic culture in the continent; improve channels of communication with the private sector; and create formal and informal mechanisms that will engage the private sector in the task of identifying foreign trade barriers and mobilizing resources for participation in the DSM.

3. Power Asymmetries as Reason for Underutilization of the DSU

Do asymmetries of power between states influence the decision of weaker countries whether to participate in the DSM or not. And, do power asymmetries have any significant bearing on the outcome of disputes? Davis argues that pre-determined rules and procedure effectively constrain the exercise of power by stronger states against weaker ones.¹⁴⁵ While finding strong support for the argument that developing countries are constrained by their lack of capacity from initiating disputes, Guzman and

¹³⁷ Gregory Shaffer, *How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies* (2003) (on file with author).

¹³⁸ Marco C.E.J. Bronckers, *Private Participation in the Enforcement of WTO Law: The New EC Trade Barriers Regulation*, COMMON MARKET LAW REVIEW 33: 299-318 (1996).

¹³⁹ The Trade Barriers Regulation replaces the New Commercial Policy Instrument (NCPI), Council Reg. 264/84, O.J. 1984, L 252/1.

¹⁴⁰ See Section 301 of the Trade Act of 1974, as amended (19 U.S.C. § 2411).

¹⁴¹ Bronckers, *supra* note 124, at 300.

¹⁴² Official of Pakistan's delegation in Geneva. Telephone Interview by author. May 2005

¹⁴³ Official of Pakistan's delegation in Geneva. Telephone Interview by author. May 2005

¹⁴⁴ Official of Peru's mission in Geneva. Telephone Interview by author. June 2005

¹⁴⁵ Davis, *Do WTO Rules Create a Level Playing Field for Developing Countries?* Prepared for delivery at the 2003 Annual Meeting of the American Political Science Association, Philadelphia, August 28-31, 2003.

Simmons, found no evidence consistent with the hypothesis that politically weak states are deterred from initiating disputes against politically powerful states for fear of retaliation. Although their finding appear to support the theory that in a judicialized dispute settlement right prevails over might and the role of bargaining power is reduced,¹⁴⁶ some scholars nevertheless suggest that power is an issue not only in the legislative arm of the WTO but also in the DSM. According to Mosoti:

Developing countries, particularly those in Africa are ... subject to the vagaries of global power asymmetries. Many of them receive aid or some form of development assistance from much of the developed world. Generally, this kind of relationship does not bode well in a litigation climate. The poor countries are bound to receive threats or subtle warnings to the effect that their aid package will be withdrawn if they file a dispute against their benefactor. These kinds of threats work very effectively because the repercussions of aid withdrawal are debilitating on the economies.¹⁴⁷

There are two possible two ways that power could influence decision whether to initiate a case or not. First, an economically weak may refrain from initiating a case against a powerful country out of fear of some time of retaliation or punishment. Second, an economically weak country may be discouraged from initiating a case because of the absence of any credible mechanism for ensuring compliance and the impracticability of retaliation. While there are few studies to confirm the former, there is sufficient evidence to validate the later. The inability to threaten retaliation has also been shown to be a factor that affects the concessions developing countries can expect to negotiate at the pre-panel consultation phase and the degree of compliance once a favorable decision is secured.¹⁴⁸

More studies are needed in this area. It is still not known how political considerations actually shape the decision whether or not to participate in the DSM. Certainly, powerful countries have many tools at their disposal to punish states that initiate cases against them such as reduction or removal of foreign aid, elimination of trade preferences, frustration of negotiations on key agreements when the erring state stands to benefit, cut in inter-state relations, and even in-kind retaliation. It is not known, however, if they actually utilize these tools. Understandably, few countries ever admit to succumbing to political pressure from foreign governments or being the victim of political intimidation.

In conclusion, income and lack of capacity do not fully explain why some developing countries utilize the DSU and others do not.¹⁴⁹ Political orientation, specifically democratic institutions, may also provide persuasive explanations for why some developing countries utilize the DSM and others do not. It does not however explain why some very democratic, high income countries, for example Denmark, have never participated in the DSM as a complainant. Additional factors that explain variations in the use of the DSM include: trade interest,¹⁵⁰ market share,¹⁵¹ and bilateral trade dependence. More studies are

¹⁴⁶ See generally Keohane, Robert, Andrew Moravcsik and Anne-Marie Salughter, *Legalized Dispute Resolution: Interstate and Transnational*, INTERNATIONAL ORGANIZATIONS 54:457-488 (2000); John H.. Jackson, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS (1997).

¹⁴⁷ Mosoti, *supra* note 10, at 15.

¹⁴⁸ Busch and Reinhardt, *supra* note 113; Chad Bown, *Developing Countries as Plaintiffs and Defendant's in GATT/WTO Trade Disputes*, WORLD ECONOMY 27: 59-80 (2004); Chad Bown, *On the Economic Success of GATT/WTO Dispute Settlement*, THE REVIEW OF ECONOMICS AND STATISTICS 86: 811-823 (2004).

¹⁴⁹ Horn, Henrik, Petros Mavroidis and Hakan Nordstrom, *Is the Use of the WTO Dispute Settlement System Biased?* Center for Economic Policy Research Discussion Paper 2340 (finding a weak correlation between GDP per capita and the degree of participation in the DSM as a complainant.).

¹⁵⁰ Cf. In their study, Davis and Bermeo found that trade interest had no significant effect on the number of cases filed. The authors conclude that trade as a percentage of GDP fails to have a significant effect on initiation.

¹⁵¹ Horn, Henrik, Petros Mavroidis and Hakan Nordstrom, *Is the Use of the WTO Dispute Settlement System Biased?* Center for Economic Policy Research Discussion Paper 2340 (1999)(showing the existence of a correlation between the diversity of a country's export and the number of cases such a country is likely to initiate and/or face.

needed. There is still very little explanation for why some developing countries utilize the DSM and others, some at the same level of income, decide not to utilize the DSM. Clearly, income levels alone do not account for why some countries use the system and others do not.

B. Remedies

A considerable body of excellent literature now exists on the limitations on the remedies available under the WTO.¹⁵² As a result, this paper will not address the issue of remedies in detail. Essentially, WTO rules provides for cessation and non-repetition of a measure once a panel or the AB has ruled that the measure is WTO-inconsistent. By calling on a losing party to immediately withdraw a measure, the rules ensure that trade disputes are resolved in a peaceful manner and that the situations that harm the trade interest of complainants are dealt to prevent further loses. There is no right to compensation. Compensation is offered bilaterally; WTO rules provide for “mutually acceptable compensation.” Finally, there is no clear provision for retrospective remedy (restitution).

Simply put, even if African states have the resources to utilize the DSM and secure favorable panel and AB rulings and recommendations, there are no monetary compensations for economic loss suffered as a result of the imposition of a WTO-inconsistent measure by the losing party. The absence of remedies is a problem that even the WTO acknowledges.¹⁵³

The proposal put forth by the Africa group regarding financial compensation deserves serious consideration. It is unfortunate that some countries have strongly resisted the idea. Undoubtedly, there are some problems associated with compensation: First, it creates a buy out problem. A compensation scheme may provide a license for rich countries to “buy out” from their WTO obligations. Second, the repercussions on developing countries will be considerable if they are subjected to similar obligations. Third, compensation as remedy may be rejected by domestic constituencies especially in legal systems where such compensation is prohibited. Other issues to consider include, the danger that such an option may ignore the rights of third parties, the difficulties associated with valuation, and the danger the compensation option may pose to the goal of establishing a predictable rule-based system.¹⁵⁴ These problems should not foreclose all discussions regarding financial compensation. Where the necessary

¹⁵² See generally, Lowenfeld, Andreas F., *Remedies Along with Rights: Institutional Reform in the New GATT*, 88 A.J.I.L 477 (1994); Henrik Horn and Petros C. Mavroidis, *Remedies in the WTO Dispute Settlement and Developing Country Interests*, (April 11, 1999) (on file with author); Sungjoon Cho, *The Nature of Remedies in International Trade Law*, 65 U. PITT. L. REV. 763 (2004); Robert E. Hudec, *The Adequacy of WTO Dispute Settlement Remedies: A Developing Country Perspective*, in DEVELOPMENT, TRADE AND THE WTO: A HANDBOOK 81-84 (Bernard Hoekman et al. eds., 2002); John H. Jackson, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to “Buy Out”?*, 98 A.J.I.L. 109 (2004).

¹⁵³ WTO, *Evaluation of the WTO Dispute Settlement System: Results to Date*, http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c12s3p1_e.htm (visited 1/1/05). According to the WTO:

“[f]ull dispute settlement procedure still takes a considerable amount of time, during which the complainant suffers continued economic harm if the challenged measure is indeed (WTO)-inconsistent. No provisional measures (interim relief) are available to protect the economic and trade interests of the successful complainant during the dispute settlement procedure. Moreover, even after prevailing in dispute settlement, a successful complainant will receive no compensation for the harm suffered during the time given to the respondent to implement the ruling. Nor does the “winning party” receive any reimbursement from the other side for its legal expenses. In the event of non-implementation, not all Members have the same practical ability to resort to the suspension of obligations.

¹⁵⁴ Sutherland Report, *supra* note 3, at 54.

political will is present, it is possible to find solution to some of these problems and at the same time provide a firm legal basis for the award of compensation.

C. Compliance

A considerable body of excellent literature now exists confirming the claim of states in Africa that the WTO lacks effective means to enforce panels and AB rulings.¹⁵⁵ Under WTO rules, enforcement of panels and AB ruling is privatized. WTO rules permits a losing party to retaliate through the “suspension” of concessions. The effectiveness of retaliation as a means for enforcing decisions of panels and AB has been questioned. Moreover, by privatizing sanctions, the DSU “invites the rule of the jungle”¹⁵⁶ because it allows a losing party to move the conflict outside the legal framework of the WTO and into the area of international politics.¹⁵⁷ In the jungle of international trade politics, small, poor, and aid-dependent countries do not stand a chance.

In effect, absent voluntary compliance by a losing party, an economically weak country harmed by a measure taken by a major player has no means within the WTO framework to prevent continued losses, induce change in the behavior of the major player or deter unlawful behavior.¹⁵⁸ Even if a complaining poor country had some meaningful concession to suspend, taking such an action is likely to harm the complaining party than the losing party.

There is a need for further examination of how the WTO’s privatized rules on sanctions harm poor countries. The idea of ‘multilaterizing’ the sanctions scheme of the WTO has been suggested and should not be too readily dismissed. In their joint proposal, states in Africa raised the idea of collective retaliation. This suggestion was quickly dismissed as unworkable and is not mentioned in the Chairman’s Text. Unfortunately, the provisions in the DSU that purport to strengthen the position of developing countries are largely ineffective as discussions in the next section reveal.

Although the weak, privatized sanction mechanism of the WTO poses a real problem for economically weak countries, the history of the GATT/WTO suggests that often retaliation is not required to enforce negotiated agreements. There are numerous examples of instances when a powerful Member has voluntarily complied with negative rulings of Panels and AB in favor of a weak Member.¹⁵⁹ Altogether, there have been a total of fourteen compliance disputes under Article 21.5 of the DSU and according to the WTO, “[o]nly seven times has the DSB granted authorization to a complainant to suspend obligations, and in all seven cases, arbitration took place because the respondent disagreed with the complainant’s proposal for the suspension.”¹⁶⁰ In other words, rarely has a losing Member simply chosen not to comply with a ruling. Moreover, Davis rightly notes that “some of the most outstanding compliance failures are cases where retaliation by the U.S. or EC was authorized” suggesting that economic strength does not always bring about compliance.

At present, assuming they are able to initiate disputes and are successful, states in Africa should when feasible exercise the right to cross retaliation provided for in the DSU. They can also try to make effective use of “enforcement powers that exists independent of retaliatory capacity.”¹⁶¹ These include:

¹⁵⁵ See generally Joost Pauwelyn, *Enforcement and Countermeasures in the WTO Rules: Rules Are Rules - Towards a Collective Approach*, 94 AM. J. INT’L. L. 335 (2000); Hudec E. Robert, *INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM* (1993).

¹⁵⁶ Sungjoon Cho, *The Nature of Remedies in International Trade Law*, 65 U. PITT. L. REV. 763 (2004).

¹⁵⁷ Henrik Horn and Petros C. Mavroidis, *Remedies in the WTO Dispute Settlement and Developing Country Interests*, 17 (April 11, 1999)

¹⁵⁸ *Id.*

¹⁵⁹ See *United States – Standard for Reformulated and Conventional Gasoline*, WT/DS2/1; *United States – Restrictions on the Import of Cotton and Man-made Underwear*, WT/DS24/1.

¹⁶⁰ WTO, *Evaluation of the WTO Dispute Settlement System: Results to Date*, http://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c12s3p1_e.htm (visited 1/1/05).

¹⁶¹ Christine Davis, *DO WTO Rules Create a Level Playing Field for Developing Countries?* (2003).

the pressure on developed countries to uphold the credibility of the MTS, “shaming”,¹⁶² and direct pressure from civil society groups. Because developed economics created the GATT/WTO System, the pressure is always on them to ensure that the credibility of the system is preserved. There is need for more studies on what factors motivate powerful states to comply with unfavorable panel or AB decisions

C. Conclusion

Although we know some of the factors that discourage states in Africa from utilizing the DSM, there is a lot that is not known. Clearly income alone is insufficient to explain the under-utilization of the DSU by states in Africa. Income does not explain why some high income countries have never initiated a case in the WTO while some lower income countries are frequent players or the variations of use among developing countries. There is need for more work on the relationship between political orientation and level of participation in the multilateral trading system. There is also need for further studies on the influence of power on decisions of political leaders not to antagonize powerful states by initiating disputes against them. The reasons why states in Africa have not utilized the services of the ACWL despite opportunity that exist to obtain high-quality legal services at a significant discount also deserve more attention. The hesitation to use the services of the ACWL suggests that there are many other reasons unrelated to cost that explain the low participation of African countries in the DSM.

What is known is that cost considerations play a big role in decisions of countries to utilize the DSM. Lack of capacity discourages poor countries from making use of the resource-intensive judicialized system of dispute resolution. To address the capacity constraints technical assistance and capacity building efforts must be scaled up, made to extend to the private sector, and routinely monitored for their effectiveness. There are also efforts that African states can take on their own to improve their options and chances of effective participation in the future.

For several other reasons unrelated to the factors already discussed, a state may decide not to utilize the DSM. For example, it may be that states in Africa simply need more time to acquaint themselves with the growing number of multilateral trade agreements. African states certainly need time to internalize the new rules. They need time to understand the new rules and to make these rules part of the usual routine of administration of trade agreements.¹⁶³ Also, in deciding whether or not to participate in the DSM, the opportunity cost of utilization cannot be ignored because “a country with limited capacity faces larger opportunity costs when it brings a case.”¹⁶⁴ As Guzman and Simmons rightly note: “[w]hen well-trained and capable officials investigate and pursue a complaint, they are taken away from other work. The more limited the capacity of a government, the more difficult it is to find appropriate people to staff a case and so make up for the work that these people would otherwise be doing.”¹⁶⁵

Finally, as discussions in the succeeding section suggest, some reform of the S&DT provisions of the DSU will be needed. While the usefulness of S&DT provisions are questioned given their underutilizations, some of the provisions are still needed and need to be strengthened to make them useful to countries that wish to use them.

VI. SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS, AFRICAN STATES AND THE DSU: A CRITIQUE

¹⁶² *Id.* (observing that “When compliance is not motivated by the actual retaliation from the individual participant to the dispute, then market power becomes unimportant—even small states are able to use rules to shame and punish the bigger state.”)

¹⁶³ José Luis Pérez Bagilondo, *Developing Countries in the WTO Dispute Settlement Procedures: Improving their Participation*, *JOURNAL OF WORLD TRADE LAW* 35(4): 483-488, (2001).

¹⁶⁴ Guzman and Simmons, *supra* note 112, 8.

¹⁶⁵ *Id.*, at 7.

Attempts have been made to address the problems developing countries experience utilizing the DSM. These have come primarily in the form of S&DT provisions in the DSU. However, existing provisions of the DSU purporting to accord special rights to developing countries are not frequently invoked by their intended beneficiaries? The WTO acknowledges that while some S&DT provisions have been used frequently, others “have not yet had any practical relevance

This section focuses on the special privileges accorded developing countries in the DSU. The reasons why these provisions have rarely been invoked by their intended beneficiaries are examined. In the light of discussions in the two preceding sections, suggestions for reform are offered.

A. Special and Differential Treatment and the WTO Dispute Settlement System

Provisions of the DSU which give developing countries and LDCs special rights include Articles 3.12, 4.10, 8.10, 12.10, 12.11, 21.2, 21.7, 21.8, 24 and 27.2. These provisions offer a broad range of rights and flexibilities to developing countries.

1. **An Exit Clause:** Article 3.12 of the DSU allows a developing country complainant, in cases initiated against a developed country, to invoke, as an alternative to the provisions contained in Articles 4, 5, 6 and 12 of the DSU, the corresponding provisions of the Decision of 5 April 1966 (the “Decision”).¹⁶⁶ The corresponding provisions of the Decision entitle developing countries to the good offices of the Director-General of the WTO and to shorter time limits in panel proceedings. The goal of the shorter time frame is perhaps to reduce the time cost and resource cost of using the system while the goal of the good offices provision is to ensure the continuing availability of some diplomatic options for countries that wish to use it.

Article 3.12 suffers some limitations. It applies only when a developing country is a complainant in a case. Second, the good offices of the Director-General apply only to consultation phase of the dispute settlement process and is therefore of limited utility. Third, after two months if no mutually satisfactory solution is reached, a panel will still have to be established. Nothing prevents a developed country from dragging its foot until the stipulated time expires. Although the panel that is eventually established pursuant to this procedure is expected to take due account of all circumstances and considerations relating to the application of the challenged measures, and their impact on the trade and economic development of the affected Members, it is doubtful whether this imposes any real obligation on the panel. Not surprising, the section has never been invoked in the WTO and was invoked a few times under GATT.¹⁶⁷

2. **A Due Consideration Clause:** The first step for any country intending to utilize the DSM is to request for consultation. The idea is to provide opportunity for possible friendly settlement in a non-adversarial, private setting. Article 4:10 provides that “[d]uring consultations Members should give special attention to the particular problems and interests of developing country Members.” The goal of this provision is to address the problems poor countries experience at the pre-panel phase of dispute resolution.

The main problem with Article 4.10 is that the provision is vague. It does not specify how “special attention” is to be given to the particular problems and interests of developing countries during

¹⁶⁶ BISD 14S/18.

¹⁶⁷ Panel Report, *EEC — Member States’ Import Regimes for Bananas*, 3 June 1993, unadopted, DS32/R. The procedure was invoked by Chile (1977, Malted barley), India (1980, leather imports) and Mexico (1986, US Superfund tax) with mixed results. CUTS Centre for International Trade, Economics & Environment, *Dispute Settlement Under the GATT/WTO: The Experience of Developing Nations*, Briefing Paper No. 4/2000. Roessler, *supra* note 5 (observing that under GATT, developing countries resorted to the good offices procedure six times and none resorted to the expedited panel procedure,

consultation”¹⁶⁸ or provides the means for determining the level of compliance by WTO Members with this provision. Where the complaining party is a developed Member, does it have an obligation to explain in its submission to the panel how it has paid special attention to the particular problems of the responding developing country? Where the defending party is a developed Member, should it be mandatory for it to explain in its submission to the panel, how he addressed or paid special attention to the interest of the complaining developing country? In both cases, should the developing country Member have a duty to bring to the attention of the party on the other side the particular problems it is having as a developing country? And finally, should the panel seized of the matter pay any attention to these submissions? Should WTO panels be empowered to make determinations on whether or not a Member has appropriately taken into account the problems and interests of developing countries? The Chairman’s Text does not address most of these questions but does provide for the possibility of holding a consultation in the capital of a least developed country Member.

A second problem with Article 4.10 is that it is not clear the nature of obligation it imposes on developed countries or on the DSB as the supervising body. Although the use of the phrase “should” instead of “shall” suggests that the obligation imposed therein is not mandatory, these labels are not dispositive. In the Chairman’s Text of proposed amendment to the DSU “should” is replaced with “shall.” Whether such changes are merely cosmetic remains to be seen.

4. Flexibility in Time-Frame: Where a developing country is a defendant, Article 12.10 provides that “the parties may agree to extend the periods established” in the DSU for consultations. If after the relevant period has elapsed, the consulting parties cannot agree that the consultations have concluded, “the Chairman of the DSB shall decide, after consultation with the parties, whether to extend the relevant period and, if so, for how long.” Currently, it is entirely up to the discretion of the DSB Chairman whether to extend the consultation period and, if so, for how long.¹⁶⁹ This provision demonstrates institutional appreciation of the problems a developing countries face preparing necessary documentation for trial.

The Chairman’s Text does not introduce any radical changes. Under the proposed amendment, if parties cannot agree to extend the period of consultation, “the developing country Member concerned may request the Chairman of the DSB to extend the relevant period.” The Chairman of the DSB shall decide after consultations with the parties, whether to extend the relevant period and if so, for how long. The only guideline for the Chairman is that “such extension should normally not exceed 15 days from the date of expiry of the relevant period.”¹⁷⁰

Article 12:10 also authorizes a panel in a given case to accord “sufficient time for the developing country Member to prepare and present its argumentation.” How much additional time a panel can give a developing country that so request is not explicitly stated nor is much guidance provided. The panel is, however, constrained by the concluding sentence, “[t]he provisions of paragraph 1 of Article 20 and paragraph 4 of Article 21 are not affected by any action pursuant to this paragraph.” This means that extensions may be granted provided such extensions do not affect the overall time-frames set out in the DSU. India invoked the provision regarding extension of time to prepare defense and got 10 extra days to prepare its first written submission.¹⁷¹ Given their lack of human and material resources, many countries will need more than a few extra days to prepare their argumentations. The Chairman’s Text addresses some of these concerns and reads:

¹⁶⁸ South Centre, *Issues Regarding the Review of the WTO Dispute Settlement Mechanism*, T.R.A.D.E. Working Papers (1999). Available at < <http://www.southcentre.org/publications/trade/toc.htm#TopOfPage>> (1/1/05).

¹⁶⁹ See TN/DS/W/19, page 3.

¹⁷⁰ Chairman’s Text, Article 4 (Paragraph 10bis).

¹⁷¹ Panel Report, *India — Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, adopted 22 September 1999, as upheld by the Appellate Body Report, WT/DS90/AB/R, DSR 1999:V, 1799.

Where the party complained against is a developing country Member, the panel shall, in determining its timetable, take due account of any particular problems faced by that Member, and afford it sufficient time to present its written submissions, normally no less than 15 additional days for the first submission and 10 additional days for the rebuttal submissions. The time-frames provided for in paragraph 1 of Article 20 and paragraph 4 of Article 21 may be extended as necessary to apply this provision.]¹⁷²

The proposed amendment introduces some flexibility. It allows a panel to look closely at the peculiar circumstances of a developing country Member. Two points must be noted though. First, it will be up to a developing country needing extension to clearly articulate the particular problem that warrants the grant of unusual extensions. Second, even in deserving cases, it is unlikely that the provision can be used to obtain extraordinarily long extension. In other words, the provision is not a solution to the capacity constraints that work against effective participation in the DSM.

5. Due Consideration in Panel Reports: According to Article 12:11 “[w]here one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favorable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures.”

This provision suffers many defects. First, it does not indicate whether the developing country involved in a dispute has a duty to raise the relevant S&DT provisions as part of its pleadings. Second, it does not indicate the obligation, if any, on a developed country member to address any arguments relating to S&DT that may be raised by a developing country member. Finally, it is ambiguous on the depth of analysis called for in panel recommendations.¹⁷³

The proposed amendment in the Chairman's Text addresses some of these ambiguities but also raise new problems. Article 12.11 of the Chairman's Text reads:

(a) a developing country Member wishing to avail itself of any provisions on differential and more favourable treatment for developing country Members that form part of the covered agreements should raise arguments on these provisions as early as possible in the course of the procedure;

(b) the submissions of any other party to the dispute, that is not a developing country Member, should address any such arguments which have been raised by a developing country Member party to the dispute;

(c) the panel's report shall explicitly take into account and reflect the consideration given to any provisions on differential and more favourable treatment for developing country Members that form part of the covered agreements which have been raised by a developing country Member party to the dispute.

¹⁷² Footnote omitted.

¹⁷³ A report from the South Centre notes that “[g]enerally, this provision has been complied with to the extent that whenever a developing country Member has invoked any special and differential treatment provision in the WTO agreements before a panel, the panel's response is made in its report.” However, the report further notes that to date, no panel report has explicitly cited Article 12.11 in either the “Finding” section or in the description of the party's argument.”¹⁷³ South Centre, *Issues Regarding the Review of the WTO Dispute Settlement Mechanism*, T.R.A.D.E. Working Papers 13 (1999). Available at <<http://www.southcentre.org/publications/trade/toc.htm#TopOfPage>> (1/1/05).

Two aspects of the proposed amendment are significant. First, the burden will be on African state to identify and analyze the S&DT provisions in covered agreements and bring such provisions to the attention of the panel and other parties to the dispute. Second, the provision obliges developed countries to respond to the arguments regarding application of the S&DT provisions when they are raised. This may put pressure on the major player to openly demonstrate their commitment to level the playing field.

The biggest weakness of Article 12.11 is the fact that the S&DT provisions in most of the covered agreements are weak and ambiguous. Sadly, negotiations on how to strengthen and clarify these provisions have stalled and are not likely to produce tangible results.

6. Surveillance and Compliance of Recommendations and Rulings: Article 21 generally deals with implementation of the recommendations and rulings of the panel and AB reports by the DSB. The overall goal is to ensure prompt compliance with recommendations or rulings of the DSB and thereby ensure effective resolution of disputes to the benefit of all Members. For many countries, how to ensure that panel reports are fully implemented is a major source of concern especially where the losing party is a major economic power.

Attempt is made in the DSU to address these problems. Article 21:2 states that “[p]articular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.” Article 21.2 is declaratory and does not appear to impose any binding obligation on WTO Members or on the WTO as an institution. Article 21.2 is cast in very general terms. It is vague on what the phrase “matters affecting the interests of developing country Members” mean and what qualifies as compliance. Nevertheless, whenever a developing country has raised Article 21.2, they have gotten results. Acting under Article 21.3 of the DSU, arbitrators have applied Article 21.2 in determining what constitutes a reasonable time frame for a losing party to implement a panel or AB ruling. In one case, Indonesia received additional six months to comply.¹⁷⁴ According to the arbitrator in the case:

Indonesia is not only a developing country; it is a developing country that is currently in a dire economic and financial situation. Indonesia itself states that its economy is "near collapse". In these very particular circumstances, I consider it appropriate to give full weight to matters affecting the interests of Indonesia as a developing country pursuant to the provisions of Article 21.2 of the DSU. I, therefore, conclude that an additional period of six months over and above the six-month period required for the completion of Indonesia's domestic rule-making process constitutes a reasonable period of time for implementation of the recommendations and rulings of the DSB in this case.

Chile¹⁷⁵ and Argentina¹⁷⁶ have also successfully invoked the section.

Overall, Article 21.2 appears to be working. It is one of the few S&DT provisions in the DSU that have been utilized by developing countries. Although cast in general terms, Article 21.3 arbitrators have usually considered it binding.¹⁷⁷ However, application of Article 21.2 is not automatic. Not only must a

¹⁷⁴ Award of the Arbitrator, *Indonesia — Certain Measures Affecting the Automobile Industry — Arbitration under Article 21.3(c) of the DSU*, WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12, 7 December 1998, DSR 1998: IX, 4029.

¹⁷⁵ Award of the Arbitrator, *Chile — Taxes on Alcoholic Beverages – Arbitration under Article 21.3 of the DSU*, WT/DS87/15, WT/DS110/14, para. 45, 23 May 2000. The arbitrator determined that reasonable period of time for compliance should be no more than 14 months and 9 days from 12 January 2000, that is to say, until 21 March 2001).

¹⁷⁶ Award of the Arbitrator, *Argentina — Measures Affecting the Export of Bovine Hides and Import of Finished Leather — Arbitration under Article 21.3(c) of the DSU*, WT/DS155/10, 31 August 2001.

¹⁷⁷ *Chile-Alcoholic Beverages* (“ Nevertheless, although cast in quite general terms, because Article 21.2 is in the DSU, it is not simply to be disregarded. As I read it, Article 21.2, whatever else it may signify, usefully enjoins,

country specifically request the application of Article 21.2, such a country must allude to the special circumstances that merit consideration. In other words, it is not enough to plead a developing-country status.¹⁷⁸

Article 21:7 provides that “[i]f the matter is one which has been raised by a developing country Member, the DSB shall consider what further action it might take which would be appropriate to the circumstances.” The language of Article 21.7 is much stronger than those of Article 21.2 given the use of the phrase “shall” instead of “should.” Nevertheless, with regards to Article 21.7, it is not clear what type of action is expected of the DSB and therefore difficult to assess if and to what extent it has been complied with. To date, no developing country has utilized this provision.¹⁷⁹ It does not address the underlying power asymmetry or the impracticability of securing compliance through retaliation.

Finally, according to Article 21:8, “[i]f the case is one brought by a developing country Member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned.” Article 21.8 is mandatory and is one that is welcomed by developing countries. However, it is difficult to determine whether the DSB has complied with this provision. There is no clear method for effectively implementing this provision. Does a complaining developing country member have an obligation to present a detailed report of the impact of the measures complained of on its economy? What if the DSB’s determination is based on inaccurate information? Not surprising, to date, the DSB has not taken any specific action under Article 21.8.¹⁸⁰

7. Least Developed Countries: Some special rules apply when a dispute involves a least-developed country. Article 24:1 provides:

*At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country Members. In this regard, Members shall exercise due restraint in raising matters under these procedures involving a least-developed country Member. If nullification or impairment is found to result from a measure taken by a least-developed country Member, complaining parties shall exercise due restraint in asking for compensation or seeking authorization to suspend the application of concessions or other obligations pursuant to these procedures.*¹⁸¹

Article 24.2 goes on to stipulate that in cases involving a LDC Member, where a satisfactory solution has not been found in the course of consultations, “the Director-General or the Chairman of the DSB *shall, upon request by a least-developed country Member* offer their good offices, conciliation and mediation with a view to assisting the parties to settle the dispute, before a request for a panel is made.”¹⁸²

inter alia, an arbitrator functioning under Article 21.3(c) to be generally mindful of the great difficulties that a developing country Member may, in a particular case, face as it proceeds to implement the recommendations and rulings of the DSB.”)

¹⁷⁸ *Chile-Alcoholic Beverages* (“However, Chile has not been very specific or concrete about its particular interests as a developing country Member nor about how those interests would actually bear upon the length of “the reasonable period of time” to enact necessary amendatory legislation.”).

¹⁷⁹ The South Centre reports that “To date, the DSB has not considered further actions regarding implementation most probably because the developing country Members which were on the complaining side have not explicitly invoked this provision.”¹⁷⁹ South Centre, *Issues Regarding the Review of the WTO Dispute Settlement Mechanism*, T.R.A.D.E. Working Papers 13 (1999). Available at <<http://www.southcentre.org/publications/trade/toc.htm#TopOfPage>> (1/1/05).

¹⁸⁰ *Id.*, at 14.

¹⁸¹ Emphasis Added.

¹⁸² Emphasis Added.

To be useful, Article 24 would need further clarification. The due restraint clause of Article 24.1 is important. However, clarification is needed on how to determine whether such restraint was exercised and what the consequences would be for Members who fail to exercise the required restraint. Should panels have the right, at the outset of a case, to determine whether a party bringing a complaint against an LDC exercised due restraint and whether the complainant has a *prima facie* case? Should such a panel have the authority to divert the case to the alternative dispute resolution procedure of Article 5 if it determines that the party bringing the complaint did not exercise due restraint? The value of the due restraint clause will be determined by the nature of mechanism created to ensure that they are respected. Panels could be given the authority, subject to the final decision of the DSB, to determine whether a party bringing a complaint against an LDC has exercised due restraint.

Although the good offices of the Director General is available upon request by a LDC, a qualifying country may not be free to make such a request. The proposal by the LDC Group to amend Article 24.2 to remove the phrase "upon request by a least-developed country Member" would make it incumbent on the complaining party to seek the "good offices" of the Director-General.

8. Technical Assistance: The DSU makes provision for technical assistance to developing countries that need it. Article 27 provides that "the Secretariat *shall* make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests." Article 27:2 goes on to provide that the expert "shall assist the developing country Member *in a manner ensuring the continued impartiality of the Secretariat.*"¹⁸³ The broad goal of Article 27 is to provide "legal advice and assistance in respect of dispute settlement to developing country Member."

The spectrum of assistance available under Article 27 is potentially broad. However, there are several problems with Article 27. First is the problem of vagueness. It is not clear at what stage in the dispute settlement process a developing country is entitled to the promised assistance. It is also not clear the scope of services the Secretariat is mandated to offer. For example, are services in the form of research on the legal, historical and procedural aspects of a case available? Second, the impartiality clause is also a problem. The impartiality requirement may prevent legal experts from the Secretariat from offering the full breadth of assistance as envisaged by the Members. Third is the problem of capacity. The Secretariat lacks the capacity to deliver assistance on a level needed to overcome the capacity constraints most countries in Africa face and is limited by resources. A division in the WTO Secretariat, the Institute for Training and Technical Cooperation, employs one full-time official and, two independent consultants on a permanent part-time basis. This is not sufficient to respond to the need of all the LDC Members and additional developing country Members that demand its services. Insufficiency of funds is a problem and is not addressed by the *Proposed Decision By the General Council Regarding Article 27.2 (Annex 4)*. Special training courses concerning the dispute settlement system are also conducted in Geneva and in the capitals of developing countries. However, no independent evaluation of the effectiveness of these training courses has been undertaken.

B. S&DT and the Development Dimension

It is doubtful that the S&DT provisions can fully or coherently address the core barriers to effective participation by poor countries. The problems can be summarized thus:

a. **Limited Scope and Coverage:** The existing S&DT provisions are not designed to comprehensively address problems relating to lack or shortage of human and financial resources, inadequacy of trade remedies, ineffectiveness of compliance mechanism, and the inability of the system to take into account the problems associated with underdevelopment. A coherent response to the development concerns that inhibit the use of the DSM calls for the full integration of development concerns in the processes of the DSM. It would require panels and AB, whenever appropriate, to reflect on the development implications of their findings, rulings and recommendations. It would also require the

¹⁸³ Emphasis added.

DSB, in authorizing retaliation, to take into account the development implications of their decision. A more detailed examination of the obstacles to institutionalizing pro-development interpretive culture in the DSM is undertaken in Section VII.

b. Lack of Use: Waste of Political Capital? A full assessment of the relevance of the S&DT provisions of the DSU is not possible because African countries have not availed themselves of them. Of the developing countries involved in the DSM, many have not utilized most of the provisions believing them to be useless. Why have many developing countries not availed themselves of these hard-won privileges? Roessler offers a plausible explanation. In his view,

“developing countries wish to face in legal proceedings developed countries as equals and are therefore hesitant to invoke procedural privileges that their opponent do not enjoy. Moreover, they also fear that the application of procedural provisions biased in their favor may detract from the legitimacy of the result of the procedures and hence reduce the normative force of the ruling they are seeking

If Roessler is right and developing countries are reluctant to use the S&DT provisions because they prefer to operate on the same footing as developed world, it means that much political capital is currently wasted trying to push for clarification of existing provisions. Time and resources may be better spent pushing for resources to address the capacity constraints to the effective utilization of the DSU and trying to obtain firmer commitment on such issues as subsidies, domestic support, and tariff escalations, in the course of on-going market access negotiations.

Conversations with trade representatives suggest that the reluctance of developing countries to use the S&DT provisions in the DSU stem from their perception that these provisions are useless. If this is so, the problem can be addressed by strengthening these provisions and by ensuring that the S&DT provisions actually confer meaningful ‘privileges’ to poor countries. Without doubt some of the provisions lack any definite content and appear to be of questionable utility. It is however impossible to predict if developing countries will be more disposed to use these provisions if they are clarified and strengthened.

c. Differentiations: As with all S&DT provisions, a burning question that would determine the degree of concessions developed countries are willing to make and the future effectiveness of the concessions once they are made is the question of who is qualified to benefit from them. Should all S&DT provisions be available to all developing countries as China has suggested or should there be a special recognition of least developed countries as the LDC group has suggested? In her communication of 22 January 2003, China observed that “the current DSU lacks general and horizontal provisions applicable to all developing-country Members, and asked that “explicit provisions applicable to all developing-country Members be established in the DSU in order to strengthen the S&D provisions to developing -country Members.” By contrast, LDCs point out that “[o]ften, the difficulties faced by LDCs are more debilitating than those faced by the rest of the WTO Membership” and as a result “a level of specificity is needed in addressing their concerns within the textual provisions of the DSU.”¹⁸⁴ Consequently, LDC’s demand that “[s]ome of the key provisions conferring rights and containing other structurally fundamental provisions of the DSU need to be made LDC specific.” Undoubtedly, these issues will generate considerable debate for the foreseeable future.

C. Justiciability of S&DT Provisions

The biggest problem with the S&DT provisions is identifying which provisions impose specific legal obligation on WTO developed Members or the WTO as an institution and which are more in the nature of “best efforts” obligations that depend on the good will of developed countries. After studying the S&DT provisions, Gabilondo suggests that only four impose any obligation on developed countries. These are: Article 3.10 (invoking the Decision of 1966); Article 8.10 (inclusion of a panelist from a

¹⁸⁴ TN/DS/W/17.

developing country in relevant cases); Article 12:11 (special provisions) and Article 27.2 (technical assistance). An examination of one of the few cases where a developing country based a claim on an S&DT provision in a covered agreement does indeed suggest that a good number of the S&DT provisions in the DSU are useless in the sense that in the sense that they do not impose any legal obligation on developed countries or the WTO..

In *European Communities – Ben Linen*,¹⁸⁵ the Panel was called upon to construe Article 15 of the Anti-Dumping Agreement. Article 15 provides:

“It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.”

Regarding the first sentence of Article 15, the Panel declined to rule on whether it imposed any legal obligation noting that the parties are in agreement that it does not impose any legal obligation¹⁸⁶ and that it was not the basis of India’s claim.¹⁸⁷

What about the second sentence of Article 15 which formed the basis of India’s claim? What constitutes “constructive remedies” and what does “explore” mean? Participating as a third party, the US, argued that while Article 15 provides procedural safeguards for developing countries, it “does not require any particular substantive outcome, or any specific accommodations to be made on the basis of developing country status.”¹⁸⁸ In the view of the US, the second sentence of Article 15 “does not impose anything other than a procedural obligation to ‘explore’ possibilities of constructive remedies but not an obligation to reach a particular substantive outcome. The Panel agreed. Citing an earlier GATT Panel decision,¹⁸⁹ the Panel ruled that the second sentence of Article 15 imposed an obligation of means and not of results.¹⁹⁰

The decision in *EC – Ben Linen* supports the position of developing countries that the S&DT provisions in the DSU and many covered agreements lack operative content. Several conclusions may be

¹⁸⁵ *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, Report of the Panel*, WT/DS141/R. 30 October 2000.

¹⁸⁶ *Id.*, footnote 85 (“The parties are in agreement that the first sentence of Article 15 imposes no legal obligations on developed country Members. As there is no claim in this regard, we express no views on this matter.”).

¹⁸⁷ *Id.*, para. 6.227 (“We turn first to consideration of the text of the second sentence of Article 15, which is the basis of India’s claim.”).

¹⁸⁸ *Id.*, para. 6.225

¹⁸⁹ *EC - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, Panel Report, ADP/137, adopted 30 October 1995, para. 584.

¹⁹⁰ *Id.*, para. 6.219 (emphasis added). According to the Panel:

We consider next the term “explore”.... In our view, while the exact parameters of the term are difficult to establish, *the concept of “explore” clearly does not imply any particular outcome*. We recall that Article 15 does not require that “constructive remedies” must be explored, but rather that the “possibilities” of such remedies must be explored, which further suggests that the exploration may conclude that no possibilities exist, or that no constructive remedies are possible, in the particular circumstances of a given case. Taken in its context, however, and in light of the object and purpose of Article 15, we do consider that the “exploration” of possibilities must be actively undertaken by the developed country authorities with a willingness to reach a positive outcome. Thus, in our view, *Article 15 imposes no obligation to actually provide or accept any constructive remedy that may be identified and/or offered. It does, however, impose an obligation to actively consider, with an open mind, the possibility of such a remedy prior to imposition of an anti-dumping measure that would affect the essential interests of a developing country.*

reached. First, the burden is on a country wishing to avail itself of most of the S&DT provisions to show as part of its prima facie case that such a provision had been violated. In *EC – Bed Linen* India declined to offer concrete suggestions as to other possible "constructive remedies under this Agreement" that might be available pursuant to Article 15. India argued that the EC had the obligation to find and propose such remedies to developing countries prior to imposition of anti-dumping measures. The Panel disagreed.¹⁹¹ This lesson is that a state wishing to initiate a case has to put a lot of thought into determining the legal basis of a potential dispute and must also invest considerable resources into collecting evidence to support a given position. Second, the distinction between "obligation of means" and "obligation of results" makes it very easy for a developed country to avoid obligation under many S&DT provisions. It is very easy to show that some effort was made to address the needs a developing country as required by a treaty provision; it is more difficult to show that that any beneficial result was achieved. Third, in the light of the *EC – Ben Linen* decision, the strength of the obligation assumed by developed countries under the DSU, for example under article 4:10 or 12.10, can be questioned.

D. Conclusion

The attempt to address the barriers to effective utilization of the DSM by developing countries through the introduction of S&DT provisions in the DSU is laudable. It is impossible in one paper to fully analyze all the S&DT provisions in the DSU and other WTO agreement. What is evident is that developing countries have rarely resorted to these provisions and that most of the provisions lack operative content. Developing countries must consider the wisdom of wasting political capital, time and money negotiating for S&DT provisions of doubtful utility. It is important that countries attempt to utilize some of these provisions; it may be that in attempting to use them the weaknesses already identified will be further exposed. Finally, there is need for some of the S&DT provisions to be strengthened and clarified. As discussions in the succeeding chapter highlight, it may ultimately be up to panels and AB to operationalize the provisions of the DSU and other covered agreements that purport to accord special rights and privileges to developing countries.

VII. DEVELOPMENT-ORIENTED JURISPRUDENCE: PROBLEMS AND POSSIBILITIES

This section examines the present obstacles to the development of a robust development-oriented jurisprudence in the DSU, the opportunities that exist for the development of such jurisprudence, and the associated dangers and tradeoffs. To date, the development dimension of the WTO mandate has been the responsibility of the Committee on Trade and Development,¹⁹² the Sub-Committee on Least-Developed Countries,¹⁹³ the Working Group on Trade,¹⁹⁴ Debt and Finance and the Working Group on Trade and Transfer of Technology.¹⁹⁵ It may however be asked whether the DSU can be used to promote the development objectives of the MTS? Can the DSM be a vehicle for promoting a development-friendly jurisprudence and can the development dimension be institutionalized into the architecture of the WTO dispute settlement system? Can the DSM be a vehicle for addressing the progressive marginalization of

¹⁹¹ *Id.*, para. 6.228 ("India having asserted that the European Communities failed to engage in some action which it was obligated to undertake, we view it as part of India's burden to present a prima facie case of violation to indicate what actions it believes should have been undertaken.") (emphasis added).

¹⁹² The CTD comprises all Members of the WTO and reports to the General Council. See WTO, *The Committee on Trade and Development*, http://www.wto.org/english/tratop_e/devel_e/d3ctte_e.htm (visited 1/1/05).

¹⁹³ WTO, *The Sub-Committee on Least Developed Countries*, http://www.wto.org/english/tratop_e/devel_e/dev_sub_committee_ldc_e.htm (visited 1/1/05).

¹⁹⁴ WTO, Working Group on Trade, Finance and Development, http://www.wto.org/english/tratop_e/devel_e/dev_wkgrp_trade_debt_finance_e.htm (visited 1/1/05).

¹⁹⁵ WTO, Working Group on Trade and Transfer of Technology, http://www.wto.org/english/tratop_e/devel_e/dev_wkgrp_trade_transfer_technology_e.htm (visited 1/1/05).

African countries in international trade?¹⁹⁶ Put differently, what is the relationship between the WTO interpretive processes and market access benefits for developing countries? Are certain approaches to interpretation more likely to erode or undermine the market access gains represented in the WTO agreements? Conversely, are certain approaches to interpretation more likely to enhance or further market access gains post agreement?

These questions and more force attention on the processes involved in the interpretation of multilateral trade agreements and the role of panels and AB in institutionalizing a pro-development interpretive culture in the DSM. These questions arise, in part, because some African countries are concerned that panels and AB, in interpreting WTO Agreements, fail to take into account the development dimension. These countries note, for example, that panels and AB have not taken sufficient account of “the need to fully address the development implications of certain findings and recommendations.” These countries do not endorse judicial activism, however. On the contrary, they have expressed concern at the way WTO Agreements have been broadly interpreted and applied by panels and AB and are concerned that WTO Agreements have been interpreted to include new rights in violation of the DSU.

A focus on the WTO interpretive processes is pertinent for at least two reasons. First, embedded in the WTO framework and various multilateral trade agreements are certain development-oriented commitments which must be monitored to ensure that the promises of the MTS are realized and shared by all. Second, to date, the pro-development objectives expressed in WTO agreements remain unfulfilled raising serious questions about the role of the DSM in advancing development goals in the MTS and the value of the commitment by developed countries to ensure that the benefits of global trade extends to all.

A. Development and Multilateral Trade Agreements

To call for a development-oriented jurisprudence is not to endorse judicial law-making. It is very possible for the panels and AB to pay serious attention to the development implications of their decisions and at the same time preserve the credibility of the DSM as a system committed to “providing security and predictability to the multilateral trading system,”¹⁹⁷ preserving “the rights and obligations of Members under the covered agreements,”¹⁹⁸ and clarifying the existing provisions of covered agreements “in accordance with customary rules of interpretation of public international law.”¹⁹⁹ Because WTO the DSU and other WTO agreements make copious references to the linkages between trade and development, the role of the dispute settlement system in furthering the development goals of the WTO must always be asked. A full examination of all the references to development in multilateral trade agreement is beyond the scope of this paper. Elsewhere, this author attempted to identify some of the S&DT provisions in WTO rules and argued that the notion of special and differential treatment was a concept in search of content.²⁰⁰

In the second recital of the preamble to the WTO Agreement, State Parties recognize “that there is need for *positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.*” In the Agreement on Agriculture, Member States also agreed that “in implementing their commitments on market access, *developed country Members would take fully into account the particular needs and conditions of developing country Members* by providing for a greater improvement of opportunities and terms of access for agricultural products of particular interest to these Members....” Finally, in the Doha Declaration, State Parties also promised to “continue to make positive

¹⁹⁶ African Development Bank, AFRICAN DEVELOPMENT REPORT 2004, 146 (2004)(observing that the progressive marginalization of the developing countries in international trade has been going on since the end of World War II).

¹⁹⁷ DSU, *supra* note 1, Article 3.2

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ Uche Ewelukwa, *Special and Differential Treatment: A Concept in Search of Content*, 74 (4) NORTH DAKOTA LAW REVIEW (2004)

efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development.”

Although the requirement in Article 3.2 that “[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements,” could pose a problem, creative ways must be found to advance the full agenda of the MTS and give effect to the pro-development provisions of covered agreements. Article 12.11 of the DSU requires that panels report should explicitly indicate the form in which account has been taken of the relevant S&DT provisions contained in the covered agreements.

C. Is a Pro-Development Jurisprudence Possible?

The ability of the DSM to effectively balance trade and development objectives of the WTO may be one of the most significant and difficult tasks the system will face in the future. Whether the DSM can achieve this without losing its credibility remains to be seen. From every indication, WTO Members including African Members are wary of judicial law-making and critical of panels and AB decisions that suggest attempts by these bodies to create new law.

Patrick Kelley suggests that there are three models of policy-making in the WTO: the Legislative Model, Judicial Activist Model, and the Contract Model.²⁰¹ The Legislative Model assumes that the WTO has law making powers and in appropriate cases will make binding decisions and interpret or amend negotiated agreements through the Ministerial Conference and the General Council.²⁰² The Judicial Activist Model “posits a WTO legal system that explicitly or implicitly empowers AB judges to interpret the provisions of ... WTO agreements in an expansive manner, responding to the changes in the international society.”²⁰³ Finally, the Contract Model “assumes that the WTO trade regime is a self-contained system based on specific detailed agreements of sovereign states.” Under the Contract Model, Kelley analogizes states to individuals in domestic societies who create law voluntarily through their contractual relations.

It is debatable whether Members assumed themselves to be creating a pure contractual regime. Kelley himself admits that “a pure contractual regime is perhaps impossible.”²⁰⁴ Although admitting that unforeseen circumstances, gaps and ambiguities are inevitable even in a detailed rule-oriented system, he argues that “the incompleteness of agreement is not, in and of itself, a justification for judicial activism.”²⁰⁵ However, Article 3.2 mandates that existing provisions of covered agreement must be clarified “in accordance with customary rules of interpretation of public international law.” Moreover, which particular norms qualify as *lex specialis* (e.g. the WTO rules on remedies),²⁰⁶ it is hard to find justification for the proposition that the WTO Members contracted out of general international law completely under the doctrine of *lex specialis*. In *US – Gasoline*, the AB cautioned against reading WTO agreements in clinical isolation from public international law:

The general rule of interpretation [as set out in Article 31(1) of the Vienna Convention on the Law of Treaties] has attained the status of a rule of customary or general international law. As such, it forms part of the “customary rules of interpretation of public international law” which the Appellate Body has been directed, by Article 3(2) of the *DSU*, to apply in seeking to clarify the provisions of the *General Agreement* and the other

²⁰¹ Patrick J. Kelley, *Judicial Activism at the World Trade Organization: Developing Principles of Self-Restraint*, 22 NW. J. INT’L & BUS. 353, 358 (2002)

²⁰² To obtain a binding interpretation of the WTO Agreements requires three-fourths votes of WTO Members. See Agreement Establishing the WTO, Article IX.2.

²⁰³ ²⁰⁵ Patrick J. Kelley, *Judicial Activism at the World Trade Organization: Developing Principles of Self-Restraint*, 22 NW. J. INT’L & BUS. 353, 361 (2002)

²⁰⁴ *Id.*, at 362.

²⁰⁵ *Id.*, at 363.

²⁰⁶ Sutherland Report, *supra* note 3, at 52.

“covered agreements” of the *Marrakesh Agreement Establishing the World Trade Organization* (the “WTO Agreement”). That direction reflects a measure of recognition that the *General Agreement* is not to be read in clinical isolation from public international law.²⁰⁷

C. Obstacles to a the Development-Friendly Dispute Settlement System

Currently, the jurisprudence of the panels and AB do not reflect the development concerns of states in Africa. There are several plausible explanations for this neglect. *First*, the limitations placed by the provisions of the DSU and by the traditional rules of treaty interpretation impose a constraint on panel and AB members. *Second*, the strict time-limits for the panel and AB phase of the dispute settlement process do not afford panels and the AB the opportunity to fully address the development implications of their findings and recommendations. *Third*, inadequacies in the jurisprudence may be a result of the requirement that every panel or AB render a unanimous decision and produce a single neat report. *Fourth*, the terms of reference of panels and AB tends to put constraints on activism. Fifth, the failure of developing countries to utilize the S&DT provisions in covered agreements and to advance arguments based on these provisions. Some of these factors will be discussed here.

1. Limitation Placed by Traditional Rules of Treaty Interpretation

Several traditional rules of treaty interpretation may limit the ability of panels and AB to liberally construe the provisions of WTO agreements relating to development. The AB has held, for example, that where a WTO Agreement is silent on a given issue, such an issue is left to the discretion of member states.²⁰⁸ The AB has also stressed that it is not the role of panels and AB to “make law.” Judged by the opinion of the AB, the interpretive principle of *in dubio mitius* also poses a problem.²⁰⁹ According to the AB in *EC – Hormones*:

The principle of *in dubio mitius* applies in interpreting treaties in deference to the sovereignty of states. If the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties.²¹⁰

Because many of the provisions of multilateral trade rules pertaining to development are ambiguous, at the urging of a developed country, panels and AB may be inclined to rule that they represent areas that are best left to the discretion of Member states.

2. Limitation Placed by the Mandate of Panels and AB

The mandate of panels and AB as expressed in the DSU represents yet another obstacle to any effort to institutionalize a development-oriented interpretive culture in the DSU.

a. **Agreement Specific Claims and Inquiry:** The primary responsibility of WTO panels is to determine whether from the facts of a given case, a violation of a “covered agreement” has occurred.²¹¹ Indeed, requests for consultations can only be made “pursuant to a covered agreement.”²¹² Moreover, in requesting a panel, Members are required to “identify the specific measures at issue and provide a brief

²⁰⁷ WT/DS2/AB/R. Emphasis in the original.

²⁰⁸ *United States – Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, SCM/153, para. 243-46 (12/4/92); *New Zealand – Imports of Electrical Transformers from Finland*, L/5815-32S/55, para. 4.2-3 (7/18/85); Terence P. Stewart and Amy S. Dwyer, HANDBOOK ON WTO TRADE REMEDY DISPUTES: THE FIRST SIX YEARS (1995-2000) 472 (2001).

²⁰⁹ *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, Appellate Body Report, WT/DS177/AB/R, (16 May 2001).

²¹⁰ *EC – Hormones*, para. 165, WT/DS26/AB/R, WT/DS48/AB/R.

²¹¹ DSU, *supra* note 1, Article 1.

²¹² *Id.*, Article 4.3.

summary of the legal basis of the complaint sufficient to present the problem clearly.”²¹³ Panels are established, “[t]o examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s).”²¹⁴ Article 7(2) goes on to state that panels “shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.”

Several implications flow from these provisions. First, it is always the responsibility of the complaining Member to reference the provisions of the covered agreements that form the basis of the Member’s case. Where a Member fails to cite specific provisions of the covered agreement relating to development, a panel is not required to examine such provisions. Second, in general, panels and AB cannot go outside covered agreements to explore development questions. The “covered agreement” are those agreements specifically listed in Appendix 1 to the DSU.

The problem is that while there are scattered references to development in most of the WTO agreements, there is no one agreement that comprehensively and specifically addresses development issues. This may pose a serious problem since the status of Ministerial declarations and Decisions is not too clear? The current narrow definition of what constitutes “covered agreements” works against any effort towards a development-friendly DSM. To the extent that Ministerial decisions and declarations are not binding legal documents, African states and other developing countries must thwart future efforts by developed countries to placate them through lofty statements in decisions and declarations of the Ministerial Council rather than through meaningful concessions in covered agreements. In the future therefore, developing countries must try to ensure that pro-development concessions by developed countries are clearly worded and inserted into negotiated agreements.

There is certainly need for further more detailed analyzes of the legal status of Ministerial decisions and declarations particularly those decisions and declarations that appear to confer specific rights to developing countries.

b. Objective Assessment: To perform their function of assisting the DSB in discharging its responsibilities under the DSU and the covered agreements, a panel is expected to “make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.”²¹⁵

Mosoti argues that “[n]othing in the current terms of reference makes it mandatory for panels to examine the development implications of their decisions.” He suggests an amendment of the DSU to make it a requirement for panels in every case to always consider the development implications of their findings at every stage of the deliberation process. Such a proposal is problematic and would probably not receive the approval developed countries. To require panels in every case, including cases not involving developing countries,²¹⁶ to examine the development implications of their decisions may not be feasible. Time constraints and principles of judicial economy would make such a proposal unworkable.

In the alternative, African countries wishing to see panels examine the development implications of their decisions should consider exercising their right to participate as third parties. Panels and AB could be required to address the development implications of their finding whenever a development question is brought to their attention by a WTO Member participating as a third party.

²¹³ *Id.*, Article 6.2.

²¹⁴ *Id.*, Article 7(1).

²¹⁵ *Id.*, Article 11

²¹⁶ Currently, by virtue of Article 12(11), panels are required, in cases involving a developing country, to “explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures.”

3. Limitations placed by the DSU

According to the AB, WTO Agreements are the international equivalent of a contract representing carefully drawn balance between members' rights and obligations.²¹⁷ Consequently, members are bound only to commitments in a given trade agreement and the DSB is duty-bound to respect this balance between members rights and obligations.²¹⁸ Article 3.4 provides that "Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements." Article 3.2 states that recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements. Article 3 requires panels and AB to exercise judicial restraint when faced with treaty provisions that are ambiguous.²¹⁹

Regarding each agreement, the critical question would be what did Members commit to? A development-friendly DSM requires panels and AB to carefully balance the requirements of Article 3.2 with the development mandate of the WTO as an organization. Article 3.2 should not be used as a shield to thwart any attempt towards a development-oriented interpretive culture in the DSM. Conversely, in pushing for development-sensitive interpretations and analysis, the limitations placed on panels and AB by the DSU must be respected. Indeed, there is a need for a careful examination of how past decisions and recommendations of panels and AB may have diminished the rights of developing countries under covered agreement. Once again, more legal analysis is called for.

4. Limitation Placed by the Principle of Judicial Economy

The primary purpose of the DSM is to resolve disputes.²²⁰ Not surprisingly, panels and AB see their role as limited to specific claims before them. Indeed, article 7(2) states that "Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute." Several implications flow from this:

a. **Panels and AB cannot make findings that are not necessary to resolve a dispute:** Panels are expected to address issues that are necessary to resolve disputes between parties. A panel may be seen to have exceeded its mandate if it makes findings that were not necessary to resolve a given dispute. According to the AB in *United States – Shirts and Blouses*:

Given the explicit aim of dispute settlement that permeates the DSU, we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to "make law" by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.²²¹

b. **A Panel has no duty to examine all legal claims made by the complaining party:** A WTO panel has the discretion to decide which of the many legal claims advanced by a complainant it may consider in order to resolve a dispute. According to the AB in *United States – Shirts and Blouses* Nothing in [Article 11 of the DSU] or in previous GATT practice *requires* a panel to examine *all* legal claims made by the complaining party. Previous GATT 1947 and WTO panels have frequently addressed only those issues that such panels considered necessary

²¹⁷ *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at § F (10/4/1996).

²¹⁸ *India – Patents (US)*, para. 46, WT/DS50/AB/R ("Both panels and the Appellate Body must be guided by the rules of treaty interpretation set out in the *Vienna Convention*, and must not add to or diminish rights and obligations provided in the *WTO Agreement*.").

²¹⁹ Terence P. Stewart and Amy S. Dwyer, HANDBOOK ON WTO TRADE REMEDY DISPUTES: THE FIRST SIX YEARS (1995-2000) 472 (2001).

²²⁰ DSU, *supra* note 1, Art. 3.7 provides that the "aim of the dispute settlement mechanisms is to secure a positive solution to a dispute."

²²¹ *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, at 19-20 (5/23/97); *United States – Carbon Steel* AB Report (para. 70)

for the resolution of the matter between the parties, and have declined to decide other issues. Thus, if a panel found that a measure was inconsistent with a particular provision of the GATT 1947, it generally did not go on to examine whether the measure was also inconsistent with other GATT provisions that a complaining party may have argued were violated. In recent WTO practice, panels likewise have refrained from examining each and every claim made by the complaining party and have made findings only on those claims that such panels concluded were necessary to resolve the particular matter.

While there is nothing to stop a developing country from raising multiple claims including development claims, the ultimate decision as to which claims to analyze rests with the panel. Developing countries are thus under pressure to advance their best legal arguments and to leave out development questions of uncertain legality.

c. **No Speculative Analysis or Advisory Opinion:** Essentially, there is no room for panels and AB to render advisory opinion on provisions of WTO agreement if those provisions are not necessary to the resolution of the case between the disputing parties. Thus unless a specific provision relating to development is critical to the resolution of the case, the likelihood is that such a question may be ignored because of panels' demonstrated reluctance to engage in speculative analysis and past refusal to consider hypothetical issues.²²²

d. **Need for Precise Recommendations:** Many S&DT provisions are vague and Ambiguous; findings on them may not be necessary to enable the DSB to make precise recommendations and rulings. As the AB stated in *Australia – Measures Affecting Importation of Salmon*:

A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings in order to ensure effective resolution of the dispute to the benefit of all Members.

Relying on *Australia – Measures Affecting Importation of Salmon*, panels will make findings with respect to additional claims put forth by a party where it considers that such findings would assist the DSB in making sufficiently precise recommendations.²²³ In *United States – Wheat Gluten*, the AB upheld the Panel's exercise of judicial economy citing its decision in *Australia-Salmon*.²²⁴

In conclusion, the principle of judicial economy may make it difficult for countries in Africa to push for the clarification and application of S&DT provisions through the dispute settlement process. Although in *United States – Carbon Steel*, the AB was reluctant to accept the argument that *United States – Shirts and Blouses* set forth a general principle that panels cannot address issues that need not be addressed in order to resolve a dispute between the parties, at present the principle of judicial economy does allow panels to decline to rule on certain matters. In *United States – DRAMS*,²²⁵ *United States –*

²²² In *United States – Tax Treatment for “Foreign Sales Corporation”* WT/DS 103/108 (“We are not entitled to speculate about the WTO-consistency of such a hypothetical scheme. Moreover, such a hypothetical scheme has not been the subject of meaningful argumentation by the parties.”)

²²³ *United States-AD Act (Japan)* (para. 6.234); *United States – Lamb Meat*, para 7.119 (Panel decided to address other claims stressing the “need for panels to address all claims and/or measures necessary to secure a positive solution to a dispute.” The panel also noted that “providing only a partial resolution of the matter at issue would be false judicial economy.”)

²²⁴ *Australia – Measures Affecting Importation of Salmon*, para. 180-183

²²⁵ *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea*, WT/DS99/R, adopted 29 January 1999.

Wheat Gluten,²²⁶ *Canada-Auto Measures* (AB Report),²²⁷ and *United States- Stainless Steel*,²²⁸ Panels and AB, relying on *United States – Shirts and Blouses*, concluded that they only need to address those claims which must be addressed in order to resolve the matter in issue in the dispute. Also in the interest of judicial economy, in cases relating to the Agreement on Subsidies and Countervailing Measures (SCM Agreement), the Antidumping Agreement, and the Agreement on Safeguards, panels do not generally consider whether a measure violates multiple treaty provisions after finding that the measure violates one treaty provision.²²⁹

Currently, panels and AB have full discretion to decline to address issues that need not be addressed in order to resolve a given dispute. In the event that panels chose to address such issues, other parties to the dispute may use that as a basis for challenging panel decision on appeal. The possibility of panels exercising judicial restraint should not preclude a developing country from raising alternative claims. In *Canada-Auto Measures*, the AB ruled that although panel was not required to examine alternative claims, in the interest of transparency and fairness to the parties, a panel “should ... in all cases, address expressly those claims which it declines to examine and rule upon for reasons of judicial economy.”²³⁰

4. Limitation Placed by Interpretive Sources

The ability of panels to adopt a development-oriented posture will depend on the sources of “WTO law” the panels draw on to interpret a given treaty provision. While some scholars suggest a liberal construction of the sources of WTO law extending to other international agreements, others caution against such approach. For example, Kelley sees WTO rules as primarily comprised of specific detailed agreements that sovereign states agree to be bound to.²³¹ He sees no room for the application of public international law norms because under the doctrine of *lex specialis*, Member states agreed to contract out of general international law norms.

Palmeter and Mavroidis make a case for a broad interpretation of the sources of WTO law include the various sources of international law. To the authors, other international treaties may be relevant in interpreting WTO agreements. According to them, sources of WTO law includes:

[P]rior practices under GATT, including reports of GATT dispute settlement panels; WTO practices, particular reports of dispute settlement panels and the Appellate Body; custom; the teaching of highly qualified publicists; general principles of law; and other international agreements, all contribute to the rapidly growing and increasingly important body of law known as “WTO Law.”²³²

²²⁶ *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, Appellate Body Report, WT/DS166/AB/R, adopted 19 January 2001.

²²⁷ *Canada – Certain Measures Affecting the Automotive Industry*, Appellate Body Report, WT/DS139/AB/R, WT/DS142/AB/R, adopted 31 May 2000.

²²⁸ *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, adopted 22 December 2000

²²⁹ Terence P. Stewart and Amy S. Dwyer, HANDBOOK ON WTO TRADE REMEDY DISPUTES: THE FIRST SIX YEARS (1995-2000) 73 (2001). See *United States – Tax* (para. 7.131); *Guatemala-Cement II* (para. 8.291); *United States- Stainless Steel* (para 6.45).

²³⁰ *Canada-Auto Measures* (paras. 116-117).

²³¹ Patrick J. Kelley, *Judicial Activism at the World Trade Organization: Developing Principles of Self-Restrictant*, 22 NW. J. INT’L & BUS. 353, 358 (2002)

²³² David Palmeter & Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 AM. J. INTL L. 398, 399 (1998). C.f. Kelley, *supra* note --, at (critical of broad construction of sources of WTO law.).

Even under the broad formulation that Palmetier and Mavroidis suggest, it may be difficult to find helpful treaties that would support a pro-development interpretation of covered agreements. Relying on customary international law will prove even more troublesome.

Finally, custom as an interpretive source is enshrined in the Agreement Establishing the WTO²³³ and sometimes used by panels.²³⁴ Reliance on customs and on prior practices of the GATT may yield results that may be insensitive to the development needs of developing countries. By contrast reliance on general international law may yield a different result.²³⁵

C. Opportunities for a Development-Oriented Interpretive Process

Despite many obstacles and limitations, there are several approaches to institutionalizing a development-oriented interpretive process in the DSM. *First*, there is need for a more expansive interpretation of what the “Covered Agreement” that panel and AB may rely on in construing relevant trade agreements and resolving disputes involving developing countries. *Second*, there is need for a broad reading of the context, object and purpose of the different multilateral trade agreements panels and AB are called to interpret. *Third*, despite the objections of developing countries, there is need for a more effective utilization of the right of panels and AB to seek information enshrined in Article 13 of the DSU.

1. Expansive Interpretation of “Covered Agreement”

The starting point of panels and AB interpretation is the text of the “covered agreements.”²³⁶ What are the “covered agreements” that panels and AB are mandated to interpret?

While the narrow interpretation of covered agreements is a problem, on the bright side, panels are not always bound to consider only those treaty provisions relied on by the complaining party. In *United States – Anti-Dumping Act of 1916 (Complaint by the European Communities)*²³⁷ to understand the context of cited provisions, the panel considered other relevant treaty provisions. Also in *Canada – Certain Measures Concerning Periodicals*²³⁸ The AB also considered other relevant treaty provisions which it judged to be a “logical continuum” to provisions cited in appeal request.

2. **Preambles as an Interpretive Tool.** What is the role of preambles in the interpretation of WTO Agreements? Regarding preambles, *US – Shrimp* provides an answer.²³⁹ In this case, the AB used the preamble in the WTO Agreement to address the environmental issues raised in the case holding that the preamble added color, texture and shading to its interpretation of the agreements annexed to the WTO Agreements and reflected the intention of the negotiators of the WTO Agreement. Preambles will allow panels and AB to factor in development as an objective of the WTO as an institution and the covered agreements including those agreements silent on development issues.²⁴⁰

3. Text of the Agreements

Some of the text of WTO agreements call attention to the conditions of development

²³³ WTO Agreement, Article XVI:I (the WTO shall be guided by the decisions, procedures and customary practices followed by CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947.”)

²³⁴ *Korea-Dairy* (para 7.32).

²³⁵ *Brazil-Aircraft Arb.* Report (paras. 3.44, 3.55, nn.45, 48 (In this case the arbitrators referred to the meaning of countermeasures under general international law to define the word “countermeasures” in Article 4.10 and 4.11 of the SCM Agreement. The arbitrators also referred to the work of the International Law Commission.

²³⁶ *Japan – Alcoholic Beverages II*, p. 34, DSR 1996:1, p. 97 at 122–123, (WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R).

²³⁷ WT/DS 139/136, paras. 6.24, 6.194, the panels considered other relevant treaty provisions that provided a context for the cited provision. Stewart & Dwyer, supra note --, p. 66 (note 325).

²³⁸ WT/DS31/AB/R, VI(A)(6/30/97)

²³⁹ WT/DS58/AB/R (para.).

²⁴⁰ *Guatemala-Cement I* (para. 7.7) (panel noting that pursuant to Article 31.2 of the Vienna Convention, the entire text of the Antidumping Agreement was relevant to the proper interpretation of a particular treaty provision.).

or provide special procedural rights for developing countries. Such provisions afford opportunities for panels to develop the jurisprudence of the organization as they relate to development. Experience suggests that when a developing country has drawn the attention of a panel to such provisions, panels have frequently heeded the requirements of such provisions.

The problem is that most provisions in covered agreements that address development concerns of developing countries are extremely vague. Consider Article 21.2 of the DSU which states that “[p]articular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.” In *Indonesia — Certain Measures Affecting the Automobile Industry*, the Arbitrator noted that “the language of Article 21.2 is rather general and does not provide a great deal of guidance.” The Arbitrator nevertheless granted Indonesia the time extension that it sought.

4. Broad Reading of the Context, Object and Purpose of a Treaty

The customary rules of treaty interpretation enshrined in the Vienna Convention²⁴¹ allow panels and AB to consider not only the terms of a WTO agreement but their context, object and purpose.²⁴² Using this multidimensional technique of interpretation, a panel may be able to factor in the condition of development in its findings.

First, silence does not necessarily end the task of treaty interpretation. According to the AB, “the task of ascertaining the meaning of a treaty provision with respect to a specific requirement does not end once it has been determined that the text is silent on that requirement.”²⁴³ Thus, the fact that an agreement is silent on the development question need not foreclose inquiries on the issue.

Second, context, object and purpose can be used to address the problem of narrow interpretation of covered agreements. In the past, Panel and AB have on occasion looked outside WTO “covered agreements” to determine the meaning of the said agreements. In *Canada- Auto Measures*, the panel looked to the context, object and purpose of a treaty to find the meaning of a treaty term.

Interpreting Article 31 of the Vienna Convention, the panel stated:

Our understanding of these rules of interpretation is that, even though the text of a term is the starting point for any interpretation, the meaning of a term cannot be found exclusively in that text; in seeking the meaning of a term, we also have to take account of its context and to consider the text of the term in light of the object and purpose of the treaty.... The three elements referred to in Article 31 – text, context, object and purpose – are to be viewed as one integrated rule of interpretation rather than a sequence of separate tests to be applied in a hierarchical order.... In many cases ... it is impossible to give meaning, even “ordinary meaning,” without looking also at the context and/object and purpose.²⁴⁴

²⁴¹ Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, signed at Vienna on May 23, 1969, entered into force on January 27, 1980. Article 31.1 of the Vienna Convention provides that a treaty “shall be interpreted in *good faith* in accordance with the *ordinary meaning* to be given to the terms of the treaty in their *context* and in the light of its *object and purpose*.”

²⁴² United States – DRAMS (para. 6.13); United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, at 17 (5/20/96). In United States – Section 301, the panel invoked Article 31 of the Vienna Convention to interpret DSU Article 23 (paras. 7.21-22).

²⁴³ *US — Carbon Steel*, para. 65, (WT/DS213/AB/R, WT/DS213/AB/R/Corr.1), (“Such silence does not exclude the possibility that the requirement was intended to be included by implication.”).

²⁴⁴ *Canada- Auto Measures* (Para. 10.12)

Similarly in *United States – Section 301*, the panel stated that “the elements referred to in Article 31 – text, context and object-and-purpose as well as good faith – are to be viewed as one holistic rule of interpretation rather than a sequence of separate tests to be applied in a hierarchical order.”²⁴⁵

5. Trade Rules for Changing Times

In advocating for a pro-development interpretive culture in the DSM, it must be remembered that multilateral trade rules are not static documents but have to be interpreted in such a way that they accord with the changing realities of the global trading environment. As the AB rightly noted:

... WTO rules are reliable, comprehensible and enforceable. WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgments in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind. In that way, we will achieve the “security and predictability” sought for the multilateral trading system by the Members of the WTO through the establishment of the dispute settlement system.²⁴⁶

6. Development Dimension and the Right to Seek Information

Article 13 is an important tool that could be used to integrate development and trade. Article 13 confers on each WTO panel, the right to “seek *information and technical advice* from any individual or body which it deems appropriate.” Relying on Article 13, panels can seek information from intergovernmental organizations, from non-governmental organizations and from state parties to the WTO. Indeed, panels “may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter.” Since there is no limit on the nature of information panels may seek, panels may use section to request and obtain information that may shed light on the impact on developing countries of trade rules.

While WTO panels have the right to seek information, they do not have a duty to seek such information even when such move could shed much light on issues before them. It is worth considering amending Article 13 to require panels to seek information from appropriate bodies in cases involving developing countries and in cases where development concerns are raised through submission by third party participants. To make it manageable, a limited number of credible inter-governmental and non-governmental organizations development organizations could be listed.

Article 13 is not a mandate for a fishing expedition, however. Also, Article 13 does not relieve developing countries of the costly burden providing appropriate scientific or other technical studies to support their claims.

D. Conclusion

A development dimension in interpreting WTO Agreements, Qureshi argues, involves *inter alia* factoring in development as an objective, factoring in the ‘condition of development’ in the interpretation and application of WTO Agreements, factoring in the specific characteristics of development, factoring in the option of a teleological approach, factoring in relevant rules of international law that facilitate development, and factoring in an appropriate approach to interpreting provisions of WTO Agreement that provide for special and differential treatment for developing countries.²⁴⁷ What Qureshi urges is a radical transformation of processes of the dispute settlement system. Such an ambitious project is bound to

²⁴⁵ *United States – Section 301* (Para. 7.22); *United States – Stainless Steel*, para. 6.99 (“We are cognizant ... that dictionary definitions can only take the interpreter so far, and that in interpreting a provision of a treaty we must take into account both context and object and purpose.”).

²⁴⁶ *Japan – Alcoholic Beverages II*, p. 34, DSR 1996:1, p. 97 at 122–123, (WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R).

²⁴⁷ Asif H. Qureshi, *Interpreting WTO Agreements for the Development Objective*, (on file with author).Id., at 4.

encounter still opposition from developed countries and even from some developing countries as more and more disputes involve lower income countries at more or less the same level of development. Is there any room for such an ambitious project? Yes and No.

Unlike non-trade issues such as environmental conservation and labor rights, the linkage between trade and development is more readily embraced in the multilateral trading system. Development-oriented provisions feature prominently in numerous multilateral trade agreements and decisions of the WTO Ministerial Council and provide a legitimate basis for a development dimension in interpreting WTO agreements. Also important is the fact that the linkage between trade and development has occurred in the course of the negotiation of new agreements and in the policy-making procedures of the General Council although with limited results.²⁴⁸ Nevertheless, there remain numerous obstacles to any move towards a development-friendly dispute settlement system suggesting a need to move cautiously, strategically and a willingness to accept small incremental gains.

Countries wishing to push for a development dimension in the interpretation of trade agreements have several obstacles to overcome.

a. **Vagueness:** The biggest obstacle to a pro-development interpretive culture is the fact that most S&DT provisions are vague, hortatory and do not define with specificity, the obligation imposed on WTO Members or the WTO as an institution. The AB noted in *US – Carbon Steel*, “when a provision refers, without qualification, to an action that a Member may take, this serves as an indication that no limitation is intended to be imposed on the manner or circumstances in which such action may be taken.”²⁴⁹ The fact that the AB also observed in the same case that “the task of interpreting a treaty provision does not end with a bare examination of its text,” and that “the absence of an express limitation on Members’ ability to take a certain action is not dispositive of whether any such limitation exists” should come as a relief to African countries but does not address the fundamental problem of vagueness.

b. **Self Regulating or Justiciable?** Related to vagueness is the problem of ascertaining whether a given provision in an agreement is largely self-regulating or entails close supervision by the dispute settlement organ of the WTO. In the DSU review process, African states and other developing countries have demanded that S&DT provisions should be strengthened by replacing “should” with “shall.” However, several decisions of the AB demonstrate that the words “shall” or “should” do not define with certainty the nature of obligation imposed on a party (whether “hard” legal obligation or “soft”).

Although “shall” appears in Article 3.7 of the DSU, the AB, in *European Communities – Bananas* and in the *Corn Syrup*²⁵⁰ case, determined that the requirement in the first sentence of Article 3.7 was self-regulating in nature. Article 3.7, provides inter alia that: “Before bringing a case, a Member shall exercise its judgment as to whether action under these procedures would be fruitful.” In *European Communities – Bananas*, the AB noted:

... a Member has broad discretion in deciding whether to bring a case against another Member under the DSU. The language of Article XXIII:1 of the GATT 1994 and of Article 3.7 of the DSU suggests, furthermore, that a Member is expected to be largely self-regulating in deciding whether any such action would be "fruitful".[footnote omitted]

Similarly, although the word “shall” appears in Article 3.1 of SPS Agreement, in the *Beef Hormone* case,²⁵¹ the AB’s ruled that the obligation in Article 3.1 was a “best effort” obligation. In arriving at this decision the AB applied a contextual analysis and looked at the unreasonableness and impracticability of an alternative interpretation. It is not clear how these uncertainties will be resolved. Howse suggests that such problems must be addressed like other interpretative questions.

²⁴⁸ J. Patrick Kelley, *Judicial Activism at the World Trade Organization: Developing Principles of Self-Restraint*, 22 NW. J. INT’L L & BUS 353 (2002)

²⁴⁹ *US – Carbon Steel*, para. 104, (WT/DS213/AB/R, WT/DS213/AB/R/Corr.1)

²⁵⁰ *Mexico-Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, Recourse to Article 21.5 of the DSU by the United States, WT AB-2001-5, Report of the Appellate Body.

²⁵¹ AB-1997-4, Report of the Appellate Body, WT/DS26, 48/AB/R, 16 January 1998.

Overall, without amending existing S&DT provisions, it may be difficult for states in Africa to rely on the S&DT provisions in the DSU and in the covered agreements. In each case, to determine the likelihood of a pro-development decision, several at least four basic questions must be asked:

- what is the legal effect of the individual S&DT provisions?
- what is the appropriate role of dispute settlement organs in policing them?
- what is the status of the provision taking into account the context of a treaty in which it appears?
- Would imposing a binding obligation be unreasonable and impracticable under the circumstances?

c. **Ascertaining the Legitimate Expectations of the Parties:** One of the biggest challenges will be ascertaining what the “legitimate expectations” of WTO Members are with respect to each covered agreement. Just because developing countries wish it, does not mean that the panels will conclude that the legitimate expectations of the parties was to let development concerns trump market access concerns. As the AB has noted, the common intentions of parties “cannot be ascertained on the basis of the subjective and unilaterally determined “expectations” of *one* of the parties to a treaty.”²⁵² In *India – Patents*, the AB stated:

... The legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself. The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the *Vienna Convention*. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.²⁵³

In ascertaining the legitimate expectations of the parties, due consideration must be given to the declarations and decisions of the Ministerial Council.

d. **Duty to Specifically Claim a Treaty Provision:** States in Africa will have the responsibility to bring to the attention of Panels provisions of covered agreements that they wish to see considered. They must also be ready to advance reasons why the relevant provision applies to their case. The fact that a country is in Africa may not automatically avail such a country rights under all S&DT provisions. For example, when Chile attempted to avail itself of the benefits of Article 21.2 of the DSU, the Arbitrator observed that “Chile has not been very specific or concrete about its particular interests as a developing country Member nor about how those interests would actually bear upon the length of “the reasonable period of time” to enact necessary amendatory legislation.”²⁵⁴

In conclusion, it must be emphasized that WTO is not a development organization nor is it the only multilateral organization concerned with issues pertaining to development. Regarding the S&DT provisions of trade rules, in every situation several questions may need to be asked:

- what is the nature of obligation imposed by provisions that call attention to the needs of developing countries or stipulate that their interest must be taken into account?
- What is the legal status of any relevant WTO Ministerial declarations and decisions?

²⁵² *EC — Computer Equipment*, para. 84 (WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R)

²⁵³ *India — Patents (US)*, para. 45, (WT/DS50/AB/R)

²⁵⁴ Award of the Arbitrator, *Chile — Taxes on Alcoholic Beverages – Arbitration under Article 21.3 of the DSU*, WT/DS87/15, WT/DS110/14, para. 45, 23 May 2000.

- Which body has the responsibility for implementing the S&DT provisions of the different negotiated agreement?
- What, if any, is the role of the dispute settlement system in efforts to effectuate the S&DT provisions of WTO Agreements?
- What are the likely repercussions of attempts to integrate trade and development through more detailed analysis of their linkage in panel and AB deliberations?

VIII. AFRICA'S TRADE PERFORMANCE: A DETERMINANT OF LEVEL OF PARTICIPATION IN THE MTS AND THE DSM?

The participation of African states in the DSM must be analyzed against the backdrop of dwindling market share and poor economic performance. Although Africa's economic performance showed marked improvement in 2003 and there are signs that the macro-economic fundamentals for the continent are also improving, overall, the continent has fared very poorly in its international trade performance over the last two decades.²⁵⁵ Africa has not shared in the celebrated growth of world trade. Since the 1980s, sub-Saharan Africa's share in world export has been shrinking. Africa's share in global trade declined to a mere 2 percent in 2003 compared to 6 percent in 1980 and 3 percent in 1990.²⁵⁶ According to the African Development Report:

“Most African countries have the lowest export per capita in the World.... The dollar value (in current terms) of exports from Africa actually declined in the 1980s and rose by only 3 percent in the 1990s. The Africa region's share of world merchandise trade, in terms of both exports and imports, declined between 1990 and 2000”²⁵⁷

Low market share of world trade inevitably means limited participation in the MTS and inability to influence international trade law and policy. Africa must work to overcome non-competitiveness of its industries, the narrow export base of its economies, and small fragmented domestic market if fuller integration in the global economy is desired.²⁵⁸ Africa must aggressively pursue market access opportunities through effective and informed participation in international trade negotiations.

A. The Structure of Africa's Export

Africa remains extremely vulnerable to changes in international markets. The composition and direction of Africa's trade is a cause for concern as is the size of its aggregate output and its low manufacturing base. Compared to other LDCs, Africa's export is composed primarily of traditional agricultural commodities. Despite talks of trade liberalization, “many African countries obtain over half of their export earnings from only one or two primary commodities.”²⁵⁹ Countries like Nigeria, Angola and Libya obtain their export earnings almost exclusively from oil. As a result of the high dependence on exports of primary commodities, “the typical African country exhibits a high degree of ‘trade openness’ which renders it unduly susceptible to external shocks.”²⁶⁰

The direction of Africa's trade is another source of concern as is the number of countries actively engaged in global trade. About 80 percent of the exports from sub-Saharan Africa go to industrialized countries.²⁶¹ The continent depends excessively on the European Union market with 50-60 percent of

²⁵⁵ AFRICAN DEVELOPMENT REPORT 2004, at iv.

²⁵⁶ AFRICAN DEVELOPMENT REPORT 2004, at iv.

²⁵⁷ *Id.*, at 150.

²⁵⁸ Committee on Regional Cooperation and Integration, Work Program of TRID: Review of Activities and Priorities for the 2006-2007 biennium, http://www.uneca.org/crci/Annual_Report_Sam.htm (1/1/05)

²⁵⁹ AFRICAN DEVELOPMENT REPORT 2004, at 157.

²⁶⁰ AFRICAN DEVELOPMENT REPORT 2004, at 157.

²⁶¹ World Bank, *Impact of the Uruguay Round on Sub-Saharan Africa*, FINDINGS, No. 67 (July, 1996).

export destined for Europe,²⁶² while intra-African trade accounts for less than 6 percent of Africa's total trade. Only a few countries in Africa account for most of the export from the continent.²⁶³

Overall, [t]he majority of African countries ... are economically small and dependent for their export on relatively low-value primary commodities."²⁶⁴ With the exception of countries such as Morocco, South Africa, Tunisia and Mauritius, Africa had had limited success in diversifying export into manufactures which today command larger market share.²⁶⁵ Most countries in the region import more than they export. Despite improved economic performance, growth is still inadequate in most countries in the region.²⁶⁶ Worse, many countries in the continent have difficulties sustaining high growth rates. The result is high variability in economic growth rates from year to year.²⁶⁷ There is presently a need for most countries "to redouble their efforts and put in place the required policies and structures to accelerate and sustain growth rates in the order of 6-8 percent."²⁶⁸

B. Addressing Shrinking Market Share

Several factors account for the decline in Africa's share in world exports including declining global demand for agricultural exports,²⁶⁹ erosion of market share through subsidies and a host of non-tariff barriers (NTBs), African countries' own trade and development policies that lessen their ability to be competitive in a fiercely competitive global market.²⁷⁰ To reverse Africa's diminishing role in global trade, domestic and regional policies must be improved. At the global level, there is need for improved market access for Africa's export and for technical assistance and capacity building efforts to be scaled up.

a. **Domestic Level Reform:** Africa must work to regain lost market share in primary commodities such as cotton and cocoa.²⁷¹ The continent needs to regain lost traditional comparative advantage in primary commodities. Studies show that sub-Saharan Africa's share for key commodities such as vegetable oil, palm oil and palm nuts fell 47 to 80 percent below the levels seen in the early 1960s.²⁷² Studies show that between 1960 and 1991, for the 30 most important non-oil exports, "sub-Saharan Africa's average market share declined from 20.8 percent to 9.7 percent of world exports of those products, implying annual trade losses of about \$11 billion, during the same period."²⁷³

²⁶² AFRICAN DEVELOPMENT REPORT 2004, at 157. (The EU accounted for over 60 percent of Africa's export in 1988 while intra-African trade accounted for less than 6 percent of the continent's total trade.)

²⁶³ South Africa, Nigeria, Algeria, Libya, Angola and Morocco together accounted for almost 70 percent of African export in 2000. Individually, these six had individual shares above 5 percent of total African export. Of the six countries, three (Nigeria, Algeria and Libya) are heavily dependent on oil and one (Angola) is heavily dependent on minerals. AFRICAN DEVELOPMENT REPORT 2004, at 154.

²⁶⁴ *Id.*

²⁶⁵ Omar Kabbaj, President of the African Development Bank Group, "Trade, Development and Poverty Reduction in Africa, Remarks at the 2004 ECA Ministerial Conference on Mainstreaming Trade Policy in National Development Strategies, Kampala, Uganda, 22 May 2004.

²⁶⁶ AFRICAN DEVELOPMENT REPORT 2004, at iv.

²⁶⁷ Factors accounting for annual variability in Africa's growth performance include: civil conflicts, unpredictability of donor's support, variations in climatic conditions, and variations in the price of primary commodities.

²⁶⁸ AFRICAN DEVELOPMENT REPORT 2004, at iv.

²⁶⁹ Alexander J. Yeats *et al.*, What Caused Sub-Saharan Africa's Marginalization in World Trade?, available at www.worldbank.org/fandd/english/1296/articles/061296.htm (visited 5/26/2005) ("From the early 1960s to the 1990s, world trade in all nonfuel products grew at a compound rate of 11.8 percent, yet the corresponding growth rate for the types of product sub-Saharan Africa exports was about 4.5 percentage points lower.")

²⁷⁰ *Id.*

²⁷¹ *Id.* (observing that during 1962-64, copper alloys were Sub-Saharan Africa's single largest export and the region supplied 32 percent of the copper alloy imported by the member states of the Organization for Economic Cooperation and Development (OECD). However, by 1991, Africa's market share had dropped below 10 percent.)

²⁷² *Id.*

²⁷³ *Id.*

There is need for governments to build institutions and create enabling environment for a true, private-sector-led economy.²⁷⁴ Governments must put emphasis on developing the physical and marketing infrastructure necessary for promotion of export. They must address existing biases against agriculture and the constraints farmers face in gaining access to factors of production and markets. There is added need to lower transaction costs resulting from a wide range of barriers relating to transport costs, inadequate infrastructure, unreliable utilities, and lack of market information.²⁷⁵ Studies show that countries of sub-Saharan Africa suffer transport cost disadvantages relative to competitors.²⁷⁶ Excluding cost of inland transportation and port charges, “international transport costs have a significant adverse impact on the level of African export.”²⁷⁷

At present, the industrial base of most countries in the region is weak. Africa “lags behind all other regions with respect to manufacturing activity and the intensity of industrialization, measured by manufacturing value-added per capita.”²⁷⁸ The growth rate for the manufacturing sub-sector was down to 2.3 percent in 2004 compared to 3.5 percent in 2002.

b. Regional Level Reform: Regional institutions have a role to play. Apart from helping to expand markets and exploiting the complementarities and economies of scale in the provision of regional public goods such as peace and security, regional development institutions can strengthen the institutional capacity of states in Africa to participate in the MTS and strengthen regional integration arrangements. African Development Bank has started a program of trade-related capacity building.²⁷⁹ Such programs need be constantly monitored and evaluated for their effectiveness.

The African Union’s socio-economic renewal program, the New Partnership for Africa’s Development (NEPAD), provides reason for optimism. July 2005 will mark the fourth anniversary of NEPAD. NEPAD promises the social, economic and political transformation of the African continent by Africans in partnership with the international community. NEPAD is designed to address the major development challenges facing Africa including the challenges of poverty, underdevelopment and marginalization of the African continent in the globalization process.²⁸⁰

Two pilot programs of NEPAD are promising. These are the African Peer Review Mechanism and the Comprehensive African Agricultural Development Program (CAADP). The APRM is “a system of voluntary self-assessment and constructive peer dialogue and persuasion.” The APRM was launched in May 2003 at the Seventh Meeting of NEPAD Heads of State and Government. The goal of the APRM is to ensure that the policies and practices of participating countries conform to agreed economic and

²⁷⁴ AFRICAN DEVELOPMENT REPORT 2004, at 266.

²⁷⁵ “However, transport costs are only one of the transaction costs associated with trade. If other constraints, such as market information and reliable utilities such as electricity and telecommunications, could be quantified, the implicit taxation of exporters associated with transaction costs would be even higher.” Committee on Regional Cooperation and Integration (Fourth Session), *Trade Facilitation to promote Intra-African Trade*, 24-25 March, 2005, <http://www.uneca.org/crci/> (1/1/05)

²⁷⁶ Committee on Regional Cooperation and Integration, *Work Program of TRID: Review of Activities and Prioritise for the 2006-2007 biennium*, http://www.uneca.org/crci/Annual_Report_Sam.htm (1/1/05) (“observing that small and fragmented markets coupled with underdeveloped infrastructure impose high transaction costs on African industries and businesses.”).

²⁷⁷ Alexander J. Yeats *et al*, What Caused Sub-Saharan Africa’s Marginalization in World Trade?, available at www.worldbank.org/fandd/english/1296/articles/061296.htm (visited 5/26/2005).

²⁷⁸ AFRICAN DEVELOPMENT REPORT 2004, at 18.

²⁷⁹ Omar Kabbaj, President of the African Development Bank Group, “Trade, Development and Poverty Reduction in Africa, Remarks at the 2004 ECA Ministerial Conference on Mainstreaming Trade Policy in National Development Strategies, Kampala, Uganda, 22 May 2004.

²⁸⁰ The four primary objectives of NEPAD are: (i) to eradicate poverty; (ii) to place African countries on a path to sustainable development; (iii) to halt the marginalization of Africa in the globalization process; and (iv) to accelerate the empowerment of women. See The African Union, NEW PARTNERSHIP FOR AFRICA’S DEVELOPMENT (NEPAD) ANNUAL REPORT 2003/2004 11 (2003) (hereinafter NEPAD Annual Report 2003/2004).

political standards and values. Twenty three members of the AU have already acceded to the APRM.²⁸¹ Two Country Reviews will be undertaken quarterly. The first four countries that will be reviewed are Ghana, Rwanda, Kenya and Mauritius. It is expected that the first 16 countries to accede will be reviewed within the April 2004/March 2005 and April 2005/March 2006 fiscal year.²⁸²

The approval in July 2002 of the Comprehensive African Agricultural Development Program (CAADP) by the African Heads of State and Government also holds some promise because without a true agricultural reform, African countries will not be in any position to utilize preferential trade arrangements in the MTS or to take advantage of opportunities that arise when non-tariff barriers lowered. If successful, the program could help resolve food insecurity, boost Africa's agricultural export and improve the quality of food intake in the continent.²⁸³

Overall, African institutions including institutions such as the African Development Bank (ADB), the Development Bank of Southern Africa (DBSA) and the African Capacity Building Foundation (ACBF) can be important in strengthening African export trade and the level of the participation of states in Africa in the MTS. These institutions can be important in terms of technical assistance and advisory services, resource mobilization and funding. The programs of these institutions have to be constantly monitored and evaluated. While the WTO is constantly scrutinized, regional institutions sometimes fall off the radar and are not held publicly accountable for their policies and actions. Civil society groups need to be aware of this double-standard and devote some time towards ensuring that regional organizations live up to their mandate.

c. Global Level Reform:

Although not the sole explanation for Africa's poor performance in external trade, external barriers to Africa's export in the form of tariffs and non-tariff barriers imposed by Africa's major trading partners have affected Africa significantly. Undoubtedly assessment of the influence of import duties, subsidies and NTBs on Africa's export is complicated by the extension of preferential tariffs by industrialized countries. There is need for further study on the range of tariffs facing African countries in the principle destinations for African export. There is additional need for studies on the effect of tariff escalations on the export of processed goods from Africa.²⁸⁴ Finally, there is need for new studies on how new tariff negotiations affect preferential tariffs extended to countries in Africa.

Agricultural subsidies and associated dumping translate into significant foreign exchange losses for countries in sub-Saharan Africa and further reduce the export opportunities for these countries. Oxfam International estimated that EU sugar export dumping cost South Africa about \$60m in foreign exchange losses in 2002.²⁸⁵ In the future and as the need arises, African Members of the WTO will have to push to ensure protection against capricious dumping and countervailing actions that target Africa's export.²⁸⁶ They must be vigilant to detect and thwart efforts to erect new barriers to Africa's export through new forms of NTBs.

Developed countries must demonstrate their commitment to address the development concerns of poor countries good faith negotiation aimed at successfully concluding negotiations on how the S&DT

²⁸¹ For a full understanding the basic objectives and modus operandi of the APRM see the following (i) the Memorandum of Understanding on the APRM, the accession document to the APRM; (ii) APRM Organization and Process Document and the document on Objectives, Standards, Criteria and Indicators for the APRM (OSCI Documents); (iii) Declaration on Democracy, Political, Economic and Corporate Governance; (iv) APRM Base Document.

²⁸² NEPAD ANNUAL REPORT 2003/2004, at 39.

²⁸³ *Id.*, 14. The four pillars of the CAADP are: land and water management, infrastructure and market access, increasing food supply and reducing hunger, and agricultural research and technology dissemination and adoption.

²⁸⁴ AFRICAN DEVELOPMENT REPORT 2004, at 160 ("Tariff escalations occurs when tariffs on final processed goods exceed those on unprocessed raw materials.")

²⁸⁵ Oxfam, *An End to EU Sugar Dumping?*, at 1.

²⁸⁶ Alex F. McCalla, *What the Developing Countries Want from the WTO*, The Estey Centre Journal of International Trade and Policy, Vol. 2 No. 1, 165, 168 (2001)

provisions in covered agreement can be clarified and strengthened in line with the Doha mandate. To date, negotiations in the Committee on Trade and Development (CTD) have been slow or nonexistent. Although the Doha Declaration mandated negotiations leading to clear recommendations on ways to strengthen them and make them more precise, three deadlines for the CTD to complete its work have been missed.²⁸⁷ It is also doubtful that a new July 2005 deadline will be met. There are sharp division between developed and developing countries and neither side appear to be budging.

In conclusion, developed countries must meet their commitment to liberalize trade in areas of special interest to African countries and least developed countries. It is unfortunate that negotiations on the Doha Development Agenda have stalled. A number of areas beg for urgent attention including:

- the special needs of LDCs,
- technical assistance to enable states in Africa implement negotiated agreements, improve their export potentials and utilize the DSM,
- clarification and strengthening of S&DT provisions in all WTO agreements especially those pertaining to LDCs. Agreement—specific proposals should be addressed as well as broader systemic issues surrounding them.²⁸⁸
- end of export subsidies on key commodities such as cotton.
- protection against misuse of sanitary and phytosanitary measures; and
- good faith examination of tariff escalation;

C. Conclusion

The issue for Africa “is not so much *whether* to trade but in what to trade, and the *terms* on which trade should take place with the developed countries of the world (or between themselves.”²⁸⁹ Currently over 80 percent of export earnings of African countries are derived from the sale of primary commodities.²⁹⁰ Worse, relative to manufactures, the price of primary commodities has been deteriorating for at least a century at an average rate of about 0.5 per cent per annum.²⁹¹ Inevitably, with their dependence of primary product exports, the present structure of global trade favor developed countries since they presently account for the lion’s share of manufactured exports.

There is a need to address both the demand side and the supply side constraint to Africa’s export. The cooperation of the international community is needed to achieve both goals.

VII. RECOMMENDATIONS

The concerns of African-country Members of the WTO regarding the functioning of the DSU raise serious questions about the theoretical equality of a rule-based system and the long-term benefit of multilateral trade rules to states in Africa. Is the WTO dispute settlement mechanism serving tangible African interests? Can African states successfully use the DSM to improve market access for agricultural products originating in Africa? In other words, can the DSM lead to the opening of foreign markets for

²⁸⁷ ICTSD, *S&D Talks Held Up Over Work Plan Disagreement*, BRIDGES, No. 4, 12. (2005)(reporting that the last meeting of the Committee on Trade and Development was suspended some developing countries, including India, China, Egypt and Brazil, refused the agenda because in their view it allotted too little time to agreement-specific proposals compared to the broader systemic issues surrounding them.).

²⁸⁸ ICTSD, *Technical Negotiations Reveal NO Progress on Key Doha Round Issues*, BRIDGES, No. 4 (2005)(reporting that the last meeting of the Committee on Trade and Development was suspended some developing countries, including India, China, Egypt and Brazil, refused the agenda because in their view it allotted too little time to agreement-specific proposals compared to the broader systemic issues surrounding them.).

²⁸⁹ AFRICAN DEVELOPMENT REPORT 2004, at 122. See generally, Gottfried von Harbeler, *THE THEORY OF INTERNATIONAL TRADE* 7 (1968 (highlighting the growth effects of trade). Thirlwall, *TRADE, TRADE LIBERALIZATION AND ECONOMIC GROWTH* 18 (2000) (marking a case for why exports are vital to growth).

²⁹⁰ AFRICAN DEVELOPMENT REPORT 2004, at 122.

²⁹¹ *Id.*, at 123.

African goods? Is the gradual elimination of trade diplomacy in favor of litigation as the primary mechanism for addressing trade disputes really in the interest of states in Africa? These questions are pertinent because at present, the DSU is not serving tangible African interests. On the whole, Africa has not benefited from the judicialized dispute settlement system ushered in by the DSU.

Core factors that discourage poor countries from participating in the DSM are: cost/capacity constraints, absence of remedies, and weak compliance mechanism. Several structural impediments in the DSU also operate to discourage weaker states from participating in the DSM. Moreover, some studies suggest that development orientation may explain variations in use of the DSM by developing countries.

One possible option is for African states to demand for new special rights and the privileges in the DSU and other covered agreements. However, as discussions in Section V reveal, developing countries in general have been reluctant to use the S&DT provisions in the DSU. While a case could be made for these provisions to be strengthened and articulated with greater specificity, it is doubtful whether African countries will use them in the future. Moreover, it is debatable whether developing countries obtain any tangible benefit by utilizing these provisions. The reason is because S&DT provisions as they currently stand do not comprehensively address the core factors that discourage poor countries from participating in the system. Sadly, it is unlikely that the on-going review process will bring about any significant improvements in the DSU or in the S&DT provisions in covered agreements. The Chairman's Text indicates that calls for retroactive compensation, automatic right to compensation, and collective retaliation have all been ignored.

A. Recommendations to the WTO

Within the WTO, there is a need to: (1) Strengthen and clarify the S&DT provisions of the DSU; (2) strengthen and clarify the S&DT provisions in covered agreement through good faith negotiation on the agreement-specific proposals already submitted by developing countries; (3) encourage a development-friendly interpretive culture in the DSM; (4) scale up and routinely evaluate the technical assistance and capacity building (TACB) initiatives of the WTO; (5) amend the DSU by introducing provisions that have the potential to encourage greater participation by poor countries, for example, proposal relating to award of litigation cost, retroactive and post-ruling compensation. The rest of this section will focus on technical assistance and capacity building. A full assessment of Africa's technical assistance and capacity building needs and evaluation of current responses to these needs is beyond the scope of this paper.

1. Reform in Scope and Delivery of Technical Assistance and Capacity Building

As this paper demonstrates, lack of legal capacity, lack of resources, and lack of adequate representation in Geneva all operate as barriers to the effective utilization of a dispute settlement process. Although in principle, the lack of human resources could be addressed by private law firms thanks to the AB ruling in *EC — Bananas III*, this is not a realistic option for many countries in Africa. The WTO acknowledges that “[r]escorting to private law firms ... is costly, especially because lawyers specialized and experienced in WTO law are mostly established in the capitals of developed countries (e.g. Washington, Brussels, Geneva, Paris and London).”

Effective utilization of the DSU presupposes adequate knowledge of other countries' legislation and regulations that could operate as barriers to Africa's exports. Moreover, a thorough understanding of the requirements of access for export to major markets serves as a basis for preparing successful negotiations, implementing agreements, as well as for determining violation of negotiated rules when they occur. To utilize the DSM effectively, African countries must have the expertise to collect, analyze and disseminate trade statistics in a reliable fashion.

To overcome the weakness and powerlessness that arise as a result of the comparative advantage in legal skills and financial resources held by developed countries, African countries need financial, technical and legal assistance.

a. Targeted Technical Assistance and Capacity Building

The dispute settlement system will not necessarily produce efficient outcomes absent the provision of adequate legal and technical capacity to countries that lack experience in trade law expertise in international trade law, international economics and statistics to mention a few.

With respect to effective utilization of the DSU, studies show that developing countries need the assistance more at the pre-panel phase of the dispute settlement process (before litigation commences) and perhaps much earlier. Busch and Reinhardt find that the reason why poorer countries have not secured significantly greater concessions under the WTO than under GATT despite pro-plaintiff rulings from panels and AB is because they are missing out on early settlement. Their study reveals that early settlement “offers the greatest likelihood of securing full concessions from a defendant at the GATT/WTO” and that “[d]efendants tend to offer the greatest concessions in the consultation stage, or at the Panel stage but before a ruling.” They conclude that:

“The primary difficulty, from the poor complainant’s standpoint, lies early in a dispute’s origins, not in litigation once embarked upon, nor in the retaliatory endgame.... The complainant’s level of development speaks directly to its capacity for recognizing, and aggressively pursuing, legal opportunities as a complainant. Having this capacity, a complaint is in a much better position to hit the right legal buttons during consultations, to pressure the defendant on its weakest legal points during consultation, and to give the impression that the issue might well be pushed to its logical conclusion.”

These findings suggest the need for technical assistances to be better targeted and made to respond to the specific needs of a country. These studies also provide a basis for evaluating bilateral and multilateral programs for technical assistance and new forms of legal aid that have arisen. If it is true that over fifty percent of all disputes are resolved by mutual agreement reached by parties during the first consultation stage, it is at this stage that focus should be. In other words, although African countries need resources to hire litigators once a case is before a panel, to make more of negotiations and consultations and increase their chances of securing early settlement, they need lawyers and technical experts in the lead up to a case and at the pre-panel phase before the parties resolve to litigate.

b. Private Sector Involvement

There is a need to deepen existing private sector understanding of the substantive aspects of negotiated agreements. Unfortunately, the technical assistance and capacity building initiatives of the WTO do not target the private sector. The private sector is only mentioned in passing in the WTO Manual on Technical Cooperation and Training (“the Manual”).²⁹² According to the Manual, one of the main objectives of the WTO technical cooperation is to “strengthen and enhance institutional and human capacities in the *public sector* for an appropriate participation in the multilateral trading system; *activities may include representatives of the private sector.*” The Manual also states:

The WTO's technical assistance is *principally provided to government officials* of beneficiary countries who have specific responsibilities with regard to the implementation of the WTO Agreements. Officials can be trained and prepared for tasks ahead, both in Geneva or on a national, regional or sub-regional basis. *The association of the private sector with technical cooperation activities can be promoted*, as it contributes to raising the business community's awareness of the multilateral trading system and enables it to identify the trading opportunities arising from the Agreements.²⁹³

²⁹² WT/COMTD/14, 12 March 1998. The manual was adopted by the Committee on Trade and Development on 6 March 1998.

²⁹³ Emphasis added.

In focusing on government officials, the WTO ignores NEPAD's call on the international community to "[p]romote entrepreneurial development programmes for training managers of African firms," and to "[p]rovide technical assistance in relation to the development of an appropriate regulatory environment, promotion of small, medium and micro-enterprises and, establish micro-financing schemes for the African private sector." This is not to suggest that the WTO abandon its focus on the public sector or even that the WTO should broaden the scope of its technical cooperation program. Rather, it is to draw attention to this gap in trade-related technical assistance programs with the hope that other capacity building initiative will address it.

b. Cost-Effective TACB Initiatives: The WTO currently spends millions of dollars organizing special trade policy courses for government officials in Geneva,²⁹⁴ holding regional seminars and organizing national seminars. There are two problems with the current approach and both go to the long term sustainability of the programs. First, given the high turn-over of officials in many countries in Africa, much is lost both in terms of money spent and institutional memory when a trained official are moved to other departments or leave to join the private sector. Second, the top-down approach does not address the underlying problem which is the absence of opportunities at the local level for training in international trade law at a level that is accessible to the average person in Africa.

For a fraction of what it costs to fly government officials to Geneva, it may be possible to equip universities and graduate schools in Africa with the tools to train the next crop of trade experts in Africa. The technicalities of the WTO dispute settlement system and growing jurisprudence of WTO panels and AB, about 27,000 pages of jurisprudence, cannot be digested in the course of a short regional seminar or in the course of a special trade policy course that the WTO currently convenes in Geneva. In the short term, the WTO or donor organization could consider special scholarship to enable universities professors obtain advanced degree in international trade law and other relevant fields. The scholarship could be made conditional on recipients returning to their countries, accepting a commitment to teach for a certain number of years, and offering assistance to their governments. Carefully tracked, such a scholarship scheme may provide the foundation for a strong network of African trade experts.

c. Need for Change in the Emphasis of TACB Initiatives: A third problem with the WTO technical cooperation program is that it is essentially designed to assist countries implement their WTO obligations (e.g. preparing legislation, regulations and notifications), and does not appear to be fully directed at equipping countries to understand the complexities of global trade rules or to protect their trading interest.

According to the United Nations Industrial Development Organization (UNIDO) the focus of international dialogue on trade related capacity building "is still almost exclusively on building capacities in negotiating and in trade information aspect."²⁹⁵ This approach, according to UNIDO, "will not facilitate trade or enable market access for developing countries in meaningful ways." There is need for TACB to enable Africa increase production, diversify exports, improve quality of products and meet international standards and regulations. For example, without domestic capabilities to understand and comply with a myriad of technical standards, and health and safety requirements, African states will not be in a position to technically analyze and challenge third country's claim in relation to exported products nor can they identify possible technical solution to the problem.²⁹⁶ If indeed the worldwide stock of

²⁹⁴ The WTO Secretariat finances and organizes three *Regular* Trade Policy Courses per year for officials from developing countries. The Courses, held twice per year in English and alternately in French and Spanish, take place in Geneva and last for twelve weeks.

²⁹⁵ United Nations Industrial Development Organization, *Enabling Developing Countries to Participate in International Trade: A UNIDO Strategy for Capacity Building*, 12 March 2002.

²⁹⁶ *Id.*

standards and technical regulation is about 100,000,²⁹⁷ it will be difficult for countries in Africa to understand or comply with them absent technical assistance.

In conclusion, considerable progress has already been made to scale up technical assistance to countries in Africa and to respond to the need for coherence and coordination in the implementation of programs. This is reflected in the creation of the Doha Development Agenda Trade Capacity Building Database, the establishment of the Joint Integrated Technical Assistance Program (JITAP) and the Integrated Framework for Trade-Related Technical Assistance to Least Developed Countries (Integrated Framework). An evaluation of these projects and programs is beyond the scope of this paper. However, there is a need for transparency in the delivery of trade-related technical assistance, a need to involve the private sector, and a need for programs to be routinely evaluated for their effectiveness.

In evaluating a TACB program, several questions could be asked: (i) Does the program serve Africa's interest?; (ii) Was the program designed with necessary input from domestic stakeholders?; (iii) Is the program sustainable?; (iv) Does the program come with burdensome conditions attached?; (v) Does the program fit within the overall development goals of the recipient country?; (vi) Is there sufficient transparency in the design of the program to allow for public scrutiny?; (vii) Any room for private sector involvement?

Undoubtedly this is another area that calls for further studies. In many respects, the whole notion of trade-related technical assistance and capacity building (TRTA/CB) is a new one. There is room for mistakes and experience may prove to be the best teacher.

A. Recommendation to States in Africa

Once the decision has been made to join the WTO, states in Africa have no choice but to actively participate in all the processes of the organization in order to ensure that the interests of their nationals are adequately safeguarded. Regardless of whether or not they participate in the DSM, decisions and rulings of panels and AB have the potential to significantly affect African interests. The fact that some developing countries are attempting to overcome the barriers to the utilization of the DSM is encouraging. What may be learned from the experience of other developing countries?

1. Baby Steps are Important: Need to Engage the System

The lack of utilization of the DSM by states in Africa is a major obstacle to any study aimed at unearthing the actual rather than imagined problems with the DSM. The diminutive participation of African states in the DSM and the fact that these states have never utilized existing S&DT provisions in the DSU may mean that their perspectives and proposals for reform will not be given the full consideration they deserve. Unless African states actually attempt to utilize the system, it is hard to predict the extent to which it can serve their interests. There are several reasons why African states may wish to attempt to utilize the system:

a. **Use with the Goal of Exposing the System's Failures and Weaknesses:** By bringing cases to the WTO, states in Africa can highlight the different barriers to African countries' exports and the failure of the GATT/WTO system to address these barriers. In other words, although the primary goal for utilizing the DSM is to eliminate or significantly reduce barriers to trade and enhance market access, a secondary goal could be, through a host of "test" cases, to dramatize and highlight the gross ineffectiveness of the multilateral trading system as far as weaker developing countries and LDCs are concerned. In this respect, a lesson may be learned from the 1961 complaint filed that Uruguay filed under Article XXIII. The complaint was filed against fifteen developed countries and listed about 576 trade restrictive measures. According to Hudec:

The Uruguayan complaint was showpiece litigation – an effort to dramatize a larger problem by framing it as a lawsuit. The complaint was making two points. One was to

²⁹⁷ *Id.*; See also OECD TD/TC/WP (98) 36/FINAL of February 1999.

draw attention to the commercial barriers facing exports from developing countries and the fact that, whether or not these barriers were legal, the GATT was not working if it could not do better than this. Second, although Uruguay carefully avoided any claim of illegality, the fact that many of the restrictions were obviously illegal could, Uruguay hoped, dramatize the GATT's ineffectiveness in protecting the legal rights of developing countries.²⁹⁸

Although the complaint did not significantly alter Uruguay's overall trading position, the important lesson learned, according to Uruguay, was that GATT did not protect developing countries.²⁹⁹

b. Use with the Goal of Gaining Experience: African states may wish to use the DSM in order to gain better experience of how it works. One way to gain experience without incurring huge transaction costs is through third party participation. Participation as third participant could help improve a country's knowledge of the functioning of the system³⁰⁰ and prepare a country for future litigation.³⁰¹ The advantages of third party participation according to one diplomat, was the opportunity it affords a country to learn about WTO processes. As a third party, a country has opportunity first hand to observe the questioning and legal analysis by panels and AB.³⁰²

Even in the role of third participants, active participation is encouraged. They must participate with a view to making full use of all the rights that are accorded third party participants in the DSU and testing the limits of those rights. For instance, in the *European Communities – Banana* dispute, it was only at the instance of a specific request by St. Lucia that the Appellate Body was able to rule that private legal counsel could participate in Appellate Body proceedings as part of the delegation of participants and third participants.³⁰³

2. Alliances are Important: Need to Engage Civil Society Groups

Alliances with national and international NGOs, professional associations, and think tanks are likely to yield a huge dividend for states in Africa that desire greater involvement in the DSM. These civil society groups can be useful in at least two respects.

a. Offset Time Cost, Financial Cost and Human Resource Cost of Utilizing the DSM: Civil Society groups have a wealth of experience that states in Africa could draw on to overcome some of the financial and human resource constraints associated with utilizing the DSM. NGOs such as Oxfam and the Institute for Agricultural Research routinely conduct studies that may be very useful and support claims of rules violation by African states.

b. Partnership in Investigating and Monitoring Rules Violation: NGOs are constantly carrying out studies on the laws, policies and practices of countries. Some international NGOs have sometimes targeted developed countries and helped to identify practices and policies of rich nations that potentially violate WTO rules. As most countries in Africa currently lack the financial and human resources needed to detect potential violations of negotiated agreements, strategic alliance with key NGOs is likely to prove useful.

c. Alternative Compliance Mechanism: Studies show that compliance with WTO ruling is sometimes motivated by incentives unrelated to retaliation.³⁰⁴ Incentives such as the need to avoid public embarrassment and the need to uphold the overall credibility of the multilateral trading

²⁹⁸ Robert Emil Hudec, *DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM* 47 (1987).

²⁹⁹ *Id.* at 49.

³⁰⁰ Lacarte-Muró and Petina Gappah, *supra* note 6, at 397 (observing that developing countries that have been third parties "have no doubt found that their knowledge of the functioning of the dispute settlement system has been considerably enhanced by such participation.")

³⁰¹ *Id.*, at 397 ("Developing countries should not hesitate to take up [third participant role] in appropriate conditions, because their familiarity with the inner workings of the system will keep them in good stead.")

³⁰² Official of the Mission of India in Geneva. Telephone Interview by author. May 2005.

³⁰³ *Id.*, at 400.

³⁰⁴ Davis, *supra* note --, at --.

system do frequently induce powerful nations to comply with pro-plaintiff ruling of WTO panels and AB. Strategic alliance with civil society groups could strengthen these alternative incentive structures and offset the current weakness in the compliance mechanism of the DSU. NGOs are effective in mobilizing grassroots constituencies and can bring considerable pressure to bear on a recalcitrant nation.

d. **Post-DSM Oversight of Bullying:** Few studies confirm the claim that power asymmetries discourages economically weak countries from initiating disputes against economically powerful countries out of fear of retaliation. Nevertheless, civil society groups can play a role here by helping to identify and publicize any use of unilateral measures by the powerful against the weak in retaliation for the latter's use of the DSM. This may help to ensure that poor countries that utilize the DSM do not suffer any adverse political costs (e.g. damage to bilateral relations or threat of economic sanctions) as a consequence.

In conclusion, given the potential importance of civil society groups, African states must reconsider their present hostility to the idea of greater external transparency in WTO processes and involvement of NGOs in the dispute settlement mechanism. Certainly, NGOs may shun any move towards alliance absent amendment of the DSU and the WTO Agreement to allow them greater participation. Without endorsing the AB ruling in the *Shrimp-Turtle* case to the effect that panels have a right to accept unsolicited information from NGOs, it is possible to devise new creative ways to involve civil society groups in WTO processes without compromising the inter-governmental nature of the organization.

3. Coalition is Important:

Countries in Africa must also consider working with a coalition of other countries when utilizing the DSM. The experience at Cancun suggests that developing countries working together as a coalition can shape the agenda-setting process at the WTO and set limits on agreements. The same holds for the DSM. Countries can consider initiating cases together or joining in a case initiated by another Member.

Coalition in the utilization of the DSM could address cost concerns and offset the power imbalance in the WTO. Experience shows that a rule-oriented dispute settlement mechanism does not necessarily reduce the importance of market power? The progressive judicialization of the DSM initially held out the promise of bringing the rule of law into the MTS, thus raising the prospects of fairness and equality under the law. Although judicialized and arguably protected from the harmful effects of power politics that plagued the GATT dispute settlement system, small countries remain very vulnerable under the system and still have reasons to be concerned about the muscle of large countries. The inadequacies of available remedies and mechanism for securing compliance effectively preclude countries with weak economies from successfully forcing economically powerful countries to eliminate WTO-inconsistent measures. Alliance in the initiation of a case may put added pressure on a responding party to comply with a subsequent favorable ruling.

Alliance in establishing regional centers for the research of global trade issues is also another possibility. The African Development Bank and other regional institutions can play a role here. In this respect the Trade Law Center for South Africa (Tralac) offers a model that other regions in Africa may wish to consider.³⁰⁵ Established in February 2002, with the financial support of the Swiss Department of Economic Development, tralac is a not-for-profit organization aimed at building trade law capacity in the southern Africa region; in governments, the private sector and civil society. The long term goal of tralac is "to be a centre of excellence building trade law capacity in the Southern African region," and "to develop a critical mass of trade law expertise" in the region.³⁰⁶

³⁰⁵ See <http://www.tralac.org>

³⁰⁶ Other interesting projects are the regional trade hubs: The West African Trade Hub (WATH), the East and Central African Trade Hub, and the South African trade Hub. These are centers financed by the United States Agency for International Development (USAID) with the apparent goal of strengthening Africa's trade relationship

4. Improved Relations with the Private Sector/Establish Mechanisms to Involve the Private Sector in the Enforcement of WTO Rules: By strengthening the domestic part of the WTO enforcement chain, African countries could significantly improve their opportunity to utilize the DSU. Hoekman and Mavroidis show that to be able to bring cases to the WTO, “there must be domestic mechanisms through which export interests can channel information to the government.”

In today’s global economic environment, competitiveness is reached and maintained only through a true partnership of the private and public sector. Africa’s effective participation in the DSU will depend to a large extent on the relationship between African states and the private sector. The private sector is best positioned to provide governments with information in a timely fashion to allow for formulation and negotiation of trade agreements and to readily identify violations by countries when they occur. Producers and exporter are the ones capable of providing reliable and very detailed information essential for successful litigation. To date African leaders have not made a genuine effort to engage the private sector and civil society groups.

Sadly, many African countries do not invest in the private sector nor do they attempt to maintain good channels of communication with the sector. The private sector is mentioned in the Market Access Initiative of NEPAD. With the goal of promoting direct investment and trade, developing micro, small and medium enterprise, and ensuring a sound and conducive environment for private sector activities, the document calls on states in Africa to: strengthen trade and professional associations and chambers of commerce; take measures to enhance the entrepreneurial, managerial and technical capacities of the private sector; organize dialogues between the government and the private sector; and strengthen and encourage the growth of micro, small and medium-scale industries. These are lofty objectives. However, it does not appear that any progress has been made. There is a need to monitor the activities of governments in this regard.

E. Meaningful Effort to Regain Lost Market Share and Diversify Exports

Participation in the DSM is very important but may be meaningless if African countries are not in a position to take immediate advantage of new trade opportunities that successful cases may open. Few countries in Africa have the surplus of exportable products or the production capacity to take opportunity of new opportunities when they arise. This is an area that calls for serious reform at the domestic and regional levels.

F. A National Action Plan for Capacity Building

A well-articulated national action plan can serve as an effective for sensitizing the private sector about the complexities of global trade law and mobilizing capacity building assistance from the public and private sector sources. African states must come up with comprehensive national action plan for trade capacity building. The national action plan must define, prioritize, and clearly articulate the country’s trade-related capacity building needs. An effective action plan requires broad consultation between governments, public entities with responsibilities in the area of trade, representatives of the private sector and other segments of civil society including research and academic institutions.

VIII. CONCLUSIONS

In this paper, I have attempted to analyze the concerns of African states regarding the functioning of the DSU and the operation of the dispute settlement system. Because no African country has instituted a case before the DSM, an analysis of substantive issues decided upon in the context of real cases that have been brought to the WTO is impossible and was not attempted. It is thus too early to tell

with the US and enabling countries in Africa take advantage of the African Growth and Opportunities Act (AGOA). See <http://www.watradehub.com/index.htm> .

whether when facing discrimination against their export, African countries that do not have recourse to WTO adjudication are better or worse of than countries that have recourse to the system.³⁰⁷

One of the basic objectives of the DSU is the prompt settlement of disputes.³⁰⁸ In assessing the effectiveness of the DSU, much is made of the relatively large number of disputes so far referred to and finalized by the panels and Appellate Body. The DSU is frequently favorably compared to other international tribunals such as the International Court of Justice which have much smaller caseload despite their many years of existence. However, speed and quantity of cases reviewed cannot be the only test of effectiveness for the system. As the Africa Group rightly observed:

“[t]he performance of dispute settlement systems as a measure of justice or success must not only be quantitative, it must above all be qualitative. No large number of judgments handed down makes a system just, if the judgments are one sided or manifestly unjust; if they prejudice or are not fully responsive to sections of the international society.”³⁰⁹

The effectiveness of the DSM will be judged as much by the number of disputes referred to and finalized by it as by its ability to advance the overall objectives of the WTO as an institution including the development objectives of the organization.³¹⁰ To states in Africa, the system is complicated, costly, overly legalistic, lacks attention to socio-economic factors, provides ineffective remedies, and is affected by power imbalances and power politics. This is unfortunate. The participation of African countries and LDCs in the DSM is vital to the credibility of the system, and to the proper defense of their interests in today’s competitive trading environment.³¹¹ The system should not only be expeditious and predictable, it must also be widely seen as fair and impartial. A strengthened, accessible and fair dispute settlement system is necessary for the credibility of the MTS.

Explanations for Africa’s limited involvement in the MTS and the DSU must be found not only in the structure of the DSM and the rules of the DSU, but also in varied reasons for the poor export performance of the continent as a whole. A mix of domestic policies, policy failure and external constraints facing Africa’s export account for the continents declining market share and limited participation in the MTS. The implications of dependence on primary commodities, supply-side constraints to export, and the difficulty of diversifying exports for Africa’s participation in the MTS and the DSU cannot be ignored.

³⁰⁷ Davis, *Do WTO Rules Create a Level Playing Field for Developing Countries?* Prepared for delivery at the 2003 Annual Meeting of the American Political Science Association, Philadelphia, August 28-31, 2003.(suggesting that compared to developed countries who have access to the WTO dispute settlement system, developing countries who do not have recourse to the system face some disadvantages when facing discrimination against their exports. The reason, she argues, is that the institutional context of negotiations influences the tactics available to countries facing discrimination and the stakes of the negotiation outcome.).

³⁰⁸ Proposal by the EC, TN/DS/W/1, (“... It should be recalled at the outset that the purpose of a dispute settlement procedure is the amicable – and quick – resolution of a dispute. In this context, the WTO Members should always endeavor to solve the dispute at the earliest possible stage, if possible at the consultation stage but also via recourse to good offices or mediation by the Director-General, as provided in Article 5 of the DSU. The EC and its member States consider that any improvements of the DSU should contribute towards this overall goal of facilitating the earliest possible resolution of disputes. ...”)

See also, Proposal by Paraguay, (“... one of the basic objectives of the dispute settlement system is to restore the balance between the rights and obligations of Members through the prompt settlement of situations in which a Member considers that its rights have been nullified or impaired by measures taken by another Member.”)

Lacarte-Muró and Petina Gappah, *supra* note 6, at 395 (“The prompt settlement of disputes is central to the functioning of the World Trade Organization”)

³⁰⁹ TN/DS/W/15

³¹⁰ *Id.* (“[T]he DS must be part of the mechanisms for attaining the development objectives of the WTO as an institution. Its success should be equally determined on the basis of the extent to which findings and recommendations fully reflect and promote the development objectives.”)

³¹¹ Lacarte-Muró and Petina Gappah 395 (noting that the participation of developing countries in the DSM is vital to the credibility and acceptability of the system).

With meaningful changes at the domestic level and reform at the WTO-level, some countries in Africa may begin to view the DSM as a credible option for preserving their rights in negotiated agreements. Growth figures for Africa for 2003 are encouraging;³¹² the continent achieved an average growth rate of real GDP 3.7 percent in 2003 up from 2.9 in 2002.³¹³ The number of countries that achieved growth of above 5 percent increased from 10 in 2002 to 18 in 2003. The number of countries with growth rates between 0 and 3 percent declined from 18 in 2002 to 11 in 2003.³¹⁴ The macro-economic fundamentals for the continent are also improving. Inflation is stabilizing,³¹⁵ external current accounts are improving, and the fiscal deficit for the continent declined from 3.4 percent in 2002 to 3.0 percent in 2003.³¹⁶ On the trade front, Africa's trade performance showed some improvement, with trade balance increasing from US\$6.7 billion in 2002 to US\$15.6 billion in 2003.³¹⁷

There is no guarantee that any of the proposals put forth by the Africa Group and the LDC Group will ultimately be accepted. In the event of a failure to achieve needed reform, what option exists for African states? Do these options lie in WTO dispute settlement process as presently structured? Do the options within the multilateral trading system? The bigger question that is not addressed in this paper is whether trade is the answer for struggling economies? Does openness and trade liberalization play a positive role in Africa's development? Available studies suggest that there is a direct relationship between increase in export and increase in a country's GDP. However recent statistics by UNCTAD show that "in virtually all LDCs, viable indicators of poverty levels, i.e., average private consumption, have suffered as exports have increased."³¹⁸ In effect, increase in total GDPs has not changed the poverty level in most LDCs.³¹⁹ In Burundi, although export has quadrupled since 1996, average private consumption has dropped by almost 25 per cent.³²⁰

What then is the future of international trade dispute settlement in a multilateral system made up of vastly unequal trading partners absent significant reform? How should the WTO proceed in the face of the present stalemate in the negotiations? What principles should guide future negotiations? Since the prevailing view is that the DSU has generally functioned well to date, two principles should guide future negotiations. First, Members should focus on areas where there are clearly defined problems in the DSU. The problem of lack of access to the system by developing countries would clearly qualify. The problem of inadequate remedy and ineffective compliance mechanism also qualify as the growing list of cases where implementation has not taken place attest to the problem in this area. Second, effort must be made to come up with a balanced result that reflects the different interests of Members but with particular attention paid to the needs of the least developed countries.

For the WTO, the challenge is to encompass within the new, judicialized, rule-based system, economies at different stages of development. The WTO must continue to wrestle with the problem posed by asymmetries in trade relations as between its developing-country Members and its developed-country members.

³¹² Factors regarded as contributing to the continent's improved performance include the recovery of non-fuel commodity prices; the strengthening of domestic macroeconomic environment; favorable weather conditions and debt relief under the enhanced HIPC Initiative. AFRICAN DEVELOPMENT REPORT 2004, at ii.

³¹³ The growth rate of 3.7 percent was the highest for the last four years and was higher than the global growth rate which stood at 3.2 percent. AFRICAN DEVELOPMENT REPORT 2004, at 1.

³¹⁴ *Id.* at 7.

³¹⁵ The continent's median inflation rate stood at 5.6. While some 40 countries recorded single-digit inflation rates, others like Zimbabwe recorded an inflation rate of 420 percent. *Id.*, at 3.

³¹⁶ *Id.*, at 5.

³¹⁷ *Id.*,

³¹⁸ Andrea Gibbons, *On the Margins: The Poor in LDCs in a Global Trade Era*, UN Chronicle, Volume XLI Number 3, September – November 2004, p. 35.

³¹⁹ *Id.*, at 36.

³²⁰ *Id.*, at 36.

ANNEX 1

The 1994 Ministerial Decision

DECISION ON THE APPLICATION AND REVIEW OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES

Ministers,

Recalling the Decision of 22 February 1994 that existing rules and procedures of GATT 1947 in the field of dispute settlement shall remain in effect until the date of entry into force of the Agreement Establishing the World Trade Organization,

Invite the relevant Councils and Committees to decide that they shall remain in operation for the purpose of dealing with any dispute for which the request for consultation was made before that date;

Invite the Ministerial Conference to complete a full review of dispute settlement rules and procedures under the World Trade Organization within four years after the entry into force of the Agreement Establishing the World Trade Organization, and to take a decision on the occasion of its first meeting after the completion of the review, whether to continue, modify or terminate such dispute settlement rules and procedures.

ANNEX 2

DOHA WTO MINISTERIAL 2001: MINISTERIAL DECLARATION WT/MIN (01)/DEC/1 Adopted November 14, 2001

30. We agree to negotiations on improvements and clarifications of the Dispute Settlement Understanding. The negotiations should be based on the work done thus far as well as any additional proposals by members, and aim to agree on improvements and clarifications not later than May 2003, at which time we will take steps to ensure that the results enter into force as soon as possible thereafter.

ANNEX 3

BACKGROUND TO THE DSU REVIEW PROCESS

The Doha Declaration required Members to agree on an improved and clarification of the DSU by the end of May 2003. To meet the initial May 2003 deadline initially set in the Doha Declaration, WTO Members agreed to a two-track approach to negotiations under which proposals by Members are considered formally, followed by informal discussions on the negotiating points contained in the *Checklist of Issues* be circulated by the Chairman of the Special Session, Ambassador Peter Balas of Hungary.³²¹ At a formal meeting on 10 and 11 April 2003, the Chairman introduced a “Framework Document” which was to form the basis for further consultations and negotiations.³²² As of May 7 2003, discussions had not led to the clear identification of possible consensus areas prompting the Chair of the Special Session to report that, “on the basis of the level of convergence of views at this point, the Chairman has only been able to suggest such text on a limited number of issues.”³²³ Although the Chairman noted that “[s]ome further progress has ... been made on other issues,”³²⁴ he stated that “in light of the continued diversity of participants’ interests, as well as the complexity of some issues, further work remained to be done to enhance and clarify the scope for possible consensus.”³²⁵ He also observed that “[o]n a number of issues, the level of convergence of views at this stage remains very limited, thus making it difficult to envisage that consensus could be achieved on these by the end of May.”³²⁶ On May 16 2003, the Chairman issued a consolidated proposed Chairman’s Text (Balas Text) which contained Members proposals on a substantial number of issues which was intended to form a possible basis for agreement.³²⁷ Based on discussions my Members, a revised version of the Chairman’s Text was issued on 28 May 2003.³²⁸

In July 2003, Members agreed to a new end-May 2004 deadline. At the Twenty-second meeting of the Special Session held on 28 May 2004, there was consensus among Members that the Special Session needed more

³²¹ Doc. JOB(02)86 (checklist of issues).

³²² Job (03)/69/Rev.2

³²³ World Trade Organization, *Special Session of the Dispute Settlement Body: Report of by the Chairman, Ambassador Péter Balás, to the Trade Negotiation Committee, TN/DS/8* (7 May 2003).

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *See* Job (03)/91

³²⁸ Job(03)/91/Rev.1. The Revised Chairman’s Text is reproduced as an annex to TN/DS/9, 6 June 2003.

time to complete its work and that the Special Session should continue the negotiations beyond May 2004.³²⁹ In June 21, 2004, his report to the Trade Negotiation Committee, the Chairman requested an extension of the mandate of the Special Session.³³⁰ Instead of putting forth a new specific target-date for the Special Session to complete the dispute settlement negotiations, the Chairman opted for an open-ended time-frame but did not rule out the possibility of a target date in the future. On 1 August 2004, as part of the July Package, the General Council adopted a recommendation by the TNC that the work of the Special Session should continue on the basis set out in the Chairman's report and reaffirmed "Members' commitment to progress in [the dispute settlement negotiations] in line with the Doha mandate."³³¹

To date, Members are unable to build consensus around most of the proposals that have been submitted. The inability of participants to arrive at consensus is especially hard for poor countries. Many poor countries have already devoted considerable resources to the DSU negotiations and may not be in a position to continue negotiations. Many African countries and LDCs have only a small delegation in Geneva and are resource-constrained. Continued delay in negotiations will negatively affect countries unable to devote additional resources to negotiations on the DSU. The implications of another missed deadline for both the DSU negotiations and for the entire DDA negotiations are grim. Successful negotiation would have sent a positive signal to the outside world that the WTO as an institution was committed to building and enhancing the capacity of developing countries. .

³²⁹ TN/DS/M/19 (17 June 2004).

³³⁰ TN/DS/10 (21 June 2004).

³³¹ *Text of the 'July package' — the General Council's post-Cancún decision*, WT/L/579, 2 August 2004.

ANNEX 4

PROPOSED DECISION BY THE GENERAL COUNCIL³³²

REGARDING ARTICLE 27.2

The General Council,

Having regard to Article 27.2 of the DSU;

[*Having regard to* paragraph 30 of the Doha Ministerial Declaration on the improvement and clarification of the Dispute Settlement Understanding;]

Having regard to paragraphs 38 to 41 of the Doha Ministerial Declaration and the need for effective delivery of technical assistance to developing countries as affirmed by Ministers;

Recognizing that developing country Members, in particular the least-developed among them, may face particular constraints in making effective use of the dispute settlement procedures contained in the DSU;

Desiring to give effect to the provisions of Article 27 of the DSU in order to assist developing country Members in enhancing their capacity to make effective use of the dispute settlement procedures, and build capacity in the area of dispute settlement, thereby assisting them to exercise the rights of their membership;

Decides as follows:

1. The Secretariat is instructed to maintain and administer, through its technical cooperation services, a roster comprised of at least [x] qualified legal experts, whose services would be made available to developing country Members for the provision of legal advice and assistance in respect of dispute settlement pursuant to paragraph 2 of Article 27 of the DSU;
2. The General Council requests the Budget Committee to explore the manner in which adequate resources, including through voluntary extra-budgetary contributions, can be ensured for the delivery of technical assistance under Article 27 of the DSU, including the provision of legal assistance as foreseen in paragraph 2 of that provision, and to report to the General Council by [--].

³³² TN/DS/9, 6 June 2003 (The proposed decision appeared in the June 2003 Report by the Chairman, Ambassador Péter Balás, to the Trade Negotiations Committee.).

ANNEX 5

NATIONAL ACTION PLAN FOR PARTICIPATION IN THE WTO: A CHECKLIST OF ISSUES

a. Background

1. Has the government presented a broad overview of the country's trade and development strategy?
2. Does trade policy play a fundamental role in the development strategy?
3. Is there an identification of the various competencies of agencies that are participating in the negotiation and implementation of trade agreements?
4. Are countries exploring and designing cooperation efforts in an integrated manner?
5. Do countries have in place adequate policy to increase resource productivity and market efficiency?
6. Are all relevant actors aware of negotiated agreements? Do representatives of trade institutions understand the principles and obligations existing in the WTO agreements?
7. Are representatives of trade institutions participating in international standardization fora? Do they have knowledge of international standards/technical barriers to trade?

c. Trade-Related Capacity Building

8. Do countries have national action plan for trade capacity building that define, prioritize and articulate the country's trade-related capacity needs?
9. Has the trade-related capacity need of the country been articulated and prioritized?
10. Has the articulated and prioritized trade-related capacity needs been communicated to all donors?
11. Is international trade law currently taught in universities and colleges?
12. Do students have opportunities for internships with relevant government departments?
13. Are there opportunities for college professors to participate in WTO training courses?
14. Are there opportunities for Africans in Diaspora to provide support to government or help train the next generation of trade lawyers?

d. Trade Negotiation

15. Do Africa's negotiating teams have appropriate information and tools to conduct successful market access negotiations?
16. Do Africa's negotiating teams have access to updated reliable information on tariff and non-tariff barriers?
17. Do Africa's negotiating teams have access to updated reliable information on legislations and regulations in developed countries that could have an impact on market access for African goods?
18. What factors inhibit effective participation in multilateral meetings on agriculture?
19. Do Africa's negotiating teams have adequate knowledge of new issues in agriculture?

c. Trade Implementation

20. Do African Mission staffs have enhanced knowledge of SPS and TBT requirements in main trading partner markets?
21. Do countries have access to studies on impact of developed countries policies on export of agricultural export from the continent?
22. Do countries have adequate knowledge of developed countries legislation in antidumping, countervailing and safeguard procedures?
23. Do countries have access to trade statistics that will enable adequate monitoring of other countries anti-dumping, countervailing and safeguard practices?
24. Do countries have adequate knowledge and personnel capacity to effectively apply the dispute settlement mechanism?

d. Consultation and Coordination Mechanisms with the Private Sector

25. Is there an identification of the role of the private sector?
26. Does the private sector understand the trade-related regulatory structure within the country?
27. What is the relationship between the trade policy institutions and the private sector? Are the trade policy institutions known to the private sector?
28. Are the respective responsibilities and the policies, strategies and initiatives of the trade policy institutions adequately communicated to the private sector?

29. Are the normative and facilitation framework (laws, strategies, and projects) well documented, publicized and communicated to public and private sector?
30. Is an efficient consultation mechanism with the private sector in place to enable Africa's negotiating team to obtain specific information to allow for appropriate formulation and negotiation of specific rules of origin?
31. What effort has been made to open a space for consultation with civil society (NGOs, research and academic institutions, the business sector, and the general public)?
32. Has private sector identified any need for increasing its capacity for complying with negotiated agreements?

e. Dispute Settlement Mechanism

33. Do trade representatives fully understand the practice and procedure of the DSM?
34. Does the private sector understand the basic mechanisms of the DSM?
35. Does the private sector have timely and relatively cheap access to information on current and past cases as they become available?

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