

African Countries and the WTO's Dispute Settlement Mechanism

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The WTO Dispute Settlement Mechanism was designed, inter alia, to secure the 'rule of law' within international trade and provide all members with opportunities to exercise their rights under multilateral trade agreements. But, after ten years, no sub-Saharan African country has yet used the option to initiate a dispute. This article examines what prevents the WTO Africa Group from using the system and critically reviews the solutions they have proposed to remedy this. It concludes by discussing how this reflects broader problems concerning African participation in WTO, and puts forward some alternative proposals.

1 Introduction

This article analyses the position of sub-Saharan African (SSA) countries in relation to the WTO's Dispute Settlement Mechanism (DSM), especially as participants in the ongoing review of its rules, the so-called 'Dispute Settlement Understanding'. The problems facing SSA countries in using the DSM are similar to those of many other developing countries, but their relatively lower level of development and integration in international trade means that these problems are more difficult to overcome. Although the importance of an adequate trade-policy infrastructure is difficult to underestimate, some of the more specific problems facing SSA countries seem to be rooted in the nature of the DSM itself.

The article begins with a short history of the DSM, followed by a general discussion of the role of developing countries in relation to it and an overview of the current DSM negotiations. It then turns to the WTO Africa Group's analysis of the obstacles SSA countries have identified as the reasons for their underutilisation of the system: high entry barriers, a skewed retaliation system and an overall lack of development orientation. The specific proposals raised by the Group in relation to each of these are also critically examined. The article concludes by describing what this analysis discloses about the position of African countries in the WTO more broadly, and attempts to identify a few proposals that would more effectively mitigate their marginality, specifically in relation to the DSM.

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2 The DSM: a short history

The dispute settlement mechanism of the General Agreement on Tariffs and Trade was based on Articles XXII and XXIII of GATT 1947. Article XXII instructed GATT member states to use consultation to settle their disputes, and if this was unsuccessful it empowered the whole membership as an organ to consult with the disputing parties in order to end the dispute. Article XXIII specified what constituted a dispute and how such matters should be raised. It went on to instruct the whole membership to respond to a dispute by investigating and making appropriate recommendations to the disputing parties, or by giving a ruling on the matter. Finally, it permitted the GATT member states to authorise retaliation in a dispute.

Because of this very general weak basis as well as its emphasis on diplomacy, positive consensus and negotiation, GATT's dispute settlement system had some systematic shortcomings (see, for example, Jackson, 1998). Any party to a dispute could at any stage block the process. There were no deadlines for the settlement process, for example on how long consultations should last. The binding nature of the rulings could be disputed and their quality was often considered inadequate. Finally, eight of the GATT's nine 'Codes' had their own system of dispute settlement. Gradually, in response to these problems, a more complex system emerged which can be regarded as professional and legalised (Petersmann, 1994). Its emergence was the main reason for GATT's relatively successful overall record of dispute settlement, despite its shortcomings.¹

Prior to the Uruguay Round, the underlying discussion about how disputes should be settled was between the United States and the European Union (Shell, 1995: 339). The US – *inter alia*, because of its interest in ensuring that all countries applied GATT rules – supported a rule-based system, while the EU supported a diplomacy-based model. During the Uruguay Round, the idea of a formal system, which could also deal with disputes in new areas such as trade in services and intellectual property rights, was tabled by the US. In part because of some positive experience with cases it had initiated under the GATT and also because of its aim of limiting US unilateralism, the EU at this point abandoned its opposition to a legalised system (see, for example, Shell, 1995). Subsequently – as in many other areas of the negotiations where the major trading countries were in agreement – a formalised dispute settlement system became a realistic outcome (Croome, 1995). At the conclusion of the Uruguay Round, the DSM was officially established in 1995 with the declared objective of ensuring that WTO rules would be observed and applied.

When drafting the Dispute Settlement Understanding (DSU), the countries active in the negotiations (the US, the EU, Canada, Mexico, Brazil, Jamaica and Japan) had two objectives in mind.² The new system was to correct the GATT system's shortcomings and be 'stronger', which meant that it should have the ability to issue mandatory rulings and have its own organisational structure. All member countries supported this: the main players wanted a stronger and more binding system that could

1. According to Hudec et al. (1993) almost 88% of GATT's rulings were at least partially complied with.

2. Stoler (2004) has argued that the negotiators achieved what they wanted, although in some cases the consequences turned out differently from their expectations.

deal with the increased range and complexity of WTO issues, while developing countries supported the system because it was rule-based and not power-based as during the GATT (Croome, 1995). This they understood to be in their interest, since fuller legalisation was supposed to entail a levelling of differences among WTO members and give them equal opportunities to use the system to defend their rights. Furthermore, the DSU included some provisions that referred to developing countries' special needs. However, these Special and Differential Treatment (SDT) measures have turned out to be of very limited value to developing countries. After ten years' experience with the system, many developing countries, and most comprehensively those in sub-Saharan Africa, are still bystanders.

3 Developing countries and the DSM

The passing of time has modified most observers' earlier enthusiasm about the DSM.³ It has become clear that the DSM has shortcomings. These include some conflicting deadlines (better known as sequencing), a weak enforcement mechanism, questionable quality of some of its rulings, and the possibility of prolonging disputes (see, for example, Mavroidis et al., 1998). Increasingly too, the absence from the scene of a majority of developing countries, including the SSA ones, has also been acknowledged.⁴

One question that is now raised is whether or not the DSM has in fact been a success, and especially whether it represents a gain for developing countries. But this latter discussion is only now emerging and only a few observers have taken part in it. Furthermore, it does not yet constitute a distinct field of debate. The prime focus of academic commentary on the DSM remains on *how* it has been used, rather than why it has not been used. A majority of researchers working on the DSM do so from within the legal tradition and have studied it as a litigation process by analysing case law and the rulings. They implicitly regard the system as a success in allowing countries to settle their disagreements. However, the DSM is also a political process, and cases have important economic impacts. Recently, lawyers have been joined by economists and political scientists in analysing the DSM. Unlike the lawyers, these last two groups are interested in determining the conditions under which countries participate in the DSM, and the costs and benefits of this participation.

A first set of observations from this source concerns possible relations between countries' levels of engagement in the DSM, their shares and patterns of trade, and the retaliation opportunities that these provide (Bown and Hoekman, 2005; Horn et al., 1999; Nordstrom, 2005). The authors cited consider countries' shares of world trade, numbers of traded products and numbers of trading partners as determinants of their participation. Their hypothesis is that 'the probability of encountering disputable trade measures is proportional to the diversity of a country's exports over products and partners, which means that larger and more diversified exporters would be expected to

3. For a longer review of this discussion see Zimmermann (2005).

4. The author's statistics (forthcoming) show that, until December 2005, developing countries initiated 39% (132 cases) of total cases (335 cases), half of which (48%) have been against another developing country. No SSA country has yet initiated a case. South Africa and Egypt have been involved in two and four cases respectively as defending parties. Benin, Chad, Nigeria and Zimbabwe in one dispute each, Senegal in two, Tanzania and Malawi in three, and Mauritius in five disputes, have participated as third parties.

bring more complaints than smaller and less diversified exporters' (Horn et al., 1999: ii). They find that the hypothesis 'goes quite far toward predicting the actual pattern of complaints across countries' (ibid.),⁵ especially when the cost of litigation is controlled for. However, they also find that the G4 countries⁶ are overrepresented in the DSM, relative to their positions with regard to these attributes.⁷

A second, related set of observations regards the negative consequences a case may have as a reason why small developing countries especially have not been active in the DSM. Examples of this are provided by Bown (2005), who develops a model to analyse a subset of disputes, namely, those dealing with issues of market access. He finds that lost market access and economic losses determine countries' decisions to initiate cases. However, 'several other political economy factors affect the decision not to litigate ... Other things being equal, adversely affected exporters are less likely to participate when they are involved in a preferential trade agreement with the respondent, when they lack the capacity to retaliate against the respondent by withdrawing trade concessions, when they are poor or small, and when they are particularly reliant on the respondent for bilateral assistance' (ibid.: 291). Bown's arguments partly recapitulate those of Hoekman and Mavroidis (2000) whose list of countries' reasons for not initiating cases includes practising policies similar to those that a case tries to change, and fear of the political as well as economic impact of a case on bilateral relations with another state.

A final set of observations from this literature focuses on biases and inequalities within and between institutions managing trade, including the WTO in general and the DSM in particular (Busch and Reinhardt, 2003; Shaffer, 2003). Here, the main problem identified is that the DSM (and the WTO) has become too technically complex and demanding for most developing countries to use effectively in the absence of adequate assistance. Underlying this is the observation that there is too much law and too little politics in the system.

Proponents of this position link these observations to others concerning developing countries' typically weak trade-policy infrastructures, their shortage of trained personnel, and their lack of knowledge about the system. This view is systematically elaborated by Hoekman and Mavroidis (2000), who present the overall dispute process in two stages – 'upstream', which is that part of the process before a case is officially brought before the DSM, and 'downstream', which is after a case has been officially initiated. During the first stage, a country's trade-policy infrastructure plays the central role. It is here that information is gathered, analysed and transferred to the government, which then decides whether to pursue a case or not.

Not only the existence but also the functioning of trade-policy infrastructures is critical for countries' engagement in the system, according to Shaffer (2003). His study of the infrastructures of the US and the EU finds that an institutionalised linkage between private companies and officials is a key characteristic of the major users of the system. While under existing WTO rules only member states may initiate a case, this generally occurs on the basis of persuasion from private companies. This is facilitated

5. This author's update of the data supports these conclusions.

6. Canada, EU, Japan and US.

7. The G4's over-representation is due to the number of cases between them.

where local private companies are strong and where the established infrastructure gives private companies a voice and the chance to lead their case informally through the initial stage.

3.1 An overview of the current DSM negotiations

How to mitigate the obstacles hindering most developing countries from using the DSM is one of the issues raised in the current negotiations on the DSU. The SSA countries, which have yet to use the DSM as litigants, were active in the early stages of the negotiations both in submitting proposals⁸ and in discussion. Their proposals drew inspiration from those research-based observations claiming that bias and inequality lie at the heart of their underutilisation of the DSM, although their proposed remedies are very different from those of the academic commentators.

This initial engagement has now been reduced to a low level of participation in the negotiations. One reason for this is that the DSM negotiations, especially since the Cancun Ministerial meeting, were downgraded in priority by all members, as the focus of the overall Doha negotiations settled on keeping the Round alive by finding solutions to the difficult issues of agriculture and services. At the same time, the DSM negotiations themselves moved away from discussion of broad problems of the system into detailed negotiations on specific subjects, operational issues and legal texts. At this level, successful engagement requires having specific and detailed proposals, in-depth knowledge of others' proposals and the ability to analyse their impact on national interests. The falling level of SSA countries' engagement reflects both a relative lack of capacity to participate in this type of detailed negotiation, and probably also a lack of interest in the subjects under discussion. Thus their impact on the more recent negotiations has been minimal. It should be mentioned here that, since the negotiations are continuing and since countries have accepted a focus on those proposals that deal with SDT, African delegations may make a come-back at the negotiating table. But this implies their taking a political decision to do so and subsequently committing a significant level of resources to the process.

The mandate of the current round of DSU negotiations is stated in Paragraph 30 of the Doha Ministerial Declaration, which reads:

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.

Meanwhile, paragraph 44 of the Declaration specifies the mandate of the negotiations regarding the SDT provisions as follows:

8. Alone or with other countries, SSA countries have tabled five proposals dealing with more than 20 issues (see below).

We affirm the provisions for special and differential treatment are an integral part of the WTO Agreements. We note the concerns expressed regarding their operation in addressing specific constraints faced by developing countries, particularly least-developed countries. In that connection, we also note that some Members have proposed a Framework Agreement on Special and Differential Treatment (WT/GC/W/442). We therefore agree that all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational. In this connection, we endorse the work programme on special and differential treatment set out in the Decision on Implementation-Related Issues and Concerns.

Since the DSM negotiations shifted from discussing normative statements to discussing operational proposals, they have been dominated by the main users of the system, and the SSA countries have been left on the sidelines. The common ground between the active users of the system is an implicit agreement that the DSM is in general working well and its existing basis should therefore remain in place. Against the resurrection of more radical proposals, they argue that this is entailed by the mandated focus on 'improvements and clarifications'. In short, the line of division in the negotiations is now between those countries which have used the system and those which have not. But a really fair and effective system should be responsive to all countries, and not only to those that use it.

4 The African view of the DSU's problems

In the early stages of negotiations the African countries tabled one stand-alone proposal (by Kenya, TN/DS/W/42),⁹ one joint proposal (TN/DS/W/15), and three proposals with other countries, one of which bore the name of the least developed (LDC) group (TN/DS/W/17, TN/DS/W/18 and TN/DS/W/19). The African and LDC proposals were mainly drafted in Geneva and were inspired by the work of certain Geneva-based NGOs,¹⁰ namely, the Agency for International Trade Information and Co-operation (AITIC)¹¹ (in the case of LDCs), the International Centre for Trade and Sustainable Development (ICTSD)¹² and the South Centre¹³ (in the case of the African Group). The two remaining proposals were drafted by other (non-African) countries' missions to the WTO and then co-sponsored by the signatory African countries.¹⁴

In general, the proposals focus on normative issues, and even then in quite general terms, rather than suggesting specific wordings for how existing provisions could be revised. This is partly because they were drafted and tabled during the first phase of the negotiations, but partly also because they reflect the capacities and house styles of the

9. WTO texts are cited here in the main text, using their WTO symbol. Their full references can be obtained by inserting the symbol at http://docsonline.wto.org/gen_search.asp?searchmode=simple

10. Interviews with African delegates at WTO.

11. www.aitic.org

12. www.ictsd.org

13. www.southcentre.org

14. Interviews with African delegates.

delegations and the types of assistance they can get from Geneva NGOs (along with the latter's own house styles).¹⁵ Some of these NGOs were established to provide developing countries with a platform to co-ordinate their activities and pool their resources in relation to the Geneva institutions, and are mainly staffed by short-term interns from member developing countries. Others have the same mandate but are staffed by 'career' NGO professionals, whose experience lies in the world of public campaigning. Arguably, both the general nature of certain developing countries' proposals and the intermittent engagement of their proponents in the negotiations reflect these NGOs' limited resources, their reliance on external funding and the competence and orientations of their available staff at any given time. They may also reflect at least some of these NGOs' preference for political differentiation, rather than crafting proposals that can build on and extend common ground. Although these NGOs, for example the South Centre, have been successful in establishing networks and producing policy papers, they have not given developing countries the necessary platform to be able to affect the negotiations, for example by providing them with sufficient, consistent and applicable technical knowledge and support in the day-to-day negotiations.

In what follows, the discussion will focus on the core African proposals (TN/DS/W/15, TN/DS/W/17, and TN/DS/W/42). The reason for this is that these proposals explicitly state the obstacles or problems that African countries (and in some cases LDCs) feel they face in using the DSM. The proposals identify three principal obstacles: entry barriers to using the DSM, the inadequate and inappropriate nature of the retaliatory mechanism, and the lack of a 'development orientation' in the DSM. As will become clear, this last obstacle is defined in a rather ambiguous way. In some formulations it refers to the existing composition of the DSM's judicial organs; in others to the supposed tendency for judicial organs in the DSM to exceed their narrow legal mandate by making more substantive decisions; and in others again to the DSM's failure to promulgate development-friendly outcomes. In each case the inadequate and irrelevant nature of the DSM's existing SDT provisions provide the justification for arguments in favour of far-reaching change.

4.1 Entry barriers

Following the distinction made by Hoekman and Mavroidis (2000) between the upstream and downstream components of disputes, two sets of entry barriers to use of the DSM by developing countries can be identified: those faced before a case is officially initiated and those involved in using the system once a case is initiated. An obvious problem of most developed-country proposals in respect of DSM reform is that they do not address the first type of barriers, even though the inadequate nature of the trade-policy infrastructures of developing countries is now widely acknowledged (see also Horlick, 2005; Michalopoulos, 1998, 2001). The increased volume and complexity of WTO agreements amplify the problems associated with lack of such infrastructures, since they increase the demand for expert legal and in-depth knowledge of how to use the system and how to proceed with a case. A related issue here is the rising cost of

15. The African proposals on commodity problems (Gibbon, this volume) are similar in character.

initiating litigation, which many countries are not able to afford. Schaffer (2005) and Michalopoulos (2001) provide some indications of the potential scale of these costs.

Given that cases are usually initiated after complainants have assessed their merits and prepared their initial arguments and their first submission, and given that many developing countries are not capable of performing these tasks, the lack of pre-case assistance is a major disadvantage. Meanwhile, existing SDT provisions are applicable only once a case is officially initiated. In other words, the current system does not acknowledge the existence of an 'upstream' stage. It is clear that developed countries have an interest in perpetuating this lacuna, since filling it may be used against them.¹⁶ Moreover, they can argue that greater attention to the 'pre-initiation' stage would entail moving beyond 'improvements and clarifications' to changing the rules governing the DSM's mandate.

The African Group's proposals address this issue, but only briefly and in general terms. They suggest that the DSM should 'provide for assistance in the form of a pool of experts and lawyers in the preparation and conduct of cases, the payment of fees and expenses entailed, [and] compilation by the WTO Secretariat of all applicable law including past decisions to be fully available to and usable by both the parties and the panels/Appellate Body in each individual case' (TN/DS/W/15, para. 8). Given that the DSM's rulings are already available and that it is already the Secretariat's duty to provide legal assistance of a general nature to developing countries, the novelty of the proposal consists only in suggesting that the WTO should cover the expenses of a 'flying squad' of experts to prepare cases. The need to identify cases in the first place, on the basis of clear national trade-policy priorities, which only an adequate and permanent trade-policy infrastructure could provide, is not touched on in this context. If it is only emergency support that is being sought, then it may well be that certain professional law firms and experts willing to assist developing countries to initiate cases on a *pro bono* basis would be a more flexible and effective option.¹⁷

Existing SDT provisions do exist under the DSM. However, not all of them are mandatory or automatically applicable, which means that countries must actively ask for them (Ewelukwa, 2005). Roessler (2005) categorises these SDT measures into two categories. The first is those which modify a general provision when a case involves a developing country, for example providing for panellists from a developing country (DSU, Art. 8.10), or making it incumbent on panels to state how they have considered any SDT provision which has been raised by a developing country in a dispute (Art. 12.11). The second is those provisions that refer exclusively to developing countries, for example those providing for developing countries to use alternative dispute settlement procedures (Art. 3.12). Roessler claims that, while the first type of SDT has been applied in a number of cases, developing countries have not used the second type, since '[in legal proceedings, they] wish to face developed countries as equals and are therefore hesitant to invoke procedural privileges that their opponents do not enjoy. Moreover, they also fear that the application of procedural provisions biased in their favour may detract from the legitimacy of the result of the procedures and hence reduce

16. The discussions on the Advisory Centre on WTO Law demonstrate this point.

17. In *US: Upland Cotton*, the law firm White and Case drafted Chad and Benin's third-party submission to the Appellate Body on a *pro bono* basis (Zunckel, 2005).

the normative force of the rulings they are seeking' (Roessler, 2005: 5). This claim seems disingenuous, since it is not clear why developing countries should want to forgo this opportunity to exploit preference when they are otherwise quite quick to ask for waivers. As for Roessler's first type of SDT provision, although it has indeed been applied, it has not played a decisive role in the resulting rulings (Alavi, 2007).

In relation to downstream entry barriers, African countries themselves identify the problem in terms of the failure of the DSM's SDT provisions to address 'lack or shortage of human and financial resources, and little practical flexibility in selection of sectors for trade retaliation' (TN/DS/W/15, para. 8). The solutions proposed in response vary in scope and ambition. Some aim at making existing non-binding SDT provisions legally binding, for example changing 'should' to 'shall' in the provisions concerning assistance and thereby presumably making them mandatory and operational (TN/DS/W/17). Others propose the inclusion of similar provisions in the DSU, for example requiring the WTO to establish a 'Fund on Dispute Settlement' that could be used by developing countries (TN/DS/W/42). However, the overall focus of these proposals may be misguided, since their common preoccupation is to ratchet up SDT across the board, rather than concentrating on how it could be used to mitigate a few central problems.

A good example here is the African Group's aim of amending the SDT provisions on the composition of panels (Art. 8.10). It is proposed that, in future, it should be automatic for at least one panellist to be from a developing country in cases involving a developing country. Furthermore, if the developing country concerned so requests, another panellist from a developing country should be added. In addition, it is proposed to increase the number of African members of the Appellate Body (AB). The reasoning behind these emphases is not clear, since this is one of the few areas of the existing SDT provisions in the DSM that has been used, although, as already noted, without much apparent impact on the rulings. Mosoti argues that the African Group's proposal to make the panellist provision automatic is 'more about building the confidence of developing countries in the system than it is about conferring a legal benefit on them' (Mosoti, 2003: 83), and should therefore be supported in any event. The proposal to increase the number of African AB members is more difficult, since here the seats are distributed according to countries'/regions' share of world trade. Thus Africa has only one seat, at the moment occupied by Professor Georges M. Abi-Saab from Egypt.

It will be recalled that the mandate of the negotiations regarding SDT provisions asks negotiators to strengthen these provisions and make them 'more precise, effective and operational'. One way to achieve this goal would be to establish a clear answer to the complex question: who is entitled to receive what assistance from whom, how and when. Seen in this perspective, the main problem with the DSM's current SDT provisions is that they appear to avoid this question. For example, DSU article 4.10 reads '... during consultations Members should give special attention to the particular problems and interests of developing country Members', without elaborating further. For proposals to be relevant here, they need to be phrased in very explicit terms.

Returning to downstream entry barriers, a complementary approach would be to press for an enhancement of third-party rights in disputes, for example by giving third-party arguments more weight in rulings. This would enhance the incentives for African

countries to take third-party status in disputes, thus allowing them to benefit from the accompanying capacity-building in a non-resource-intensive way.

4.2 Weak retaliation

The second obstacle to participation that the African Group has identified is the DSM's weak, and in the African case irrelevant, retaliatory system. The problem is that, as small countries with an insignificant share of international trade, most SSA nations cannot meaningfully retaliate against their bigger trading partners since their resulting losses would exceed any possible gains. This line of argument is supported by a string of cost-benefit analyses of the retaliation provisions of the DSM (for example, Bown and Hoekman, 2005; Nordström, 2005). A related but secondary issue is the capacity demands for initiating retaliation.

The extent to which 'access without fear' to the DSM's retaliation mechanism would be a significant gain for African countries is questionable. The experience so far with those few cases that have reached the retaliation stage shows that, unless other rules are changed, countries can avoid being subjected to retaliation for a very long time. Many countries under this threat simply invoke the DSU provisions giving parties the option to ask for re-examination of the other party's measures, without any time limit for how long this might take.¹⁸ Furthermore, it is not clear whether retaliation, when it does occur, makes it more likely that the losing parties comply with the rulings.

Nevertheless, reform of the DSM's retaliation mechanism is on the agenda. Some key players have raised the need for time limits at this stage. Others have suggested introducing an automatic provision for cross-retaliation, whereby the winning party could freely choose which sectors it might target. A third group of countries proposes that members should be able to auction their retaliation rights. The main point of the African Group's proposal is that the right to retaliate against a country losing a case should be extended to all members and not only the winning party. This proposal could be implemented either as a general amendment to the DSU or applied to African/LDC countries only as a SDT provision – although up to now the DSM's retaliation system does not operate with any SDT provision. Such a provision would reduce African countries' costs and capacity demands in respect of initiating retaliation, although it is unclear how it would remove the problem of the inherent cost of retaliating as such.

Regardless of the content of the African proposal, the centrality given to this issue may be questioned from a further angle. In most cases – especially those involving developing countries – the retaliation stage is never reached. This is less because retaliation mechanisms are weak and/or there is restricted access to them, but mainly because it takes on average three years for a case to reach this stage. Given that most developing countries, and especially African countries, do not have enough resources to follow a case through as far as the retaliation stage, and that by the time this stage is reached the losses caused by the disputed measure would be huge, an emphasis on reforming this stage is of limited use for most developing countries. Poor countries would benefit from such reform only if it were accompanied by measures to speed up

18. The lumber disputes between the US and Canada, the banana dispute between Latin American countries and the EU and the airplane cases between Canada and Brazil illustrate this point.

the whole process, or at least to amend the current provision allowing retaliation proportional only to those losses incurred from the time a measure is found inconsistent and a final ruling has been adopted.

4.3 *Lack of development-friendliness*

While the first two obstacles African countries have identified as limiting their participation in the DSM are also recognised as problematic by a much wider audience of commentators (even if they might disagree with the remedies offered by the African Group), the complaint of a lack of 'development-friendliness' does not quite have the same echo. This is because the basic principles embodied in the DSM, namely, that trade disputes should be solved according to (WTO) rules as opposed to political considerations, are broadly accepted. Most of the academic literature, even in its more critical versions, tends to share this basic assumption with the designers of the DSM. The DSM is conceptualised as a legal system where the same rules apply to countries on an equal basis, and where cases are judged according to their merits. This principle is incarnated in the AB, which has developed a case law with this emphasis.

In this setting, the only instance where 'development' considerations may play a role is via one of the DSM's SDT provisions (Art. 12.11), which asks panellists to consider any development issue raised by a developing country in a dispute. But it does not instruct the panels to find that the issue raised should override WTO rules. In short, the scope and depth of this SDT provision are very limited, and it does not challenge the basic assumptions of the DSM.

The implicit biases of systems of trade rules, including the DSM, in favour of powerful countries – reinforced through the dominance of judicial forms of rule-making – have been noted by some contributors to the literature (for example, Busch and Reinhardt, 2001). But beyond vague recommendations for less legal formalism (Picciotto, 2005), the latter fall short on how the consequences of this situation might be mitigated. The African Group's proposals in this area are therefore of particular interest.

The DSM's lack of development orientation is attacked by the African Group on two fronts: first, the alleged trend of the DSM towards law-making, and secondly, the system's lack of development-friendly decisions. These attacks appeal to two quite different conceptions of the role of the DSM – one to do with the level of legal formalism applied by the panels and the AB in their proceedings, and the other to do with ensuring outcomes of a given kind, seemingly without much reference to the law. The African Group's proposed corrective to these shortcomings is to establish a wholly different system. The group's stance is best approached through its response to the EU's proposal on establishing a standing panel-organ instead of the current system whereby panellists are selected on an *ad hoc* basis (TN/DS/W/1).¹⁹

19. The EU's proposal, TN/DS/W/1, suggests that a roster of panellists serving for a certain period of time should replace the existing system of *ad hoc* nomination of three panellists in each case. The reason behind the proposal is that a permanent panel system would shorten the length of the panel phase of the process and secure better quality for the rulings, since it would stabilise and professionalise the panel phase.

In response to the EU's proposal, the African Group suggested that any amendment to the panel structure should cover the functions of panels and not only their composition. In this regard, it argued that the functions should be limited to determining the factual matters in a case, including finding and assessing all the facts related to how a case might affect developing countries. The actual ruling should then be left to the AB, which should be re-named the 'WTO Tribunal' (TN/DS/W/15, para. 11). Furthermore, each member of a panel and of the AB would be required to submit a separate written opinion on a case and 'the decision shall be the majority opinion of the members' (ibid.). The African Group also proposed that any party to a dispute, or the DSM's own organs at any stage of the dispute, should be able to refer a ruling or an issue to the General Council for resolution.

The implied new structure would thus reorganise the DSM into three instances and phases: fact finding by panels, deliberation and ruling by a tribunal, and (if desired by any party to a dispute) recommendation/ruling/evaluation by the General Council. If applied, this scenario would strengthen the role of politics in the process, but without going back to the GATT diplomacy-centred model, since the whole process would be based upon facts – including, critically, facts concerning the development aspects of the issues in question. Meanwhile, the proposal sought to address the current lack of obligation on panels to give opinions on those development-related issues that are not specifically raised by a party to a dispute. Such an obligation would now become automatic, i.e., incorporated in the panels' standard working procedures.

The ambiguity of the thrust of these proposals is underlined by their accompanying argumentation, where the proposed obligation to consider all the relevant facts is formulated as a corrective to an alleged tendency for panels and the AB to exceed their mandate and 'come up with surprises in their interpretation and application of WTO provisions, in some cases totally unexpected and unintended in the negotiation of the provisions' (TN/DS/W/15, para. 10). Accusations that panels, and more particularly the AB, have on occasions exceeded their mandate are not specific to the African Group or even developing countries. They arise in relation to the fact that, when panels and the AB are faced with ambiguity in the rules, or when there is a gap in these rules, they can – and in many cases must – offer interpretations. In general, however, while for developed countries this raises the issue of the quality of the ensuing legal judgements, for the African Group it concerns underlying principles, namely, that the DSM should not become a rule-making body. This issue is related to that of the role of precedent in the DSM. According to the DSU, rulings are only valid in their specific case and should not be directly applicable in other cases. However, in many cases panels and the AB 're-confirm' previous rulings. This has created a *de facto* body of precedent, although most of it deals with procedural as opposed to substantial matters (Bacchus, 2005).

The case that the African Group referred to in this connection is the AB's decision on unsolicited *amicus curiae* briefs, those letters or information that non-parties to a dispute send to a judicial body without being asked. The discussion of the role of *amicus* briefs in the WTO started in 1998 with *United States: Import of Certain Shrimp and Shrimp Products* (DS58). During this case, the panel received two unsolicited *amicus* briefs from NGOs, which it directed to the disputing parties without considering them. The reason for this was that Article 13 of the DSU, according to the panel, permitted it to 'seek' information, and since the received *amicus* briefs were not *sought*,

the panel ruled that it did not have the right to consider them (WT/DS58/R). The US appealed against this argument, and the AB reversed its finding that 'accepting non-requested information from non-governmental sources is incompatible with the provisions of the DSU' (WT/DS58/AB/R, Part VII), on the grounds that the word 'seek', according to the AB, was interpreted too literally by the panel. In short, the AB's decision meant that panels – and the AB – could in each case decide what to do with an unsolicited *amicus* brief. This decision has been reaffirmed in subsequent cases, and panels have accepted *amicus* briefs and have distributed them to the parties, although in only a few cases have they considered them in their rulings.

At the time, the stated reason why developing countries were against the AB's decision was that, in their view, developed countries' NGOs and private companies were in a better position to submit *amicus* briefs than those from developing countries. Thus the practice would *de facto* be to developed countries' advantage. But the real reason behind their objection was that this practice might give the disputing parties additional work, since they would have to respond not only to the other party's claims but also to claims and arguments of non-parties. Given that developing countries' resources are very limited, the concern must be considered a valid one. But the decision is not necessarily bad for developing countries, since many NGOs and even some legal experts might use their resources to draft *amicus* briefs supporting a disputing developing country.

The African Group proposed that, in such cases, the issue should be discussed and decided by the whole membership. Presumably a political forum like the General Council was thought more likely to reach a development-friendly outcome than a legal one such as the AB. In fact, the *amicus* issue was discussed at a specially convened General Council meeting in November 2000.²⁰ However, due to lack of consensus, it was accepted that the AB should continue to consider its *amicus* decisions on a case-by-case basis. The way the *amicus* issue has been handled illustrates how the African Group's proposed new structure for the DSM might function in practice. In this scenario, a party to a dispute would refer a ruling to the General Council to evaluate. The General Council as a political decision-making organ would then assess the broader impact of the issue and try to achieve a consensus, which implies political bargaining. This scenario is in contrast to the current system, where the AB evaluates panels' rulings on a legal basis, without officially considering their broader social, economic or political implications.

The African Group's proposal appealed directly to the fact that, while 'development' objectives are institutionalised in the preparatory work for many trade agreements, and even written into their preambles, decisions made by the panels and the AB appear to sideline these objectives and refer to other principles entirely. This point is well illustrated in the Generalised System of Preferences (GSP) case brought by India against the EU, *European Communities: Conditions for the Granting of Tariff Preferences to Developing Countries* (DS246).²¹

20. See WT/GC/M/60 for the whole discussion and paras 113-120 for the chairman's concluding remarks.

21. This case concluded after the African proposal was tabled and was therefore not used by them as an example.

The case concerned whether the EU's GSP was consistent with the WTO's Enabling Clause, which permits countries to give better than Most Favoured Nation treatment to developing countries. The question was whether this 'better than usual' treatment should cover all developing countries or could be restricted to a few. India, referring to papers from the preparatory work on the Enabling Clause and some UNCTAD documents, argued that these documents showed that the intention of the Enabling Clause was that any existing GSP scheme should cover all developing countries. The EU argued that the documents were irrelevant, since they were not adopted or even discussed in the GATT. Thus, according to the EU, the Enabling Clause permits developed countries to form specific GSP schemes to address different developing countries' needs and situation. The panel approved India's logic but, upon appeal, the AB supported the EU. It chose to interpret the Enabling Clause in a formalistic manner, approving the existing GSP programmes instead of finding them inconsistent with the WTO rules and potentially starting an avalanche of cases.²²

Returning to the African Group's proposed new structure for the DSM, with the final word resting with the General Council, it is again unclear whether developmentalist prerogatives would have been endorsed in the GSP case. In such a scenario, the Enabling Clause and its preparatory work could have been interpreted as an integrated system designed to assist developing countries and not discriminate between them. Thus India could have won the case. But members might instead have preferred to avoid a review of each and every North-South preferential trade arrangement.

While formally and diplomatically other countries have expressed willingness to consider the African countries' proposals, informally they have criticised them as falling outside the negotiations' mandate, in some cases inapplicable and unclear and in other cases contradictory. In short, the proposals have been relegated to the files and have not progressed further into the system. But since the negotiators have committed themselves to prioritising the SDT proposals in the coming months (TN/DS/13), some of the above-mentioned issues, especially those directly dealing with the SDT provisions, may re-surface. This, of course, requires that developing countries, and especially the African Group, enhance their engagement in the negotiations, and more importantly, table more specific and detailed wordings for their suggestions. But this is not likely to happen, since the African Group is now devoting its limited resources mainly to the negotiations on agriculture. Here they are faced with three major problems: cotton, sugar and the general erosion of preferences as a result of reductions in developed countries' tariffs.

5 Conclusion

The story of African countries and the DSM illustrates their marginal role and position in the WTO in general. This appears to relate to four main factors. First, because of their low level of development and insignificant share of international trade, the African countries have traditionally not been considered as important players who should be consulted in the negotiations. This has resulted in a lack of know-how on bargaining

22. For a discussion of this ruling see Howse (2004).

and negotiation. The main example provided here is their proposed restructuring of the DSM, which is linked with certain other countries' concerns about the trend towards law-making in the WTO, but takes these concerns in a direction that others are not willing to follow. Second, since many of the DSM's – and WTO's – rules have not been drafted with African countries in mind, they are of little or no value to them, and have in fact alienated them from the organisation. A good example is the rules regarding retaliation, which are designed for those who can retaliate. Third, because of the low or inappropriate quality of the input they get from NGOs, the few demands and proposals that the group tables tend to be both unrealistic and intermittently pursued. An example here is the focus of demands concerning SDT on issues such as the membership of the AB. Finally, their marginality relates to a lack of internal coherence and a related incapacity to co-operate with other countries.

The WTO is an organisation which deals with issue-specific matters, as reflected in all the alliances, for example the Cairns group and the G20 group on agriculture. Although there is some justification for making alliances based on countries' geographical position, for example small island economies or land-locked countries, these common features are relevant only because the specific circumstances give rise to special difficulties for the countries concerned. There are not many reasons justifying alliances based on regional proximity alone. In the African context, the alliance between four African cotton-producing countries (Benin, Burkina Faso, Chad and Mali) illustrates that, when alliances are made to deal with specific issues, they are somewhat more successful. In this case, the concerns of the four African countries were shared by many other countries and were furthermore backed by the DSM's ruling in the cotton case, *United States: Subsidies on Upland Cotton (DS267)* brought by Brazil. However, the main reason why African countries have constituted a group in the WTO is that most of them, as single countries, do not have sufficient resources to act on their own. The question here is whether this is a sufficient reason for making an alliance, when it is not complemented by substantial issue-specific common causes.

The conclusion that it is not is supported by a comparison of the African Group's proposals in the WTO generally with those of the LDC group. The latter are in a much better position to argue for their demands, and to put feasible proposals on the table, mainly because they are faced with common problems and can thus adopt common positions that are more practical than symbolic. The African Group's alliance, on the other hand, is not built to pursue issue-specific concerns. This failing might have been mitigated if African countries had used the African Group as a basis for making alliances with other countries around common interests and/or as a source of inspiration for how to deal with difficult subjects. Encouragingly, some attempts have been made along these lines, but so far without success. The main reason for this goes back to the African Group's rather fluid focus, in the absence of a stable agenda. A second reason is that the decision-making process within the group is very unclear. Thus it is difficult for other countries to negotiate or make a stable alliance with them.²³

In sum, the role of African countries in the WTO in general and the DSM in particular reflects a vicious circle, in which they are both marginal and further

23. These are the author's impressions from the negotiations, which subsequently have been confirmed in interviews with various countries' delegates.

marginalise themselves. In regard to the DSM, African countries have two (non-exclusive) options: to use it to highlight broadly the negative effect of WTO rules on their economies and development ambitions, and to use the ongoing review process to try through negotiations to raise their concerns and amend the rules. They have not used the first option and nothing indicates that this will change in the near future. As for the second option, as shown above, they have sidelined themselves. Having said this, WTO decisions are made by consensus and thus the African countries have the power to block the DSM negotiations in subsequent phases. However, this strategy may backfire or the option may never materialise, since during the final bargaining phase in the Doha Round they will be faced with many interlinked issues. Thus it is not certain that they will achieve any of their demands in a specific area such as the DSM. Furthermore, they would still need to formulate their ideas explicitly and find broader support for at least some of them. In short, the longer the DSM negotiations take and the more the African countries restrict their involvement in them, the more disadvantages they will face. The other countries will agree on selected issues, and in the worst case the Africans will find that a deal will be done that will not fulfil their needs and which they are unable to block.

A more practical option in the DSM negotiations would be for the African Group to identify their broad interests and some specific objectives, and support other countries that have similar goals. This was what actually happened at the Hong Kong ministerial meeting in 2005; the African countries supported the G20's position in the agricultural negotiations without threatening to block the process or trying to fight on their own. Whether Africa will really gain from the realisation of the G20's objectives is another question.

Finally, engaging developing countries in the WTO, including the DSM, is a concern that many other countries share and for which they are interested in finding solutions. In the case of the DSM, it is now widely recognised that the obstacles require two types of solutions: assisting countries to build adequate trade-policy infrastructures, and reforming the DSM. The infrastructure-building part of the first type of solution may be outside the WTO's scope, as Hoekman and Mavroidis (2000) suggest, but this could be reinforced by a reform of the DSM mandate, so that it would also cover the upstream phase of cases. The current negotiations should also be the forum for other proposals for DSM reform. Here some important gains could be achieved if the African countries were to review their existing definition of their main interests and form a broader front around securing a much more precisely defined set of SDT provisions and improved third-party rights.

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