

AFRICA IN THE FIRST DECADE OF WTO DISPUTE SETTLEMENT

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“...We are distrustful of any rules and institutions which operate in a way to keep Africans perpetually as primary producers...”¹

*– Sir Abubakar Tafawa Balewa
Prime Minister of Nigeria (1962)*

“...For you know as well as we do...that right, as the world goes, is in question only between equals in power, while the strong do what they can and the weak suffer what they must...”

– Thucydides, The Peloponnesian War, The Crawley Translation, 351 (T.E. Wick, ed., Random House 1982)

¹ Quoted in S.K.B Asante, *Regionalism and Africa's Development* (Macmillan Press Ltd., 1997) at p. 127.

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I. Introduction

The conclusion of the Uruguay Round of multilateral trade negotiations was a turning point in the history of global economic relations.² Besides ushering in the WTO, whose Members agreed to fourteen substantive agreements, many of which specify the coverage and application of the more general provisions in the initial *General Agreement on Tariffs and Trade* (GATT), it brought about a certain momentum to the process of further economic liberalization that reverberates to date.

Whereas the GATT covered trade in goods and only applied to a limited extent on agricultural and textile products, the WTO covers trade in services and intellectual property rights, as well as trade in all goods, including agricultural and textile products. In addition, there have been intense efforts to extend the WTO's reach into other areas such as investment, government procurement and trade facilitation. Although with the exception of trade facilitation over which WTO Members have already agreed to negotiate, proposals for negotiations in the other areas have met with stiff resistance from developing countries, the jury is still out as to how long such resistance will last.³

² See *Marrakech Agreement Establishing the World Trade Organization*, 15 April 1994, *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments-Results of the Uruguay Round* 6, 6-18; 33 I.L.M. (1994) 1140, 1144 -1153. For a historical background of the creation of the WTO, see generally *World Trade: Toward Fair and Free Trade in the Twenty First Century* (Marie Griesgraber & Bernhard G. Hunter, eds. 1997).

³ See generally, Simon Evenett, et al., (eds.), *The Singapore Issues and the World Trading System*, (World Trade Institute and Swiss State Secretariat for Economic Affairs, June 2003); Victor Mosoti, "Non-Discrimination and its Dimensions in a Possible WTO Framework Agreement on Investment: Reflections on the Scope and Policy Space for the Development of Poor Economies", 4(6) *Journal of World Investment and Trade* (Fall 2003) pp 1011-1046; and Victor Mosoti, "The WTO Agreement on Government Procurement: A Necessary Tool in the Legal Strategy for Development in the Poor World?" 25(2) *University of Pennsylvania Journal of International Economic Law* (Spring 2004) pp.593-638.

Over the past decade, international trade relations have indeed become much more legalized under the WTO, pursuant to the adoption of the Uruguay Round agreements and, in particular, the *Dispute Settlement Understanding* (DSU). The DSU introduced a variety of reforms to the old GATT system. These reforms include a greater clarity of rules, binding decisions, and a standing Appellate Body.⁴ This highly legalized and judicialized WTO system applies to a much broader membership and subject coverage.⁵ From the 23 original members under the GATT, which had increased to 99 members by the conclusion of the Tokyo Round in 1979, the WTO now has 148 members, following the accession of Nepal and Cambodia at the 5th Ministerial Conference held in Cancun, Mexico in September 2003. To a certain extent, the increase in numbers has been advantageous to developing countries, and in particular, the African Group, which forms the block majority in WTO Membership. Given the unique decision-making process at the WTO, and Africa's perennial weakness in strongly articulating her own concerns at the international level, the majority in numbers has not, unsurprisingly,

⁴ For a detailed discussion on the mechanics of dispute settlement in the WTO, see for example, Edwin Vermulst and Bart Driessen, "An Overview of the WTO Dispute Settlement Process and its Relationship with the Uruguay Round Agreements", 29 *Journal of World Trade* (1995) p.131 at 136; Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement: International Law, International Organizations and Dispute Settlement* (1997); James Cameron et al. (eds.) *Dispute Resolution in the World Trade Organization* (1998); David Palmeter and Petros Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure* (1999); and for a fascinating discussion of the particular approach of the major players in the system, and cooperation with the private sector, see Gregory Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (Brookings, 2003).

⁵ Article 1.1 of the DSU spells out the reach of the dispute settlement system stating that the DSU "shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the "covered agreements")." The Appellate Body in *Brazil-Desiccated Coconut*, defined "covered agreements" to "include the WTO Agreement, the Agreements in Annexes 1 and 2, as well as any Plurilateral Trade Agreement in Annex 4 where its Committee of signatories has taken a decision to apply the DSU." It went on to state that "in a dispute brought to the DSB, a panel may deal with all the relevant provisions of the covered agreements cited by the parties to the dispute in one proceeding." See *Brazil-Measures Affecting Desiccated Coconut* (WT/DS22/AB/R)(1997), at p. 13. Recent scholarship pegged on the premise that WTO law is only part of the *corpus* of wider public international law suggests that a complainant can lodge or argue a dispute based on non-WTO law. See Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (Cambridge University Press, 2003), and more particularly, Joost Pauwelyn, "How to Win a WTO Dispute Based on Non-WTO Law: Questions of Jurisdiction and Merits", 6 *Journal of World Trade* (2003) pp. 997-1030.

translated into more real influence or benefits.⁶ However, there have been instances of fleeting success, for example the unanimity exhibited during the Doha Ministerial Conference in 2001, and the successful inclusion of the so-called “Cotton Initiative” in the agenda of the Cancun Ministerial Conference in 2003 and subsequent discussions aimed at finding a solution to depressed world cotton prices as a result of subsidies by some developed countries.⁷

African countries have largely been absent as players at the WTO dispute settlement system in its first decade. In recent literature, this has been attributed to a number of factors, among them, the low volume of trade, roughly two per cent of global trade, with an export base often characterized by largely non-contentious single unprocessed commodities, a complicated and expensive dispute settlement system, with a WTO case estimated to cost roughly US\$500,000 if taken through to the Appellate Body,⁸ inadequate legal expertise and a less litigious

⁶ See Francis Mangeni, *African Influence at the WTO*, Study Commissioned by the Secretariat of the Common Market for Eastern and Southern Africa (COMESA) (Lusaka, 2002).

⁷ See *Poverty Reduction: Sectoral Initiative on Cotton*, Joint Proposal by Mali, Burkina Faso, Chad and Benin (WTO Doc. TN/AG/GEN/4). The countries wrote to the WTO Director-General on 30 April 2003, introducing a “Sectoral Initiative in Favour of Cotton”, which was presented to the Trade Negotiations Committee on 10 June 2003. The proposal became a Cancun Ministerial Conference document (WTO Docs. WT/MIN(03)/W/2/Add.1 and WT/MIN(03)/W/2). In the proposal, the countries sought a decision at the Cancun Ministerial Conference as an agenda item titled “Poverty Reduction: Sectoral Initiative in Favour of Cotton: Joint Proposal by Benin, Burkina Faso, Chad and Mali.” There were differences regarding whether the item should be self-standing or whether it should come under the three pillars of the negotiations on agriculture, i.e., market access, domestic support or export subsidies. Due to the collapse of the conference, no definitive result was achieved. Subsequent efforts led to the creation of a Cotton Sub-Committee within the Special Session of the Committee on Agriculture to focus on cotton as a specific issue in the agriculture negotiations.

⁸ See Petina Gappah, “African Countries and the WTO Dispute Settlement System”, Paper Presented at a conference organized by the Trade Law Centre for Southern Africa, Cape Town, South Africa, 31 March, 2005 (of file with the author). See also, Uche Ewelukwa, *African States, Aggressive Multilateralism and the WTO Dispute Settlement System: Politics, Process, Outcomes and Prospects*, Paper Presented at the 2005 Fellows Conference, Carnegie Council on Ethics and International Affairs: Justice and World Economy Program (2005). The paper is available at <http://www.cceia.org/viewMedia.php/prmID/5213> (last visited 6 October 2005); and Chad Bown and Bernard M. Hoekman, *WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector*, available at <http://people.brandeis.edu/~cbown/research.html> (last visited, 6 October, 2005).

approach to possible disputes particularly when major trading and donor partners are involved.⁹ Optimistic assessments of the functioning of the dispute settlement system however cite the greater relative involvement of developing countries when taken as a group.¹⁰ Although this masks the skewed nature of developing country participation, it is a useful indication of the increasing strength of some developing countries, such as Brazil and India that are actively using the system both to resolve disputes and leverage influence over negotiating positions in the on-going Doha Round of multilateral trade negotiations. While on occasion tackling the peculiarities of developing country involvement, this paper focuses attention on the level of participation and expressed concerns of the African Group of countries in the WTO.

⁹ See *Proposal by the African Group*, WTO Doc. TN/DS/W/15 (25 September 2002). Among the problems pointed out by the African Group were that the dispute settlement system is “complicated and overly expensive, which has institutional and human resource as well as financial implications”, that “the means provided for enforcement of findings and recommendations (trade retaliation) are skewed against and disadvantage African Members; that “in its operation, the system should not abstract itself from the development fundamentals” and that “the special procedures for developing country Members have not addressed the core difficulties African Members face in seeking to use the system.” See also, Chad P. Bown and Bernard Hoekman, “WTO Dispute Settlement System and the Missing Developing Country Cases: Engaging the Private Sector,” Paper presented at the conference on “WTO Dispute Settlement and Developing Countries: Use, Implications, Strategies, Reforms” held at the University of Wisconsin, Madison, May 20-21, 2005. This and other papers on related issues are available at www.wisc.edu/wage/WTO/WTO.htm (last visited, 6 June 2005).

¹⁰ See for instance, WTO, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium-Report by the Consultative Board to the Director General Supachai Panitchpakdi* (WTO, Geneva, 2004) at pp. 49-59; Edwini Kessie, “The ‘Early Harvest Negotiations’” in Federico Ortino and Ernst Ulrich Petersmann, *The WTO Dispute Settlement System 1995-2003*, Chapter 12, (Aspen Publishers, 2004) (stating that “what is even more impressive [about the WTO dispute settlement system] is that it is not only developed countries which are making use of the system, but also developing countries, who currently account for roughly twenty-five percent of the total number of cases that have been initiated as compared to five percent under the GATT”); Julio Lacarte-Muro and Petina Gappah, “Developing Countries and the WTO Legal and Dispute Settlement System: A View From the Bench”, 3 *Journal of International Economic Law* (2000) pp. 395-401; Robert Rogowsky, “The Effectiveness of the DSU for Developing and Middle Income Countries”, Paper Delivered at the World Trade Forum, Berne, Switzerland (August 2002); March Busch and Eric Reinhardt, “Developing Countries and GATT/WTO Dispute Settlement”, 37(4) *Journal of World Trade* (2003) pp. 719-735; Jose Luis Perez Gabilondo, “Developing Countries in the WTO Dispute Settlement Procedures: Improving their Participation”, 35(4) *Journal of World Trade* (2001), pp. 483-488; and Gregory Shaffer, “How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies”, in *ICTSD Resource Paper No. 5* (ICTSD, Geneva, March 2003).

In itself, low participation should not be a problem if indeed the need for it is minimal, and particularly given that this weakness is not confined to the dispute settlement process but to trading capacity in general and in all it entails.¹¹ Hence, one view could be that absenteeism in the dispute settlement system is only symptomatic of far greater structural economic weaknesses in Africa, and perhaps not necessarily a reflection of the failures of the system itself. But that is only one side to the story, even though it is probably the more important one.

Over and above the commonly identified and curable problems, such as delays in implementation and weak enforcement,¹² the other view is to examine the structure, functioning and evolving jurisprudence of the system, and try to tease out any shortcomings or trends that could explain the inability of African countries to make use of it. In this regard, it is well to remember that the WTO dispute settlement system is a unique creation, one that has been described as representing a paradigmatic shift, a triumph of law over diplomacy.¹³ In

¹¹ This includes weak links and cooperation between the government and private sector operators and industry groups. For a discussion on how such linkages can impact on the ability of a country to initiate disputes, taking the EU and US examples, see Gregory Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (Brookings, 2003). For the structural economic weaknesses of African countries see generally, UNCTAD, *Economic Development in Africa: Performance, Prospects and Policy Issues*, United Nations, 2001, pp. 3-5; Ademola Oyejide, *Africa's Participation in the Post Uruguay Round World Trading System*, PSIO Occasional Paper No. 6 (Graduate Institute for International Studies, University of Geneva), 1997; Robert Hudec, *Developing Countries in the GATT Legal System* (Hampshire: Gower Publishing Company Ltd; 1987); African Development Bank, *African Development Report 2000* (Oxford University Press, 2000); *World Bank, Can Africa Claim the 21st Century?* (Washington DC: World Bank), p. 208; and C. Michalopoulos, "The Developing Countries in the WTO", 22(1) *World Economy* (1999).

¹² Other criticisms include conflicting deadlines in the process, the fact that there is little room for non-trade issues such as environment and human rights, emphasis on the inter-governmental nature of the process and therefore absence of non-state actors, and "poor quality panel decisions". For such and other criticisms see: Petros Mavroidis and Thomas Cottier, *Is the WTO Dispute Settlement System Responsive to the Needs of the Traders? Would a System of Direct Action by Private Parties Yield Better Results?* *Journal of World Trade*, Vol. 32(2) pp. 147-165 (1998); Kym Anderson, *Environmental and Labour Standards: What Role for the WTO?* in, Anne Krueger, *The WTO as an International Organization* (University of Chicago Press: 1998) pp. 231-55; and Amin Alavi, *African Countries and WTO's Dispute Settlement System* (2005)(on file with the author).

¹³ See J.H.H. Weiler, "The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement", 13 *American Review of International Arbitration* (2003) p. 177 (in which Professor Weiler describes the shift from diplomacy to genuine "legalism" in GATT/WTO law).

this sense therefore, the potential diplomatic strength in numbers that developing countries enjoy at the WTO counts for nothing, if it is not accompanied by a thorough understanding of, and an ability to use, the mechanism through which questions of law are adjudicated.

Further, developing countries, and especially the weakest of them, do certainly need the WTO dispute settlement. Examples abound of instances when their economic development has been imperilled because of the imposition of cavalier trade measures or because patently unjustifiable decisions are taken and implemented by their trading partners, be they other developing or developed countries. Hence, whether it is a problem between Kenya and Pakistan regarding rice and tea export duties,¹⁴ Nepal and India over ginger export bans due to licensing requirements and sanitary and phytosanitary concerns,¹⁵ Sudan and the Gulf region countries over the export bans of live sheep and meat,¹⁶ or West African cotton exports that

¹⁴ Kaburu Mugambi, “Kenya-Pakistan Trade Dispute Turns Nasty”, *The Daily Nation* (Nairobi, March 3 2005) (in which Kenya raised duties on imports of Pakistani rice from 35% to 75% as a result of the provisions in the East African Customs Union Protocol regarding the common external tariff, and in turn, Pakistan threatened to restrict imports of Kenyan tea. The matters are further complicated by the *Pakistan-Sri Lanka Free Trade Agreement* signed on 9 February 2005, in which duty on a range of items is reduced to zero. Sri Lanka is a major tea producer and a competitor to Kenya).

¹⁵ Officials from the Nepalese Plant Quarantine Service complain that their counterparts on the Indian side unilaterally impose export bans of ginger from Nepal for sometimes untenable reasons including licensing requirements which are nevertheless not required under the provisions on full reciprocity of concessions for primary products in the *Nepal-India Trade Treaty* of 1996. Although the treaty has not been notified under GATT Article XXIV or the Enabling Clause, it nevertheless subsists and influences trade relations between the two countries. Regarding raw and dried ginger, Indian Plant Quarantine inspectors have also stated concerns over phytosanitary issues.

¹⁶ Although neither Sudan nor Saudi Arabia are WTO Members at the moment, they are in the process of negotiating their accession, and what is more, in discussions with Sudanese Ministry of Agriculture officials, one of the key reasons for their continued interest in the WTO process is that they are continually exploring the possibility of either using the dispute settlement system to solve some of their problems or, more importantly, using its existence as a point to compel their trading partners to sit and discuss their problems. Sporadic cases of failure of the cooling system in charter aeroplanes transporting lamb and goat meat from Sudan to Saudi Arabia have sometimes led Saudi authorities to reject exports from Sudan (because the chilled meat, supposed to be at -1c° or 0c° , was not) for long unjustified periods. At other times, they have also imposed seemingly unreasonable requirements for example that the spinal cord of an animal carcass for export should be detached or extracted but that the carcass should remain intact.

are locked out of the market because of subsidies by developed countries,¹⁷ the issue comes down to what perception and faith these potential players have in the system's reliability, inclusiveness and delivery. The thrust of the argument for greater involvement and participation derives from an acknowledgment that the WTO dispute settlement system is not only about one-off disputes between trading partners. It is much more about securing the long-term predictability of trading concessions and interests in the international legal system,¹⁸ and a cumulative evolution of a body of principles of international economic law that will remain in place for years to come. Given the centrality of the dispute settlement system in the essential WTO function of granting legal certainty and predictability, an absence from this process of clarification and elaboration is fundamentally prejudicial to the long-term position of African countries in the global trading system. The lack of participation by large sections of the WTO membership, such as African countries, is a danger to the long-term "predictability" function of the WTO, and could undermine the usefulness of the entire process eventually. It is therefore in the interests of all WTO Members to work towards

¹⁷ The issue of cotton is one that has taken centre-stage at the WTO recently, both in the negotiations (attribute the failure of the Cancun Ministerial Conference to the inability to resolve the issue, among others) and in the dispute settlement system. In a dispute lodged by Brazil against the United States subsidies program under the Farm Security and Rural Investment Act of 2002, both the Panel and the Appellate Body found in favour of Brazil (hinging on the finding that pursuant to Article 13(b)(ii) of the *Agriculture Agreement* the U.S. domestic support measures "grant support to a specific commodity in excess of that decided during the 1992 marketing year" and, were therefore not exempt from actions based on GATT Article XVI:1 or Articles 5 and 6 of the Subsidies and Countervailing Measures Agreement.) See panel report in *United States-Subsidies on Upland Cotton* (WT/DS267/R).

¹⁸ The fundamental theoretical basis of the GATT-WTO legal and dispute settlement system may be found in the Weberian desire to guarantee a certain 'market ethic' amongst the world's trading nations, and to maintain and enforce the sanctity of negotiated trade concessions. This 'market ethic' is universal, and not limited to trade relations. It is also not alien to the way African communities conducted trade in earlier times. The honour system that prevailed then, and ensured that debts were paid or promised deliveries of goods made, is very similar to the functioning of the Weberian 'market ethic' in modern-day global commerce. See, Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Guenther Roth & Claus Wittich eds., Univ. of Cal. Press 1978) (1921-1922), vol. 1, 636-637. See also David Trubek, "Max Weber on Law and the Rise of Capitalism", 3 *Wisconsin Law Review* (1972) p. 720 at 746 (arguing that the predictability of market behaviour, the enforceability of contracts and therefore the profitability of engaging in economic relations seem to have been direct concerns of Weber's legal theory and that autonomous legal systems with universal and general rules, could guarantee the needed legal certainty).

resolving the problems that prevent them from making use of the system when they need to. This is because, as a whole, the dispute settlement process may be viewed as a public good whose usefulness and proper functioning is in the interest of all players, be they developed or developing countries. In particular, it serves all Members' interests to ensure that it remains credible and functional. It is therefore a public good in the sense that through litigation, there is a greater clarity of WTO rules. Although there is no formal doctrine of *stare decisis* in the WTO, it is clear that panels and the Appellate Body refer to past decisions and to a large extent try not to fundamentally depart from previous interpretive positions. These means that, as a public good, all WTO Members potentially stand to benefit from this clarification process.

Related to this is the fact that any remedy that is given to a winning party in a WTO dispute has to be granted on a most-favoured-nation basis, meaning, it has to be multilateralized. If for example as a result of an adverse ruling, a WTO Member has to lower its tariffs for a particular product, these lower tariffs cannot be granted selectively, or only to the winning party. In this sense, all WTO Members stand to gain from the process hence strengthening my argument that the process is indeed a public good. A reluctance to address the shortcomings of the WTO dispute settlement process would be ill-advised because it would ultimately be favourable not only to weak countries, in this case, African countries, but to all players.

Following this introduction, this paper seeks to answer two specific questions: *First*, in what instances have African countries participated in the WTO dispute settlement system and to what effect? *Second*, what should be the issues of concern for African countries and what limitations do they face in addressing those concerns? Part II discusses the participation of African countries in the system focusing attention on participation in dispute resolution, and participation in negotiations on the review of the DSU. Part III highlights some of the issues

arising from the dispute settlement system that are or should be of concern to African countries. These include agricultural subsidies as raised in the *US-Cotton Subsidies* dispute, tariff preferences as raised in the *EC-Trade Preferences* dispute, regional trade arrangements as raised in the *Turkey-Textiles* dispute and balance of payments problems as raised in the *India-Quantitative Restrictions* dispute. Part IV concludes and includes some thoughts on possible strategies for improving Africa's participation.

II. African Participation in the Dispute Settlement System

A. Participation in Dispute Resolution

(a) Participation in GATT Disputes

During the GATT, as now, African countries were only very rarely involved in disputes. In fact, in the records I have looked at, in only one dispute was an African country involved as a principal party, that is, either as a complainant or as a respondent. The one country was South Africa. In a 1985 dispute, *Canada-Measures Affecting the Sale of Gold Coins*,¹⁹ South Africa challenged a retail tax measure on Maple Leaf gold coins in the Province of Ontario.

Prior to the measure, retail tax on the gold coins in Ontario stood at 7 per cent. With the imposition of the measure, the tax was eliminated. No other gold coins, whether produced in Canada or abroad, were exempted from the tax. South Africa argued that the measure was inconsistent with Articles II and III of the GATT. Canada's defence derived from Article XXIV:12 of the GATT to the effect that the measure was taken not by Canada itself, but by a

¹⁹ *Canada-Measures Affecting the Sale of Gold Coins*, Report of the Panel (GATT Doc. L/5863).

provincial government, and that the central government in this case had taken all reasonable measures necessary to ensure compliance with GATT obligations. The panel found that the Ontario measure was inconsistent with the GATT non-discrimination provisions and that it had resulted in a nullification and impairment of the concessions of South Africa. It ordered Canada to offer compensation.

African countries were also involved as third parties in a few other disputes. In these rare cases in which they were involved, two of which I detail below, often the participation was active partly because there was a real interest at stake for them to have made the decision to get involved in the first place. Like in the two examples below, their exports were often under threat because of the measure that had been challenged. Hence, during the GATT, it would appear that African countries only took part in disputes after a rational decision that inaction would limit their trade opportunities.

In a 1987 dispute, *United States-Taxes on Petroleum and Certain Imported Substances*, Nigeria was a third party.²⁰ The dispute was between Canada and the United States under GATT Article XXII:1 and concerned taxes on petroleum and certain imported substances levied under the US *Superfund Act* of 1986. The *Superfund Act* authorized a programme to clean up hazardous waste sites and deal with public health programmes caused by hazardous waste. It provided for excise and corporate income taxes and appropriations to pay for the cost of these programmes. The *Superfund Act* introduced in particular a new broad-based corporate income tax and an excise tax on petroleum. Nigeria, being an oil exporter to the US reserved its rights to participate in the dispute as a third party. In its arguments before the panel, Nigeria was in support of the Canadian position that the US measure was inconsistent

with the non-discrimination provisions in the GATT. Nigeria stated that it recognized the need to solve the problem of hazardous wastes but that it saw no justification for the imposition of discriminatory taxes for that purpose and that for an oil-exporting developing country such as Nigeria, the measure was unnecessarily burdensome. Although the Panel eventually found the US measure not to be inconsistent with its GATT obligations, there was a small victory in the sense that the United States agreed not to employ the penalty tax rate.

In a 1989 dispute, *European Economic Community-Restrictions on Imports of Dessert Apples (Complaint by Chile)*,²¹ South Africa made substantive submissions in support of Chile. In the dispute, the EEC had imposed restrictions on the imports of Chilean dessert apples using an import licensing system that according to Chile was inconsistent with GATT Articles XI:1 and XXIII:2. During this period, South Africa was a major exporter of dessert apples to the EEC and it stood to lose its market share in a manner similar to Chile, if the panel found the EEC measures to be GATT consistent. The Panel found that the system of restrictive licensing applied by the EEC to imports of apples constituted an import restriction or prohibition inconsistent with Article XI:1 of the GATT, and that the allocation of quotas was conducted in a discriminatory manner. Although the Panel did not explicitly recommend that the EEC should compensate the complainant, it noted that compensation could be mutually negotiated by the parties, a clear victory for Chile, and the other countries like South Africa that were in support.

²⁰ *United States-Taxes on Petroleum and Certain Imported Substances*, Report of the Panel adopted on 17 June 1987 (L/6175 - 34S/136).

²¹ *European Economic Community-Restrictions on Imports of Dessert Apples (Complaint by Chile)*, Report of the Panel adopted on 22 June 1989 (L/6491 - 36S/93).

(b) Participation in WTO Disputes

Thus far, there have been 328 standard DSU complaints.²² This number includes all complaints initiating a formal proceeding by one or more Members against another Member. It is noteworthy that by the time a petition is filed with the WTO, informal consultations between the parties outside of the WTO have proven unsuccessful and the formal dispute resolution process of the DSU has been deemed necessary by the complaining party. This is not the case in the large number of disputes that get resolved at the consultations phase, formally within the WTO or even bilaterally. Under these circumstances, ‘negotiating in the shadow of WTO law’²³ has often helped the parties to arrive at a resolution mutually acceptable to both. Hence, there have only been 189 requests for establishment of panels thus far. Further, there have been 55 standard adopted Appellate Body reports, and eight Article 21.5 Appellate Body reports, and 86 adopted panel reports and a further 12 Article 21.5 panel reports.²⁴ Africa’s participation in this important process is miniscule.²⁵ Robert Rogowsky,

²² All the statistics cited in this paper are from *Facts and Figures on WTO Dispute Settlement*, at www.WorldTradeLaw.net, a website maintained by Simon Lester and Kara Leitner (visited on March 14 2005).

²³ See Marc L Busch and Eric Reinhardt, “Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes”, 24 (1 & 2) *Fordham International Law Journal* (2000), pp. 158-172.

²⁴ According to John Jackson, “...the relatively large number of settlements that are occurring” is “one of the more positive indicia” of the general success of the system. See John Jackson, “Dispute Settlement and the WTO: Emerging Problems”, 1(3) *Journal of International Economic Law* (1998) 329-351, 340. See also, Robert Hudec, “The New WTO Dispute Settlement Procedure: an Overview of the First Three Years”, 8 *Minnesota Journal of Global Trade* (Winter 1999) p. 1. Hence, the general view seems to be that the system has worked well. It has been described variously as “very positive”, “has worked and continues to work extremely well since inception”, “satisfactory”, “largely successful” and so on. See Ira Shapiro, S. Bruce Wilson, D.G. Waddell, and Bernd Langeheine, “Comments: National Perspectives on the System”, 32 *International Lawyer* (Fall 1998) p. 811. See also, William Davey, “The WTO Dispute Settlement System”, 3(1) *Journal of International Economic Law* (2000) pp. 15-18, who states: “So far the record of the WTO dispute settlement system is impressive. It has been extensively used...” According to Ernst Ulrich Petersmann, “the 1994 WTO Agreement and its mandatory worldwide dispute settlement system are milestones on the long and winding road to worldwide economic freedom, consumer welfare and democratic peace.” See Ernst Ulrich Petersmann, *The GATT/WTO Dispute Settlement System* (Kluwer Law International, 1996), p.4.

²⁵ Limited participation is not confined only to dispute settlement but covers trade in general. See Ademola Oyejide, *Africa’s Participation in the Post Uruguay Round World Trading System*, PSIO Occasional Paper No. 6 (Graduate Institute for International Studies, University of Geneva, 1997), p. 13 et seq.

while writing about the geographical distribution of the Members that have filed disputes whether as complainants or respondents, writes: “Not surprisingly, Africa is largely non-participatory in either category.”²⁶ Indeed, Table 1 below shows that no African country has ever been a complainant in any dispute and in only six cases has an African country been a respondent. Of the six disputes, Egypt was a respondent in four, while South Africa was a respondent in two. Egypt is clearly the most experienced in the dispute settlement system in this regard, having been challenged by among others, Turkey, Pakistan, India and Thailand.

Table 1
Disputes in which an African country was a Complainant or Respondent

Country	Dispute	Complainant	Respondent
Egypt	<i>Egypt-Anti-dumping Duties on Matches from Pakistan (WT/DS327)</i>		X
Egypt	<i>Egypt-Measures Affecting Imports of Textile and Apparel Products (WT/DS305)</i>		X
South Africa	<i>South Africa-Definitive Anti-dumping Measures on Blanketing from Turkey (WT/DS288)</i>		X
Egypt	<i>Egypt-Definitive Anti-dumping Measures on Steel Rebar from Turkey (WT/DS211)</i>		X
Egypt	<i>Egypt-Import Prohibition on Canned Tuna with Soybean Oil from Thailand (WT/DS205)</i>		X
South Africa	<i>South Africa -Anti-dumping Duties on Certain Pharmaceutical Products from India (WT/DS168)</i>		X
Totals		0	6

Table 2 below shows the disputes in which an African country requested consultations or the establishment of a panel. The table shows that the only panel request by an African country was also made by Egypt, in the *Egypt-Definitive Anti-dumping Measures on Steel Rebar from Turkey* case in which Egypt was a respondent.²⁷ The dispute was about Egypt’s imposition of a definitive anti-dumping measure on imports of steel rebar from Turkey, and centred on the

²⁶ See for instance, Robert Rogowsky, “The Effectiveness of the DSU for Developing and Middle Income Countries”, a paper presented at the World Trade Forum, World Trade Institute, Berne, August 16-17, 2002 at p. 7 (on file with the author).

²⁷ *Egypt-Definitive Anti-Dumping Measures on Steel Rebar from Turkey (WT/DS211/R)*

calculation of dumping margins with Egypt’s method having focused only on the price data, and not the cost data, and the conclusiveness of the information sought by Egypt’s investigating authority. The Panel found, *inter alia*, that while the investigating authority gathered data on all of the factors listed in Article 3.4 of the Antidumping Agreement, it violated this provision by failing to take into account or evaluate some of the factors like productivity, actual and potential negative effects on cash flow, employment, wages, and ability to raise capital or investments. Egypt has also requested consultations in four other cases and South Africa two cases.

Table 2
Request for Consultations or Panels initiated by an African Country

Country	Dispute	Request for Consultations	Request for panels
Egypt	Egypt-Anti-Dumping Duties on Matches from Pakistan of 2005 (WT/DS327/1) (Pakistan)	X	
Egypt	Egypt-Measures Affecting Imports of Textile and Apparel Products of 2003 (WT/DS305/1) (US)	X	
South Africa	South Africa-Definitive Anti-Dumping Measures on Blanketing from Turkey of 2003 (WT/DS288/1)	X	
Egypt	Egypt-Definitive Anti-Dumping Measures on Steel Rebar from Turkey of 2001 WT/DS211/2		X
Egypt	Egypt-Definitive Anti-Dumping Measures on Steel Rebar from Turkey of 2000 WT/DS211/1	X	
Egypt	Egypt-Import Prohibition on Canned Tuna with Soybean Oil of 2000 (WT/DS205/1) (Thailand)	X	
South Africa	South Africa-Anti-dumping Duties on Certain Pharmaceutical Products from India of 1999 (WT/DS168/1)	X	
Totals		6	1

The one area in which African countries have been comparatively active is in participation as third parties. As table 3 below shows, 15 African countries have been involved as third parties in 10 disputes in the course of the past decade. Mauritius has been involved in five different disputes while Cote d’Ivoire has been involved in four.

Table 3
Disputes in which an African Country was a third Party

Country	Dispute (Panel/AB)	Total
Cameroon, Côte d'Ivoire, Ghana, Senegal	<i>European Communities- Regime for the Importation, Sale and Distribution of Bananas (WT/DS27/R/)</i> (Panel & AB)	4
Nigeria, Senegal,	<i>United States-Import Prohibition of Certain Shrimp and Shrimp Products (WT/DS58/R)</i> (Panel & AB)	2
Cameroon, Côte d'Ivoire, Mauritius	<i>European Communities-Regime for the Importation, Sale and Distribution of Bananas (WT/DS27/RW/EEC)</i> (panel)	3
Mauritius	<i>Mexico-Anti-dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States (WT/DS132/R)</i> (Panel)	1
Egypt	<i>European Communities-Antidumping Duties on Imports of Bed Linen from India (WT/DS141/R)</i> (Panel & AB)	1
Zimbabwe	<i>European Communities-Measures Affecting Asbestos and Asbestos-Containing Products (WT/DS135/R)</i> (Panel & AB)	1
Mauritius	<i>European Communities-Conditions for of Tariff Preferences to Developing Countries (WT/DS246/R)</i> (Panel & AB)	1
Benin, Chad	<i>U.S-Subsidies on Upland Cotton, (WT/DS267/R)</i> (Panel)	2
Côte d'Ivoire, Madagascar, Tanzania, Malawi, Mauritius, Swaziland, Kenya	<i>European Communities-Export Subsidies on Sugar (WT/DS265/R)</i> (Panel)	7
Totals: 15	10	

Often, their involvement is merely as observers, but in a few instances, some countries actually made substantive submissions, for example Nigeria in the *Shrimp* case and Egypt in the *Bed Linen* case. Nigeria was a third party in the *United States-Imports of Certain Shrimp and Shrimp Products* case, both at the panel stage and the Appellate Body stage.²⁸ In the panel hearing, Nigeria stated that it shared the unanimous concern for the conservation and protection of sea turtles. However this dispute did not relate to the desirability of protecting and conserving sea turtles but rather to the methods and measures for doing so. In this regard, Nigeria endorsed the multilateral approach to conservation as explained in the 1996 report of the Committee on Trade and Environment.²⁹

²⁸ *States-Imports of Certain Shrimp and Shrimp Products*, Panel Report, WTO Doc. WT/DS58/R, (15 May 1998).

²⁹ *Report of the Committee on Trade and Environment*, WTO Doc. WT/CTE/1, 12 November 1996.

Egypt was also a third party in *European Communities-Antidumping Duties on Imports of Cotton-type Bed Linen from India*.³⁰ Egypt, as third party, argued rather controversially that Article 15 of the *Antidumping Agreement* obligated the European Communities to explore the possibilities of constructive remedies before applying anti-dumping duties, and that the European Communities failed to comply with this provision, as it did not suggest to the Egyptian exporters the possibility of, for instance, price undertakings. Egypt was of the view that Article 15 *imposes a legal obligation* on developed countries any time they contemplate imposing anti-dumping duties, and it is therefore up to those developed countries then to suggest to the developing countries involved whether or not they would be interested in offering price undertakings.

In *European Communities-Trade Description of Sardines* case,³¹ Morocco submitted an *amicus curiae* brief. The dispute was between Peru and the European Communities. Peru had requested consultations with the European Communities following an EC Council Regulation (EEC No. 2136/89) that purported to lay down common market standards for trade in preserved sardines. Article 2 of the EC Regulation provided, *inter alia*, that only products prepared from *Sardina pilchardus* may be marketed as preserved sardines. In other words, only products of this species may have the word “sardines” as part of the name on the container. According to this regulation, *Sardinops sagax*, found mainly in the Eastern Pacific along the coasts of Peru and Chile could not be marketed as such. *Sardinops Sardina pilchardus* is found mainly around the coasts of the Eastern North Atlantic, in the Mediterranean Sea and in the Black Sea.

³⁰ *European Communities-Antidumping Duties on Imports of Cotton-type Bed Linen from India* WT/DS141/R, 30 October 2000

Morocco presented the dispute settlement system with a novel procedural issue by submitting an *amicus curiae* brief, essentially on the urging of French fishing companies in Moroccan waters. It should be remembered that in general, developing countries were opposed to the idea that panels and the Appellate Body could accept *amicus curiae* briefs. Morocco's submission should therefore be seen in this light, and a number of delegates expressed private concerns over the implications of Morocco's submission.

The Appellate Body had to render a decision on the question whether it had authority to accept an *amicus* brief from a WTO Member. Peru, the appellee in the case argued that such an acceptance would be a circumvention of Articles 10.2 and 17.4 of the DSU, which govern third-party participation by WTO Members in panels and the Appellate Body. The Appellate Body held that in its prior rulings on the issue, it had never distinguished between *amicus curiae* briefs from WTO Members or from other sources such as individuals or non-governmental organizations. It went on to state that it could not treat non-members more favourably than Members themselves with respect to the submission of such briefs, and that nothing in the DSU prevents a WTO Member from submitting an *amicus* brief.³²

³¹ *European Communities-Trade Description of Sardines*, WT/DS231/AB/R.

³² *European Communities-Trade Description of Sardines*, WT/DS231/AB/R, para. 161-165. See also, Issue of Amicus Curiae Submissions, Note by the Editors, 3(4) *Journal of International Economic Law* (2000) 4, pp. 701-706 (2000); Gabrielle Marceau and Matthew Stilwell, *Practical Suggestions for Amicus Curiae Briefs before the WTO Adjudicating Bodies*, 4 *Journal of International Economic Law* (2001) 1, pp. 155-187; Gregory Shaffer and Victor Mosoti, "EC Sardines: A New Model for Collaboration in Dispute Settlement", 6 *BRIDGES Monthly Review* 7, pp. 15-16 (2002); Henrik Horn and Joseph H.H. Weiler, "European Communities – Trade Description of Sardines, Textualism and its Discontent", in *The WTO Case Law of 2002* (Cambridge Press, 2005), pp. 248-275; Arthur Appleton and Veijo Hesikanen, "The Sardines Decision: Fish without Chips?" in Andrew Mitchell, ed., *Challenges for the WTO*, (Cameron May, London, 2005) pp. 165-192.

(c) Participation in the Formulation or Improvement of Working Procedures

During the discussion of the Working Procedures for Appellate Review in 1996, the only African country that made its views known was Egypt. Egypt's views were rather telling, indicating that it was uncomfortable with the Members not having been consulted when the procedures were being drawn up. The record states that "The representative of Egypt welcomed the fact that the Appellate Body finalized its Working Procedures, [but]...would have wished to have been consulted further in the process of the preparation of the Working Procedures."³³ Egypt also expressed its opinion regarding the various contentious issues:

Egypt was not concerned over collegiality or over nationality. Appellate Body members would be receiving documents related to all appeals. In accordance with Rule 4.3 of the Working Procedures, the division deciding each appeal shall exchange views - not consult - with other members.³⁴

An issue had been raised regarding the nationality of the Appellate Body members. Some developing countries were concerned about the geographical representation of the members. In response, Egypt, perhaps aware that it would propose a candidate for the position, indicated that "all precautions had already been taken prior to their selection"³⁵ and that the nationality of the members should not be in question both regarding representation and their ability to discharge their duties impartially. In the on-going negotiations on DSU reform, the issue of transparency in the working procedures has also come up, with some Members such as the United States arguing that the process should be more open both in the process and also with

³³ WTO Doc. WT/DSB/M/11 (19 March 1996).

³⁴ *Id.*

³⁵ *Id.*

regard to participation by other interested parties. On its part, the African Group has emphasized the inter-governmental nature of the WTO. In its proposal the Group stated:

The African Group does not consider external transparency to be a priority in the DSU negotiations, when viewed in the context of the objectives of the Doha Development Agenda. Further, if transparency is designed to assist delegations and other government representatives to view the process and determine their interests if any, that fact should be very clearly stated and agreed by all delegations as the issue to consider. In that case, there would be technical and financial assistance implications for developing-country Members.³⁶

(d) Participation as Panellists or Appellate Body Members

Regarding participation as panellists or as Appellate Body members the trend is also clearly that of very limited involvement as Table 4 below shows. The situation was worse during the GATT, when in the roughly 50 years of the GATT only three Africans in the records I have looked at, served in a GATT Panel. Mr. G.O. Niyi, later on to become Chief Executive of the Nigeria Export Promotion Council was probably the first and only sub-Saharan African to serve on a GATT panel, in the *United Kingdom-Dollar Area Quotas* dispute in 1973³⁷ while Dr. A. El Gowhari, an Egyptian delegate to the GATT served in *EEC-Restrictions on Imports of Apples from Chile* in 1980,³⁸ and Abdelkader Lecheheb, a Moroccan diplomat at the GATT served in the 1994 dispute, *United States-Measures Affecting the Importation, Internal Sale and Use of Tobacco*.³⁹

³⁶ *Proposal by the African Group*, WTO Doc. TN/DS/W/15 (25 September 2002).

³⁷ *United Kingdom-Dollar Area Quotas*, (L/3891 - 20S/236) Report of the Panel adopted on 30 July 1973.

³⁸ Report of the Panel adopted on 10 November 1980 (L/5047 - 27S/98).

³⁹ *United States-Measures Affecting the Importation, Internal Sale and Use of Tobacco*, DS44/R

Table 4
Service on Panels and the Appellate Body (AB)

Country	Panellists and No. of Disputes Served in	Panel Disputes in which they Served	AB Members	Total
Egypt	M. Abdel-Fattah 6	<i>Brazil-Coconut; Canada-Aircraft; Canada-Aircraft (Art. 21.5); EC-Pipe Fittings; Indonesia-Autos; U.S-Byrd Amendment; U.S-Wheat Gluten.</i>	S. El-Naggar (1995-2000)	4
	M. Shahin 1	<i>EC-Poultry</i>	G. Abi-Saab (2000-present)	
Mauritius	U. Dwarka-Canabady 2	<i>Canada-Aircraft II; U.S-Wheat Gluten</i>		1
South Africa	J. Human 4	<i>Guatemala-Cement II; Turkey-Textiles; U.S-1916 Anti-dumping Act; U.S-Underwear</i>		4
	C. McCarthy 1	<i>Chile – Alcohol</i>		
	A. Swart 1	<i>EC-Butter</i>		
	D. Unterhalter 1	<i>U.S-Steel Sunset Review</i>		
Totals			2	9

In the past decade, only a total of nine individuals from an African country have served either as panellists or in the Appellate Body of the WTO. Compared to just one small country, New Zealand, which has had 13 individuals serving on panels, in addition to one serving Appellate Body Member, this low participation in such a vital process by an entire continent, with the majority Membership in the WTO, should be worrying. Of the nine individuals that served, four were from Egypt, four from South Africa and one from Mauritius. Two of the individuals, one from Egypt and the one from Mauritius, were women. One individual, a former Egyptian Minister has served on six panels, and has built up enough experience to probably position himself for service in the Appellate Body as the third consecutive Egyptian in the Appellate Body upon the expiration of the second and final term of the current serving member. The issue of participation was raised by African countries in the negotiations for the reform of the DSU. In its proposal, the African Group expressed concern in “the still unbalanced representation of Africa on the panels and the Appellate Body. A balanced geographical representation will assist in promoting a balanced DS that reflects the various backgrounds and inherent concerns of the entire WTO membership.”⁴⁰

⁴⁰ *Proposal by the African Group*, WTO Doc. TN/DS/W/15 (25 September 2002).

B. Participation in the Negotiations on DSU Review and Negotiations

The process of DSU review was foreseen at the conclusion of the Uruguay Round in 1994. At the time, the Trade Negotiations Committee agreed that WTO Members would “complete a full review of dispute settlement rules and procedures within four years after the entry into force of the [Marrakesh Agreement], and to take a decision on the occasion of its meeting after the completion of the review, whether to continue, modify or terminate such dispute settlement rules and procedures.”⁴¹ In keeping with this decision, the DSU review process commenced in 1998.⁴² The process then dragged on through to the Seattle Ministerial Conference without success, the most far-reaching proposals having been only those that were designed to address the question whether the procedures under Article 21.5 of the DSU should be exhausted before recourse could be made to Article 22.⁴³ A fresh mandate was obtained at the Doha Ministerial Conference in 2001, with WTO Members agreeing to open formal negotiations on the DSU in 2002. According to paragraph 30 of the *Doha Ministerial Declaration*,⁴⁴ WTO Members agreed 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.

⁴¹ See the *Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes* (third paragraph), at www.wto.org/english/docs_e/legal_e/legal_e.htm#ag (visited on March 14 2005).

⁴² WTO Doc. WT/DSB/M/39 (18 November 1997), and the *Dispute Settlement Body: Annual Report*, WT/DSB/14 (27 November 1998).

⁴³ WTO Doc. WT/MIN(99)/8, *Proposed Amendment of the Dispute Settlement Understanding* (22 November 1999).

⁴⁴ WTO Doc. WT/MIN(01)/DEC/1. *Doha WTO Ministerial Declaration* (20 November 2001).

After the Ministerial meeting, the negotiations begun, based on the mandate in paragraph 30, and with the deadline of May 2003. It was also agreed that the results of these negotiations would not form part of the single undertaking. The negotiations were conducted by the special session of the Dispute Settlement Body (DSB), established for that purpose by the Trade Negotiations Committee on February 1, 2002. The DSB met many times, both formally and informally with initial discussions being dominated by differences as to what exactly the scope of the mandate was and what it entailed.⁴⁵ A large number of proposals have thus far been submitted, touching on almost all provisions in the DSU, in addition to broader systemic issues.⁴⁶ African countries have to date submitted or joined in six proposals. On 25 September 2002, the African Group of WTO Members presented a proposal addressing a catalogue of issues that were perceived by the group as being at the core of their inability to effectively take part in the dispute settlement process.⁴⁷ The proposal, drafted initially with the help of a team of stellar young African lawyers put together by the Permanent Representation of the African Union in Geneva, was discussed and vetted by the African Group, and eventually submitted on their behalf by Kenya, which was coordinating the group at the time. African countries argued that the dispute settlement system is complicated and expensive, a claim borne out, if by no other reason, their own very limited participation. The majority of African countries still have one or two over-burdened trade officials in their Geneva offices, usually economists, whose focus on dispute settlement comes much further down in their list of priorities. With the exception of South Africa and Egypt, which have the most experience with the functioning of the process, the rest of the delegations are only tangentially interested in the issue.

⁴⁵ See for example the proposal by Malaysia, WTO Doc. WTO Document, TN/DS/M/1 (12 June 2002).

⁴⁶ See Special Session of the Dispute Settlement Body, *Report by the Chairman to the Trade Negotiations Committee*, TN/DS/9 (June 6 2003) at para. 3.

⁴⁷ *Proposal by the African Group*, WTO Doc. TN/DS/W/15 (25 September 2002).

Besides the problem of capacity pointed out in the proposal by the African Group, there were a number of suggestions. Taking into account the expensive nature of legal representation in the system, and the fact that even the low hourly rates charged by the Advisory Centre on WTO Law (ACWL) are still rather prohibitive for many African countries, it was proposed that a fund should be established to help defray such costs. The down side to this proposal is its practicalities were not discussed or worked out in the proposal itself, neither, *a fortiori*, was it followed up and explained by the African Group in the negotiations. In addition, perhaps, it might have been better to take this issue up more seriously, not within the WTO, but with the ACWL, and direct any such proposed resources directly to the centre itself. In their proposal, African countries also suggested that a pool of lawyers should be made available to help poor countries with the preparation and conduct of cases. Presently, the WTO secretariat does have a mandate to give general legal advice to developing countries, obviously, including African countries. However, the thrust of the African proposal regarding assistance in this regard was that the scope should be enhanced, and the robustness of such assistance should not be fettered by the neutrality that attends advice from staff of the WTO secretariat. This proposal for sure would lead to greater operational costs for the WTO secretariat, perhaps including the possibility of hiring more lawyers in order to meet what are bound to be more demands from developing countries.

One of the more fundamental criticisms that the African Group's proposal raised is that the dispute settlement system is not development-friendly. In my view, this is a rather serious claim and one that should attract more empirical scholarship. It was proposed in this regard that an amendment be effected to the DSU to make it automatic that in the event that a dispute involves a developing country, at least one panellist should be from a developing country, and that upon the request of the developing country involved in the dispute, a second panellist

should also be a developing-country national. The thinking behind this proposal seems to have been that developing country nationals would be automatically sympathetic to development-related concerns raised by developing countries. The end-result might therefore be more “development-friendly” decisions. Such a result may not always be the case, in particular because of the refined and legalistic way in which legal questions at issue are formulated by panels and the Appellate Body which might not allow latitude to ground a decision on broad arguments like ‘development.’ In addition, insisting on developing-country nationals might actually exclude some other WTO experts who are perhaps better suited to bring development concerns to the fore of the dispute settlement system, by virtue of their training, breadth of experience and moral authority.

In their proposal, the African Group also objected to circumstances when panels overstep their mandate and have cited that as one of the problems of the system, in the following words: “In their interpretation and application of the provisions, the panels and the Appellate Body have in several instances exceeded their mandate and fundamentally prejudiced the interests and rights of developing-country Members as enshrined in the WTO Agreement.”⁴⁸ The controversy that inspired this provision was the one over *amicus curiae* briefs in the *US-Shrimp* dispute.⁴⁹ More broadly however, this harkens back to concerns about activist panellists and Appellate Body Members, and their role in disorienting the negotiated balance of concessions. In the *Australia-Automotive Leather*⁵⁰ case for instance, Australia condemned

⁴⁸ See *Negotiations on the Dispute Settlement Understanding: Proposal by the African Group* (dated 9 September 2002) (TN/DS/W/15).

⁴⁹ See *United States-Import of Shrimp and Shrimp Products* (WT/DS58/R).

⁵⁰ See *Australia-Subsidies Provided to Producers and Exporters of Automotive Leather* (WT/DS126/R). See also *Dispute Settlement Body: Minutes of Meeting Held in Centre William Rappard on 11 February 2000* (WT/DSB/M/75), at p. 5 (where the United States is reported to have expressed its views: “The United States did not agree with every word of the Panel Report. The Panel’s remedy went beyond that sought by the United States. Nevertheless, because this case had gone on for far too long, because the parties had agreed up front that

“judicial adventurism” by the Panel in granting a remedy that was retrospective and punitive, and hence beyond what is allowable under the DSU.

Article 3:2 of the DSU provides that “Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.” This basically means that panels and the Appellate Body should remain faithful to the negotiated balance of concessions as expressed in the various WTO Agreements. In the *Japan-Alcoholic Beverages II* case, the Appellate Body stated: “Article 31 of the *Vienna Convention [on the Law of Treaties]* provides that the words of the treaty form the foundation for the interpretative process: ‘interpretation must be based above all upon the text of the treaty’.”⁵¹ And in the *India-Patents (US)* case, the Appellate Body was emphatic on the confines of its interpretive role:

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....These rules must be respected and applied in interpreting the *TRIPS Agreement* or any other covered agreements....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.⁵²

In the search for a standardized interpretive method to the WTO agreements, while at the same time leaving some amount of flexibility to the panellists and the Appellate Body in doing their work, the DSU provides that WTO panels and the Appellate Body should be

they would not appeal, and because of the unique facts of this case, the United States believed that it was time to bring this dispute to a close by adopting the Panel Report”).

⁵¹ See, *Japan-Taxes on Alcoholic Beverages II* (WT/DS8/AB/R) at p. 11.

⁵² See, *Appellate Body Report on India-Patents (US)*, paras. 45-46.

guided by the customary rules of interpretation of public international law. This has translated into a textual approach to interpretation of WTO agreements.

Another proposal in which African countries had a major input was one submitted in October 2002, by Least Developed Countries (LDCs). A large number of African countries are LDCs. Their proposal covered a wide range of issues and addressed the particular problems that they perceived to be at the centre of their low participation in the dispute settlement system.⁵³ In the proposal, LDCs suggested among other things, that when a dispute is between a least-developed country Member and a developing or developed country, the panel should include at least one panelist from a least-developed country. They also suggested that panellists and Appellate Body Members should render individual opinions and the decision be taken on a plurality. They stated:

There is no provision for dissenting judgments in the DSU. This needs some re-thinking given the inadequacies highlighted in the DS jurisprudence. Often, and as demonstrated by judicial practice at the International Court of Justice, and in certain national court systems, dissenting judgments may bring to the fore usually unheard concerns which may in the long run shape the evolution of the system. Dissenting judgments should be allowed in the DS system through a rule that the Members of the panel or Appellate Body should each deliver a judgment and the final decision be taken on the basis of a majority. LDCs understand that this may mean additional resources and work for the Secretariat.

LDCs also proposed changes to strengthen the remedy of compensation by making it mandatory, on the promotion of prompt compliance, on what should be taken into account in panel and Appellate Body reports, and on special procedures for LDCs. With regard to special procedures, they proposed that Members should exercise “restraint” in raising matters when an LDC is involved, as provided for under Article 24 of the DSU, that no compensation should be sought from an LDC Member, that no retaliatory measures should be taken against

an LDC Member and that WTO Members are expected to immediately withdraw an offending measure where a case has been established against them through the dispute settlement system. It took until May 2003 for all the various proposals to be reviewed by the DSB.⁵⁴

The Chairman's Text, bringing together the proposals issued on May 16 2003 was unfortunately only distinctive in its having ignored most of the key changes proposed by the African Group and the LDC Group. The text dealt with: the extension of third party rights, improved conditions for Members seeking to join consultations, introduction of a remand and interim review in Appellate Review proceedings, the sequencing issue, the enhancement of compensation as a temporary remedy, the strengthening of notification requirements for mutually agreed solutions, and the strengthening of special and differential treatment.⁵⁵ This last one on special and differential treatment was to be achieved mostly by replacing the "should" best-endeavour language by a more compelling "shall" in the relevant provisions.

Whereas laudable, it should be remembered that there was not much by way of such provisions in the DSU to begin with. The proposal on collective retaliation, that is suspension of concessions or other obligations by all WTO Members rather than only by the complainant in a dispute, contained in the proposals by the African Group and the LDC Group was omitted. In addition, the proposal by India and also the African Group to limit the ability by panels and the Appellate Body to accept and consider unsolicited information and advice unfettered in the form of *amicus curiae* briefs was also omitted. Also omitted was the

⁵³ *Proposal by the LDC Group*, WTO Doc. TN/DS/W/17 (9 October 2002).

⁵⁴ For a compilation of the proposals, see WTO Doc. JOB(03)/10/Rev.3.

⁵⁵ See Special Session of the Dispute Settlement Body, *Report by the Chairman to the Trade Negotiations Committee*, TN/DS/9 (June 6 2003) at para. 3.

proposal by the African Group for the creation of a WTO Fund to facilitate effective utilization of the dispute settlement system by developing and least-developed countries.

III. Issues Arising from WTO Dispute Settlement

A. The Issue of Agricultural Subsidies: *U.S –Cotton Subsidies* Dispute

Agriculture has always been a paradox in GATT-WTO history.⁵⁶ On average, protectionism has increased in the agricultural sector while it has been significantly reduced or completely eliminated in most other sectors that have been the subject of multilateral negotiations, especially industrial goods. While the agricultural sector is taxed, sometimes quite heavily in many African countries, and forms an important source of government revenue, in the developed world it remains the coveted beneficiary of large amounts of government expenditure in the form of subsidies and other support programmes. According to the 2003 *Monitoring and Evaluation* Report of the Organization for Economic Cooperation and Development (OECD), a total of US \$ 235 billion was spent by OECD member countries in support to farmers in 2002 alone.⁵⁷ These payments, offered in support of a wide range of agricultural products, distort both trade and production. Underlining the need to do away with such distortions is the assertion that eliminating barriers to merchandise trade could result in “welfare gains ranging from US\$ 250 billion to US \$ 260 billion annually of which one third to one half will accrue to developing countries. The more rapid growth associated with global

⁵⁶ See Melaku Geboye Desta, *The Law of International Trade in Agricultural Products: From 1947 to the WTO Agreement on Agriculture* (Kluwer Law International, 2002) at pages 5-8.

⁵⁷ See OECD, *Agricultural Policies in OECD Countries: Monitoring and Evaluation 2003* (OECD, 2003) at page 4.

reduction in protection could reduce the number of people living in poverty by as much as 13 per cent by 2015.”⁵⁸

The *Agreement on Agriculture* contains a series of basic obligations on the lowering of export domestic support and export subsidies over a period of time. Domestic support measures are disallowed unless they are “green box” measures exempt from these commitments. Such “green box” measures include domestic food aid, decoupled income support, and social support programmes. Article 9:1 specifies the export subsidies that are subject to reduction commitments, and states that they include “...the provision by governments or their agencies of direct subsidies, including payments-in-kind, to a firm, to an industry, to producers of an agricultural product, to a cooperative or other association of such producers, or to a marketing board, contingent on export performance.” Various parts of this provision have been the subject of interpretation by WTO panels and the Appellate Body. In its ruling in the *Canada – Dairy* case, the panel erroneously determined that ‘payments-in-kind’ were *per se*, direct subsidies. In an appeal, the Appellate Body clarified that “where the recipient gives full consideration in return for a ‘payment-in-kind’ there can be no ‘subsidy’, for the recipient is paying market-rates for what it receives.” Stating what it understood by ‘payment-in-kind’ and laying the interpretive rule, the Appellate Body went on to say:

In our view, the term ‘payments-in-kind’ describes one of the forms in which ‘direct subsidies’ may be granted. Thus, Article 9.1(a) applies to ‘direct subsidies’, including ‘direct subsidies’ granted in the form of ‘payments-in-kind’. We believe that, in its ordinary meaning, the word ‘payments’, in the term ‘payments-in-kind’, denotes a transfer of economic resources, in a form other than money, from the grantor of the payment to the recipient. However, the fact that a ‘payment-in-kind’ has been made provides no indication as to the economic value of the transfer effected, either from the perspective of the grantor of the payment or from that of the recipient. A ‘payment-in-kind’ may be made in exchange for full or partial consideration or it may be made gratuitously. Correspondingly, a ‘subsidy’ involves a transfer of economic

⁵⁸ See WTO, *Annual Report 2003* (World Trade Organization, Geneva, June 2003) at page 10.

resources from the grantor to the recipient for less than full consideration....The Panel erred in finding that ‘a determination in the instant matter that ‘payments-in-kind’ exist would also be a determination of the existence of a direct subsidy.’ The Panel should have considered whether the particular ‘payment-in-kind’ that it found existed was a ‘direct subsidy’. Instead, because the Panel assumed that a ‘payment-in-kind’ is necessarily a ‘direct subsidy’, it did not address specifically either the meaning of the term ‘direct subsidies’ or the question whether the provision of milk to processors for export under Special Classes 5(d) and 5(e) constitutes ‘direct subsidies’.⁵⁹

In a sense therefore, *Canada-Dairy* narrowed the scope of the rule somewhat, leaving out some of the payments by developed countries that should be inconsistent with the rules. For African countries, the implication is that the extent of domestic support in developed countries limits the market access prospects for their own competitive agricultural products.

The recent Appellate Body decision in *United States – Subsidies on Upland Cotton*,⁶⁰ is probably the most far-reaching declaration on the illegality of some of the measures typically employed by developed countries in support of agriculture. Besides the fact that the dispute addressed cotton, a commodity of direct concern to many African countries, particularly those in West Africa which are leading low-cost producers, it also had the distinctive systemic value in the sense that some of the cotton producing African countries, Benin and Chad, were third participants. This dispute concerned various agricultural “domestic support” measures and other measures by the United States. These measures included marketing loan program payments, production flexibility contract payments, market loss assistance payments, direct payments, counter-cyclical payments, crop insurance payments, cottonseed payments and export credit guarantee programs. According to Brazil, some of these were export and domestic subsidies inconsistent with the disciplines in the *Agreement on Agriculture* and the *Agreement on Subsidies and Countervailing Measures*. In sum, the Appellate Body upheld the

⁵⁹ WTO Doc. WT/DS103/AB/R, Appellate Body Report in *Canada – Dairy*, paras. 87-88.

⁶⁰ WT/DS267/AB/R.

panel's finding in favour of Brazil holding essentially that most of the payment schemes used by the United States were illegal and were resulting in depressed upland cotton prices. According to the Appellate Body: "we ... uphold the Panel's finding ... that production flexibility contract payments and direct payments are not decoupled income support within the meaning of paragraph 6, are not green box measures exempt from the reduction commitments by virtue of Annex 2 of the Agreement on Agriculture, and are not, therefore, sheltered from challenge by virtue of paragraph (a) of Article 13 of the Agreement on Agriculture."

The implications are huge for African cotton producers and the continent in general. First, the outcome of the dispute lends credence to the views of the African countries involved in the Cotton Initiative, described earlier. In a sense, it vindicates the position they took during the 5th WTO Ministerial Conference held in Cancun in 2003. It improves their bargaining position because it is these same agricultural support programmes that they were challenging in the on-going Doha Round of trade negotiations.

Secondly, the declaration that these support programmes are WTO-inconsistent means that if the United States phases them out, as it should, along with any other countries with similar programmes for fear of being challenged along the same lines, then African cotton producers may finally be able to penetrate these hitherto inaccessible markets. This should translate into higher revenues and welfare gains. Thirdly, the participation of Benin and Chad, two least—developed countries, having identified the issue at dispute as being of significance to their economic interests, should embolden other African countries to take part in future disputes of potential interest to them. Put simply, it is an example of astuteness and tenacity in international economic relations that is worthy of emulation.

B. The Issue of Trade Preferences: the *EC-Trade Preferences Dispute*

African countries have been long-time beneficiaries of various schemes of trade preferences. This is easily justifiable by historical and political-economy reasons. Increasingly however, these schemes have been challenged both formally, such as through the WTO Dispute Settlement System and through negotiations aimed at their elimination, and informally through the press and general dissatisfaction amongst trading partners about their existence. In the *EC-Conditions for the Grant of Tariff Preferences to Developing Countries* case,⁶¹ India challenged the tariff preferences given by the European Community to twelve developing countries to fight drug production and trafficking. Mauritius was the only African country that was a third party at the panel stage and also a third participant on appeal.

As Shaffer and Apea note, the implications of this dispute are significant, although their focus is on the conditions for the grant of preferences.⁶² First, it means that the future of the entire system of trade preferences on which many African countries rely heavily for market access opportunities can be called into question,⁶³ and for sure, any conditional grants of trade preferences, including those linked to environmental, labour, human rights and intellectual property protection can be successfully challenged.

The United States *African Growth and Opportunity Act* (AGOA) is one such conditional preference system. The Act authorizes the U.S President to designate countries as eligible to receive trade benefits under AGOA if they have established or are making progress towards

⁶¹ WT/DS246/AB/R.

⁶² Gregory Shaffer and Yvonne Apea, "Putting the GSP Case in Context: Who Decides the Conditions for Trade Preferences?" Available at <http://prod.law.wisc.edu/wwwroot/ils/glsl/gstco.pdf> (last visited June 1, 2005).

⁶³ See Robert Howse, "The Death of GSP? The panel ruling in the India-EC dispute over preferences for drug enforcement," 1 Bridges (ICTSD, January 2004), p. 7.

establishing a market economy, respecting the rule of law and political pluralism, protecting intellectual property, combating corruption, protecting human rights and worker rights, and eliminating certain child labor practices. AGOA is hence easily questionable given the ruling in the EC-Trade Preferences case. Secondly, it has implications on the on-going negotiations on special and differential treatment, an issue of central concern and importance to African countries, and on which they have been most vocal. According to Howse, if, as the decision in this case does, the WTO dispute settlement system constrains the ability of developed countries to grant preferences on a conditional basis, the United States Congress may reconsider the basis upon which they granted the US President fast-track authority which may put the Doha Round negotiations in jeopardy.⁶⁴

C. The Issue of Regional Trading Arrangements: *Turkey-Textiles* dispute

The *Turkey-Textiles* dispute was the first dispute in which the Appellate Body was called upon to interpret Article XXIV of GATT 1994, and the related *Understanding on the Interpretation of Article XXIV* of the General Agreement on Tariffs and Trade 1994. The case also touched on the nature of the institutional balance between the WTO's judicial and political organs. Turkey had imposed quantitative restrictions on textiles and clothing from India in connection with the formation of a customs union with the European Communities. The issue was whether WTO panels or the Committee on Regional Trade Agreements should decide whether a measure taken pursuant to a regional agreement is justified under GATT Article XXIV. Turkey argued that Article XXIV provides an exemption for the measure it had taken, and that the panel had no jurisdiction to examine its actions in forming a customs union.

⁶⁴ Robert Howse, "Back to Court after Shrimp-Turtle? Almost but not Quite Yet: India's Short Lived Challenge to Labor and Environmental Exceptions to the European Union's Generalized System of Preferences," 18

The Appellate Body found that panels have the authority to review measures for which GATT Article XXIV is offered as a justification. According to the Appellate Body, the panel erred in failing to examine the definition of a customs union contained in Article XXIV in order to determine what exemptions are necessary to permit the formation of a customs union. It stated that Article XXIV can be used as a defence for inconsistent measures adopted in connection with a customs union (or in fact, any other regional trading arrangement) “only to the extent that the formation of the customs union would be prevented if the introduction of the measures were not allowed.” In other words, there is a *necessity test*, and the extent to which Article XXIV is a defence is conditional, and has been narrowed down by the test. The Appellate Body also found that the Turkish quantitative restrictions did not qualify for an exemption under Article XXIV, and therefore that they violate Articles XI and XIII of GATT 1994, as well as Article 2.4 of the *Agreement on Textiles and Clothing*.

Implications of the Decision: The panel had found that Article XXIV does not provide an exception from the rules against quantitative restrictions contained in Articles XI and XIII of GATT 1994. In examining the chapeau of Article XXIV: 5 the Appellate Body emphasized the words “shall not prevent” and held that “Article XXIV can justify the adoption of a measure which is inconsistent with certain other GATT provisions only if the measure is introduced upon the formation of a customs union, and only to the extent that the formation of the customs union would be prevented if the introduction of the measure were not allowed.” This language severely limits the extent to which Article XXIV:5 can be used to defend the concessions that are granted by countries in a regional trading agreement, or indeed to justify their very existence. In a sense, it imperils the whole regionalism enterprise.

American University International Law Review (2003), p. 1333 at 1381.

This is of direct relevance to African countries because of the importance they attach to regionalism as a development strategy. There are 14 regional integration arrangements in African, in addition to the long-term Lagos Action Plan for the creation of an African Economic Community. If all of these arrangements will be subject to scrutiny by the WTO, and especially if they are challenged through the dispute settlement process, there is a danger that most of them will be found deficient in some way based on the criteria in GATT Article XXIV. The words “formation of the customs union” limit the exception to those things necessary for formation, and thus requires examination of the definition of a customs union contained in Article XXIV: 8 of GATT 1994. On the issue of the jurisdiction of panels to consider member state actions under Article XXIV, the Appellate Body asserted the authority of panels to examine these issues. It established a two-part test, first examining whether a customs union would be formed within the meaning, and subject to the conditions, of Articles XXIV: 5 and 8 of GATT 1994, then examining the necessity of the violation of other GATT 1994 provisions that the respondent seeks to justify under Article XXIV.

D. The Issue of Balance of Payments Problems: *India-QRs* Dispute

In *India-Quantitative Restrictions on Imports of Agricultural Textile and Industrial Products*,⁶⁵ the Appellate Body upheld the Panel’s finding that WTO panels are competent to hear any complaints regarding measures for which a GATT Article XVIII balance of payments justification is claimed. This decision has momentous implications on the ambit of the WTO’s dispute settlement jurisdiction. Essentially it brought within the scope of the

⁶⁵ WTO Doc. WT/DS90/AB/R.

dispute settlement, matters that should be handled by the political organs within the WTO, in this case, the Balance-of-Payments Committee and the General Council.

In the case, India argued that jurisdiction over its balance-of-payments based quantitative restrictions was exclusively assigned to the Balance-of-Payments Committee and the General Council of the WTO, constraining the authority of the panel to review the balance-of-payments justification. The Appellate Body rejected this argument, upholding the panel finding that the panel had competence to hear the dispute and that in fact, India's quantitative restrictions violated Article XI of GATT, and were therefore not justified under Article XVIII: 11. An issue also arose regarding the institutional relationship between the WTO and the International Monetary Fund (IMF). India contended that the panel had failed to make an objective assessment of the matter pursuant to Article 11 of the DSU because it delegated this authority to the IMF. Article 13 of the DSU permits the panel to seek information from any source, and Article XV: 2 of GATT 1994 calls for full consultation with the IMF on such matters. The Appellate Body found that a "careful reading of the Panel Report makes clear that the Panel did not simply accept the views of the IMF" and that as a result, the panel had made an objective assessment of the matter.

Implications of the Decision: Article XVIII:B of GATT 1994 allows developing countries to restrict imports if they face balance of payments problems. This decision makes this provision much less effective, and thereby takes away a mechanism for developing countries to correct trade imbalances. In the long run, it weakens their position even further. The immediate implications are that for countries with balance-of-payments problems, as most African countries are, they have lost the opportunity to discuss this issue in a diplomatic manner in fora such as the General Council where development challenges could be better articulated as

opposed to the dryly legalistic dispute settlement system. The crux of the problem seems to be in the WTO's over-reliance on the IMF to determine whether or not a balance of payments problem exists in a particular developing country. It must not be forgotten that many African countries have a rather tangled relationship with the IMF. A further difficulty that this decision implies on African countries in particular is in the method that the IMF uses to determine incidences of balance-of-payments problems. The IMF "includes volatile and uncertain short-term flows" for instance portfolio investments and "uncertain reserves in its assessment of a country's foreign reserves, thereby tending to overestimate them." Such inflows of capital are usually too transitory to be of any useful impact to the economy. How the IMF determines the existence of a balance-of-payments problem would therefore seem to be somehow faulty once these short-term flows are taken into account. The decision also requires developing countries to give priority to tariff-type control action over the more instantaneous direct import control measures. This reduces their capacity to deal with such balance-of-payments problems as soon as they arise. It slows their ability to respond to disaster.⁶⁶

IV. Conclusions

This paper has shown that African countries are only very minimally involved in the WTO dispute settlement system. This was also the case in the GATT. South Africa and Egypt are the two African countries that have been most involved in the WTO dispute settlement

⁶⁶ See Frieder Roessler, "The GATT Declaration on Trade Measures Taken for Balance-of-Payments Purposes: A Commentary", 12 *Case Western Reserve Journal of International Law*(1980), p. 383; Asif Qureshi, "Challenging Quantitative Restrictions for Balance-of-Payments Purposes", 6 *International Trade Law and Regulation* (March 2000) p. 1; Raj Bhalla, "Mercy for the Third World Through GATT Article XVIII", 6(1) *Singapore Journal of International and Comparative Law* (July 2002) and Chantal Thomas, "Balance-of-

process as principal parties, and not merely as third parties. South Africa has had two complaints filed against it. India complained against anti-dumping duties imposed by South Africa on imports of pharmaceutical products in 2003, while Turkey complained about definitive antidumping measures. Egypt received a request on measures it imposed on the textile and apparel products sector from the United States. In the Appellate Body, no African country has ever participated as a complainant or respondent. What does this diminutive by African countries mean? In my view, it is a damning indication of the fact that African countries have not been fully integrated into the GATT-WTO multilateral trading system roughly seven decades down the road. It means that their role in the process has remained marginal.

The paper has argued that the lack of participation by large sections of the WTO membership, such as African countries is a danger to the long-term “predictability” function of the WTO, and could undermine the usefulness of the entire process eventually. As a result, the problems contributing to the weak participation by African countries need to be addressed urgently. It has also highlighted, but not extensively dealt with, some of these problems. These include human and resource constraints and the catalogue of issues that the African Group and the LDC Group expressed in their proposals in the negotiations on the DSU, among them, the fact that the dispute settlement system is prohibitively expensive and complicated, that the ultimate remedy in the case of violation of WTO obligations, retaliation, is skewed against and to the disadvantage of African countries, and therefore not effectively usable if such need arose, and that African countries are virtually un-represented in the panels and Appellate Body.

However, African countries do still need to improve their participation in the system, particularly because it is not only about disputes but also because it is an evolving body of international economic law principles, that are steadily being shaped by those WTO Members that are active participants. What is positive is that African countries have already come up with modalities on how to optimally utilize their scarce human resource potential, and thereby boost their ability to become active participants in global trade relations. Amongst the country representations in Geneva for example, they have “focal points” for various negotiation issues, and a coordination strategy for the Doha Round. They hold regular meetings, typically every week in Geneva. In this way, they have put in place a mechanism that enables them to, at a minimum, have one person who is familiar with the issues in each negotiating issue in the Doha Round. This person is then tasked with the burden of briefing the rest of the delegates in the regular meetings. The meetings also serve as strategy sessions at which views and ideas are exchanged. Knowing that European delegations receive heavy support from a battery of extremely capable lawyers and economists at the European Commission, it is only sensible that African countries pool their resources together in this manner too.

This “pool” design should be extended to participation in the dispute settlement system as third parties. In the main, the only obstacle the countries may have is in showing sufficient and legitimate interest in the case at hand. If the current proposals on extending third party rights, and differentiating between “third parties” and “third participants” meet with members’ approval in on-going negotiations on the DSU, the issue of ‘legitimate interest’ may not be a problem. In any event, there are only very few disputes in which a single African country cannot show a legitimate and sufficient interest. The *Advisory Center on*

Economic Order”, 15 *American University International Law Review* (2000) p. 1249-1277.

*WTO Law*⁶⁷ could be used to give the initial advice as to the benefit in participating as a third party in each dispute, or in conducting a preliminary assessment on whether there is sufficient interest. The Centre could also be involved in drafting submissions.

As indicated earlier, there are usually one or two professionals in most African delegations to the WTO in Geneva. These two, typically subdivide their work in a function-driven though formally undefined manner. Sometimes, a more senior diplomat would simply take what he or she has dealt with for the longest time or what he or she feels most competent in. Any issues that remain would then be assigned to the junior or later arriving delegate. Most of the senior diplomats tend not to deal with dispute settlement matters, but concentrate their efforts on market access and other 'real' negotiating issues. The consequence is that dispute settlement issues do not receive as much attention as they should due to resource constraints exacerbated by such internal work arrangements in the various missions. Setting up a legal monitoring unit within the African Group that could always explore possibilities of participating as third parties in disputes, joining in consultations in as many disputes, and in bringing joint disputes when such an occasion presents itself could be one way of getting past this problem.

As a way of building long-term capacity for full engagement in the dispute settlement process and the multilateral trading process as a whole, African countries may also wish to think about establishing regional advisory centres on WTO law. Such centres need not be heavily capital intensive ventures if the model outlined below is followed. Already, preliminary discussions have taken place on a centre on WTO law and policy to be located in Egypt. Such a move will no doubt complement the Geneva-based Advisory Center and the work of the

⁶⁷ See www.acwl.ch (last visited on March 15, 2005).

WTO Training Institute. The primary goals of such centres would be training, as “issue-monitoring venues” and as some kind of clearing houses for potential disputes. They could also carry out preliminary fact gathering and possibly even fact analysis with the view to building a fact pattern for a WTO dispute. The centres could be located in Universities with academics working closely with the Ministries of Trade or Commerce. The primary research could be conducted by academics on sabbatical or by graduate students. This way, the need for the hiring of new staff and associated extra expenses could be forestalled. Usually such collaboration could be by a simple Memorandum of Understanding between the University or research group and the government department concerned. A very innovative approach that African countries may wish to support and be engaged in further, or borrow a model from, is the Trade Law Center for Southern Africa, a research institute affiliated with the University of Stellenbosch in South Africa.⁶⁸ It provides support to the governments in the Southern Africa region, largely by carrying out consultancy-type studies, to provide a basis for trade policy formulation.

⁶⁸ See www.tralac.org (visited on March 15, 2005).