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## Facilitating Access to Dispute Settlement for African Members of the for African Members of the World Trade Organization

Michelle Sanson

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# Facilitating Access to Dispute Settlement for African Members of the World Trade Organization

Michelle Sanson\*\*

## ABSTRACT

*The reasons why African Member States have not pursued a single formal complaint since the inception of the WTO legal system are complex and multilayered. They may be characterised as four key barriers: first, the significant cost and high levels of expertise in law and economics required; second, the lack of appropriate domestic mechanisms such as legislation implementing WTO law, procedures for receipt and investigation of complaints, and avenues for raising industry awareness; third, the inadequate remedy of trade sanctions under the dispute settlement mechanism; and fourth, issues of politics, arising from the power imbalance between donor and donee nations, and priorities, particularly those more pressing than trade, such as poverty and AIDS. This article seeks to explore these barriers on the basis of data collected by the author through interviews conducted in 15 African WTO Member states. Further the author has examined and suggested possible solutions in each case.*

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## I. Introduction

The involvement of developing countries in the Dispute Settlement Mechanism (DSM) of the World Trade Organization (WTO) has increased markedly in recent years, and developing countries now comprise 40 per cent of cases brought before the DSM.<sup>1</sup> At the same time, African member states, which comprise over a quarter of the WTO membership, and all of whom are developing or least developed countries, have been absent. This absence has been noticed and questioned by commentators,<sup>2</sup> and described by Zunckel as ‘intuitively understandable but practically mystifying.’<sup>3</sup> Why is it that not a single African member has brought a dispute in the 14 years since its inception? What impact does this have on the overall efficacy of the system?

Two preliminary questions arise. The first is whether African members have actually had any trade concerns that they would like to bring a dispute over – after all, we cannot assume that absence from the DSM means that there is a problem. The second is whether it ‘matters’ if a significant group of members cannot access the system. This article answers both questions in the affirmative, drawing upon evidence obtained from interviews of trade ministry officials from 15 African WTO member states conducted in the second half of 2006. It then characterises the barriers as fourfold and cumulative, and goes on to address potential ways the barriers may in future be reduced or removed- through action at the DSM level, at the inter-member level, and by the African members themselves.

<sup>1</sup> See Gerhard Erasmus, *The Non-Participation by African States in the Dispute Settlement System of the WTO: Reasons and Consequences*, in TRUDI HARTZENBERG (ED.), *WTO DISPUTE SETTLEMENT: AN AFRICAN PERSPECTIVE* (2008), 179 at 187.

<sup>2</sup> See for example, Amin Alavi, *African Countries and the WTO’s Dispute Settlement Mechanism*, (2007) 25(1) *DEVELOPMENT POLICY REVIEW* 25; Victor Mosoti, *Africa in the First Decade of WTO Dispute Settlement*, (2006) 9(2) *JOURNAL OF INTERNATIONAL ECONOMIC LAW* 427.

<sup>3</sup> Hilton Zunkel, *An African Awakening in US Upland Cotton – Lessons from LDCs’*, in HARTZENBERG, *supra* note 1, at 105.

## II. African Experience of the DSM, and Why Their Absence Matters

The Dispute Settlement Understanding (DSU) of the WTO establishes a legal system for the settlement and adjudication of disputes under the covered agreements.<sup>4</sup> The WTO membership administers the DSM through the Dispute Settlement Body (DSB)<sup>5</sup> which has compulsory jurisdiction over all its members<sup>6</sup> and all their disputes.<sup>7</sup> Director General Pascal Lamy has described the WTO as a ‘unique legal order or system of law’, occupying a similar position to the EU, in the sense of being neither purely horizontal nor vertical.<sup>8</sup> It has been heralded by some as a strong rules-based system which enables law to triumph over political power,<sup>9</sup> itself a powerful incentive for developing countries to agree to its creation.

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<sup>4</sup> Jurisdictional provisions are included in the DSU itself (Article 1 and Appendix 1), as well as in many of the individual agreements. (See for example, *Agreement on Agriculture*, Article 19; *Agreement on the Application of Sanitary and Phytosanitary Measures*, Article 11; *Agreement on Technical Barriers to Trade*, Article 14; and *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (Anti-dumping), Article 17).

<sup>5</sup> Article 2 of the DSU establishes the DSB to administer the DSU. The DSB is comprised of all WTO members and has the authority to establish panels, adopt reports and to ‘maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements’. In practice the DSB endorses decisions of panels and the Appellate Body unless there is a consensus not to do so (which has not occurred).

<sup>6</sup> Article 1 of the DSU.

<sup>7</sup> Article 23 of the DSU. See also, *Mexico – Taxes on Soft Drinks*, for a possible right for a panel to decline to exercise jurisdiction in circumstances where there are legal impediments to them doing so: *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R and the Panel Report WT/DS308/R. Such a legal impediment may include a pre-existing decision by another court or tribunal, pursuant to the principle of *res judicata*. Note also that WTO members have the option under Article 25 to arbitrate their dispute instead of using the regular panel procedure. Although this has not occurred to date, it is an available option.

<sup>8</sup> Pascal Lamy, *The Place and Role of the WTO in the International Legal Order*, (2006) 17(5) *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 969. An example of the vertical nature of the WTO dispute settlement system is the compulsory jurisdiction over its members, and the right to authorise trade sanctions in the event of non-compliance with its rulings. An example of the horizontal nature of the WTO dispute settlement system is the way that panel and Appellate Body rulings are cast as recommendations that the WTO member take steps to bring its measure back into conformity with its WTO obligations.

<sup>9</sup> See for example, Tonia Kandiero, *Malawi in the Multilateral Trading System*, Managing the Challenges of WTO Participation: Case Study 23, available at [www.wto.org/english/res\\_e/booksp\\_e/casestudies\\_e/case23\\_e.htm](http://www.wto.org/english/res_e/booksp_e/casestudies_e/case23_e.htm).

Systemically, the DSM has been set up with a view to creating a level playing field. Attempts have been made in the design of the WTO DSM to create *de facto* equality between members by eschewing formal equality through positive discrimination.<sup>10</sup> For example, restraint should be exercised in raising or enforcing disputes against any least-developed country (Art 24); special attention is to be given to the particular problems and interests of the developing country party during the consultation phase (Art 4(10)), with time frames for consultation extended to allow the developing country Member to prepare its case (Art 12(10)); any dispute between a developing country and a developed country member is to have a panelist from a developing country member (Art 8(10)); and panels are supposed to refer in their report how account has been taken of provisions on differential and more-favourable treatment for developing country members (Art 12(11)). Of course, not all of these provisions have been properly applied in practice,<sup>11</sup> and do not always apply where they are most needed.<sup>12</sup> The point here is, however, that the system itself is *designed* to assist developing country members in being able to assert their rights through the DSM.<sup>13</sup> Given that the DSM has now been in existence for some 14 years, it is a suitable time to ask whether its design has been effective. Focus on the African WTO members is appropriate because it comprises a significant, single continent cluster of members (over 25 per cent) all of which are either developing countries (15) or least developed countries (25).<sup>14</sup>

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<sup>10</sup> See Lamy, *supra* note 8.

<sup>11</sup> In particular there has been an overall failure of panels to report explicitly on the form in which relevant provisions have been taken into account under Article 12(11), and largely a failure to provide legal assistance pursuant to Article 27.2 of the DSU.

<sup>12</sup> The special and differential treatment (SDT) provisions only apply once a case is officially initiated, and not all SDT provisions are mandatory or automatically applicable so developing countries have to specifically ask for them to be applied: See UCHE EWELUKWA, *AFRICAN STATE, AGGRESSIVE MULTILATERALISM AND THE WTO DISPUTE SETTLEMENT SYSTEM: POLITICS, PROCESSES, OUTCOMES AND PROSPECTS* (2005).

<sup>13</sup> Despite the design, there may be legitimate strategic reasons that some developing country members decline to exercise their rights because they want to face their opponents as equals and are afraid special treatment may jeopardise the legitimacy of the result and its normative force: See FRIEDLER ROESSLER, *SPECIAL AND DIFFERENTIAL TREATMENT OF DEVELOPING COUNTRIES UNDER THE WTO DISPUTE SETTLEMENT SYSTEM* (2005), Advisory Centre on WTO Law (ACWL), Geneva, 5.

<sup>14</sup> Taken in the light of the recognised link between trade and development, and recent 'aid for trade' initiatives, focusing here on a cluster of members with significant trade and development needs is particularly pertinent.

The African experience with the DSM suggests that the design has not facilitated the sort of level playing field formally envisaged. Instead, with nearly 400 disputes notified to the DSB to date, not a single African member has been a complainant, and only two African members (Egypt and South Africa) have been respondents.<sup>15</sup> Otherwise, 14 African members have been involved in disputes as third parties (mostly in an attempt to protect preferences derived from the Cotonou Agreement) and the majority of African members (62.5 per cent) have had no formal role in a dispute at all.

Involvement in a dispute as a third party can be a powerful learning experience,<sup>16</sup> but it is no real substitute for being a principal party. The role of a third party, both in the contribution they can make and the outcomes they can achieve, is severely limited. For example in *US – Cotton*, the 15 third parties were only able to contribute towards the complainant, Brazil, proving its case against the US.<sup>17</sup> Whilst the finding that the US measures regarding cotton were inconsistent with its WTO obligations applies to all members affected by the measures, in that changes to US legislation apply on a most-favored nation (MFN) basis, a failure by the US to comply with the ruling does not create any right for the third parties to negotiate compensation or seek authorisation for trade sanctions.<sup>18</sup> In the Appellate Body proceedings,

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<sup>15</sup> *Supra* note 13.

<sup>16</sup> Fortunately this involvement has been facilitated by a broad interpretation of the ‘substantial trade interest’ requirement in Article 4.11 of the DSU – for example, the lack of exports in bananas did not stop the US from bringing an action against the EC over them (*EC – Bananas*). The reasoning is that all WTO members have a substantial trade interest in achieving the global welfare objective of the GATT: Ngangjoh H. Yenkonng, *Third Party Rights and the Concept of Legal Interest in World Trade Organization Dispute Settlement: Extending Participatory Rights to Enforcement Rights*, (2004) 38(1) JOURNAL OF WORLD TRADE 757.

<sup>17</sup> Similarly being third parties in *EC – Sugar* was to support the EC and say that they were justified in getting a price in the EC that was 300 per cent of the world market price because this was vital to their survival and sugar played an important role economically, socially and politically in their countries. Being third parties in *EC – Bananas* was to support the EC which gave preferences to bananas from ACP countries. Note that those developing countries which had complained in Latin America were given quota deals on importing bananas into the EC on the basis they did not bring a dispute (Banana Framework Agreement 1994): Mavis Marongwe, *African Countries and the WTO Dispute Settlement System*, TRALAC Trade Brief, 28 June 2004, available at [www.tralac.org/scripts/content.php?id=2718](http://www.tralac.org/scripts/content.php?id=2718).

<sup>18</sup> Remedial action under Article 22.2 of the DSU does not make any provision for third parties to seek remedies. It has, however, assisted the strength of bargaining power of cotton producing members in the Doha Round negotiations; but the fact remains that being a third party in panel and Appellate Body proceedings is significantly limited, particularly when compared for example to the position of third parties brought into domestic litigation.

Benin and Chad sought as third parties to get a ruling that they had suffered serious prejudice along with Brazil, using Article 24.1 of the DSU to argue that particular consideration should be given at all stages of a dispute to least developed countries, but the Appellate Body chose not to rule on the issue.<sup>19</sup> Clearly, being third parties offers no real substitute to full participation for African Members.

Yet the absence of African WTO members from the DSM does not automatically mean the system has failed. What if the overall system works so well and African members enjoy such a special and beneficial position in WTO law, that they simply don't have any complaints?<sup>20</sup> Does it really matter if they do not pursue them formally? After all, they comprise less than three percent of the world trade collectively. These two preliminary questions must be addressed, in order to ascertain need for access, and the significance of the issue of non-access.

Turning to the first question, there is no denying that African Members, as with other developing and least developed country members, enjoy a special position in WTO law. In addition to the special and differential treatment (SDT) provisions in the DSU mentioned above, there were longer periods allowed for the implementation of WTO obligations,<sup>21</sup> so the period in which a breach may be detected and complained about is reduced. Additionally,

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<sup>19</sup> *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, 504-512.

<sup>20</sup> This assertion has been included in an ACWL Report, *The ACWL After Four Years – A Progress Report by the Management Board*, ACWL/GA/2005/1, ACWL/MB/2005/1, 5 October 2005. It is surprising given the problems African WTO Members face in taking advantage of preferential trading arrangements; See CHAD BOWN & BERNARD HOEKMAN, *WTO DISPUTE SETTLEMENT AND THE MISSING DEVELOPING COUNTRY CASES: ENGAGING THE PRIVATE SECTOR*, (2005); Marc L. Busch and Eric Reinhardt, *Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement*, (2006) 37(4) *JOURNAL OF WORLD TRADE* 719; Mosoti, *supra* note 2; Victor Mosoti, *Does Africa Need the WTO Dispute Settlement System?: Towards a Development-Supportive Dispute Settlement System in the WTO*, Sustainable Development and Trade Issues, ICTSD Resource Paper No 5, March 2003; Nsongurua J. Udombana, *A Question Of Justice: The WTO, Africa And Countermeasures For Breaches Of International Trade Obligations*, (2005) 38 *J MARSHALL LAW REVIEW* 1153; Gregory C. Shaffer, *How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies: Towards a Development-Supportive Dispute Settlement System in the WTO*, Sustainable Development and Trade Issues, ICTSD Resource Paper No 5, March 2003.

<sup>21</sup> For example, least developed countries could delay most of their obligations under the TRIPS Agreement until 1 January 2006 (Article 66.1).

specific provisions in some agreements discourage members from introducing anti-dumping measures, safeguard measures, and countervailing duties against developing countries.<sup>22</sup> These are often contentious measures which could otherwise lead to a formal dispute. Further, the strict prohibition on export subsidies does not apply to least developed countries,<sup>23</sup> and the large majority of African Members benefit from non-reciprocal arrangements under the Generalized System of Preferences (GSP),<sup>24</sup> arrangements under which fall outside the DSM.<sup>25</sup>

However, this does not mean that African members have no contentious issues. Indeed, findings from interviews conducted by the author across 15 African Member countries in 2006 evidences the opposite view. For example in Kenya, trade interests are perceived to be affected by cheap and poor quality imported products from China and Japan in likely breach of the Agreement on Subsidies and Countervailing Measures and the Anti-Dumping Agreement.<sup>26</sup> Kenya could also have brought action under the Sanitary and Phytosanitary (SPS) and the Technical Barriers to Trade (TBT) agreements, in relation to measures taken by other members which prevent Kenya from accessing some markets for their tea, coffee and horticulture products; particularly the difficulty accessing the Pakistan market due to a deliberate 'go-slow' customs policy on processing relevant import documentation.<sup>27</sup>

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<sup>22</sup> *Anti-Dumping Agreement*, Article 15; *Safeguards Agreement*, Article 9.1; *Agreement on Subsidies and Countervailing Measures*, Article 27.10.

<sup>23</sup> Article 27.2 of the *Agreement on Subsidies and Countervailing Measures*.

<sup>24</sup> *Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries*, BISD 26S/203, 28 November 1979, creates the basis for GSPs, whereby developed countries may depart from their MFN obligation in granting non-reciprocal trade preferences to developing countries.

<sup>25</sup> The exception is that the GSP scheme itself may be challenged as a breach of the MFN principle, but this action is brought against the developed country providing the preferences rather than the developing countries receiving them. See for example, *EC – Bananas* which was based in preferences by the EU in favour of African and Caribbean (ACP) countries.

<sup>26</sup> Ouma Ochieng and David S. Majanja, *International Trade Dispute Resolution: Case Study on the Possibility of Kenya Utilizing the WTO Dispute Settlement System*, Africa Dialogue on WTO Dispute Settlement and Sustainable Development, Mombasa Kenya, 2-3 November 2006, 2.

<sup>27</sup> *Id.* at 8.



Tanzania<sup>28</sup> and Uganda<sup>29</sup> have faced significant trade impacts arising from an EU prohibition on fish caught from Lake Victoria, in response to cholera in the region. Ugandan trade ministry officials mooted bringing a dispute, feeling that there was a 'watertight' case, but ultimately Uganda decided not to proceed. Ultimately a bilateral solution was arrived at, involving approval of fish processing facilities and inspection procedures. Mozambique had a similar issue with the EU import prohibition on fish, which it likewise responded to with lab testing of fish.<sup>30</sup> It was also concerned by potential dumping of chickens from Brazil.<sup>31</sup> Similarly Ghana has also raised allegations of dumping of chickens.<sup>32</sup> Zambia has had concerns about dumping in the oil sector,<sup>33</sup> and with regard to salmon. Nigeria has problems with dumped textiles and substandard goods coming in from South East Asia.<sup>34</sup>

Lesotho faced a potential issue of dumping in relation to export of Coca-Cola produced under license in South Africa.<sup>35</sup> Like Lesotho, Malawi's trade issues have been largely regional. For example it has complained of Mozambique dumping wheat flour in the Malawian market, causing injury to the domestic milling industry. Also South Africa has complained of China using Malawi to tranship goods to South Africa.<sup>36</sup> Botswana's primary concerns include dumping of flour and milling products from South Africa.

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<sup>28</sup> Interview on 10 August 2006 with Burhani Mlundi, the Assistant Director of the Ministry of Industry, Trade and Marketing, Tanzania.

<sup>29</sup> Interview on 31 July 2006 with Mr Peter Elimu Elyetu, Principal Commercial Officer of the Ministry of Tourism, Trade and Industry, Uganda.

<sup>30</sup> Interview on 1 September 2006 with Mr Cardoso Almirante Manuel Comboio, Lawyer, Ministry of Industry and Trade, Mozambique and also: Interview on 1 September 2006 with Mr Hgonias António Macia, Head of Department (Specialized Organisations), Directorate of International Relations, Ministry of Industry and Trade, Mozambique.

<sup>31</sup> *Id.*

<sup>32</sup> Interview on 9 September 2006 with Mr Lawrence Y. Sae-Brawusi, Director, Ministry of Trade, Industry, PSD and PSI, Ghana.

<sup>33</sup> Interview on 4 October 2006 with Ms Peggy Mlewa, First Secretary, Permanent Mission of Zambia to UN.

<sup>34</sup> Interview on 3 October 2006 with Mr Maigari Gurama Buba, First Secretary, Nigeria Trade Office to the WTO, Geneva.

<sup>35</sup> Interview on 5 September 2006 with David P. Damane, Director of Trade, Ministry of Trade and Industry, Cooperatives and Marketing, Lesotho.

<sup>36</sup> Interview on 15 August 2006 with Harrison Mandindi, the Director of Trade in the Ministry of Trade and Private Sector Development, Malawi.

It is alleged that South Africa uses cake flour for its own production but the secondary product, bread flour, is dumped in Botswana and this affects the domestic milling industry.<sup>37</sup> It also faces challenges in getting locally produced supermarket products onto the shelves, because South African companies own the distribution chain and stock the supermarkets in Botswana with products from South Africa to the exclusion of local products. Swaziland has considered bringing a dispute against the US in relation to conditionalities under GSPs and the African Growth and Opportunity Act (AGOA).<sup>38</sup>

What is made clear from the above issues raised by trade ministry officials in Africa is that they *do* have trade issues that they feel could potentially warrant bringing a dispute under the DSU. Some of the issues raised may not actually contain a proper cause of action under WTO law, but that is not the point. The point is that, to use Felstiner et al's expression, there is 'naming' and 'blaming', even though there is to date no formal 'claiming'.<sup>39</sup>

Now to the second preliminary question – does it really matter if African members are not accessing the system? Statistics have shown a positive correlation between trade stakes and trade disputes.<sup>40</sup> Therefore it can be argued that those with lower trade stakes would have less disputes, and those with virtually no significant trade should have none. The reasoning here, in the author's opinion, is flawed. It is akin to saying, in 1920s America, that Negroes did not need access to justice because they had no legal rights to enforce. In relation to gender rights, it was partly through positive discrimination that the position of women in many societies developed to what it is today. In relation to access to justice for WTO members, it is only by protecting the rights and special benefits that poor countries theoretically enjoy in the WTO system, that they can truly take advantage of them.

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<sup>37</sup> Interview on 29 August 2006 with Mr Kedibonye Laletsang, Acting Director, Department of International Trade, Ministry of Trade and Industry, Botswana.

<sup>38</sup> Interview on 31 August 2006 with Mr Titus B. Nxumalo, Senior Trade Policy Analyst, International Trade Department, Ministry of Foreign Affairs & Trade, Swaziland.

<sup>39</sup> William L.F. Felstiner, Richard L. Abel and Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...*, (1980-81) 15 LAW AND SOCIETY REVIEW 631.

<sup>40</sup> Bown and Hoekman have charted the positive relationship between a country's shares and patterns of trade with the level of usage of the WTO DSM: Bown and Hoekman, *supra* note 21; and Horn et al have found that the system is geared towards larger and more diversified exporters: HENRIK HORN, PETROS C. MAVROIDIS AND HÅKAN NORDSTROM, IS THE USE OF THE WTO DISPUTE SETTLEMENT SYSTEM BIASED? (1999).

Further, African members have the right to legal protection of whatever small trade stakes they have managed to develop. The impact of non-compliant behaviour by their trading partners may cause immense harm in relative terms. For example, a loss of even \$10 million in the sale of cocoa in a small African country with a narrow export base can be disastrous for the country's balance of payments and gross domestic product (GDP).<sup>41</sup>

Another example can be seen in the context of protectionist agriculture policies in the EC and the US,<sup>42</sup> where there is flagrant disregard for compliance by these major players.<sup>43</sup> The US cotton subsidies, which total US\$3.9 billion, result in a 40 per cent decrease in world market prices, represent approximately 15 million lost jobs in Africa and account for an annual loss of US\$1.2 billion for the African cotton producers.<sup>44</sup>

Secondly, the DSM, despite its origins in the General Agreement on Tariffs and Trade (GATT), is young – just 14 years old at the time of writing. In adolescent legal systems, courts perform housekeeping and crystallising functions – housekeeping in the sense that they tidy up gaps in the new laws, and crystallising in the sense that, through developing definitions of key terms and interpretations of key provisions, they make clearer boundaries around the scope of each provision. We have seen this, for example, in the interpretation of the word 'necessary' in Article XX of the GATT, as being closer along a continuum to 'indispensable' than to 'making a contribution to'.<sup>45</sup> The interpretation of this word will have an ongoing impact on the

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<sup>41</sup> Organization for African Unity (OAU), *The New Partnership For Africa's Development*, October 2001.

<sup>42</sup> The degree of suffering caused by protectionist policies by the United States and the European Union in agriculture and textiles are well documented and have been estimated to cost the developing world some \$300 billion a year in lost revenues: David Held in an interview with Adam Lent, editor of Fabian Global Forum, 27 January 2003, available at [www.fabianglobalforum.net](http://www.fabianglobalforum.net).

<sup>43</sup> *US – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil*, Appellate Body Report, WT/DS267/AB/RW.

<sup>44</sup> Arsene Omichessan, *Navigating the Dispute Settlement Understanding (DSU): How Benin Took on the Challenge of Cotton?*, Africa Dialogue on WTO Dispute Settlement And Sustainable Development, Mombasa Kenya, 2-3 November 2006, 2. For WTO members where cotton is the main product and export, such as Benin, Mali, Chad and Burkina Faso, the harmful effects cannot be overstated, and the ongoing failures of the US in this regard are an abomination.

<sup>45</sup> *Korea — Various Measures on Beef*, Appellate Body Report, WT/DS161/AB/R.

scope of the general exceptions to the MFN and national treatment (NT) principles, and the African WTO members are playing no role in such jurisprudential developments. Mosoti has described it this way – the DSM is not just about disputes, it is ‘also about the evolution of a *corpus* of international trade law principles and jurisprudence that will govern multilateral trade relations for years to come’.<sup>46</sup> The dispute settlement process as a whole is a public good because through litigation there is greater clarity in WTO rules, which benefits all WTO members.<sup>47</sup> These public good characteristics are weakened by the lack of willingness of potential litigants to engage in dispute settlement activity.<sup>48</sup>

The above perspective is not without its dissidents. Some, such as Kessie and Addo, say that Africa’s trade interests have not been prejudiced by its limited involvement in the DSM, because it is purely a dispute settlement system, with very limited potential for interpretations to create new obligations.<sup>49</sup> It is true that, formally, there is no doctrine of *stare decisis* and decisions apply only to the primary parties in a dispute. Article 3.2 of the DSU specifically states that rulings cannot ‘add to or diminish the rights and obligations provided in the covered agreements’. However this ignores the fact that in practice, almost without exception, panels and the Appellate Body have followed the approach adopted in previous cases, on the basis that this promotes the security and predictability of the DSM.

Further, there is a legitimate expectation on the part of the WTO Members that they will be held in compliance with their WTO obligations if they act in accordance with the interpretation of various WTO provisions as set down by panels and endorsed by the Appellate Body. The complex bargaining process of the Uruguay Round meant that many of the provisions in the WTO Agreements were kept purposely vague to attract greater consensus. The result is that WTO panels and the Appellate Body have significant *de facto* power

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<sup>46</sup> Mosoti, *supra* note 20, at 73-4. See also, Marongwe, *supra* note 17.

<sup>47</sup> Mosoti, *supra* note 2 at 432.

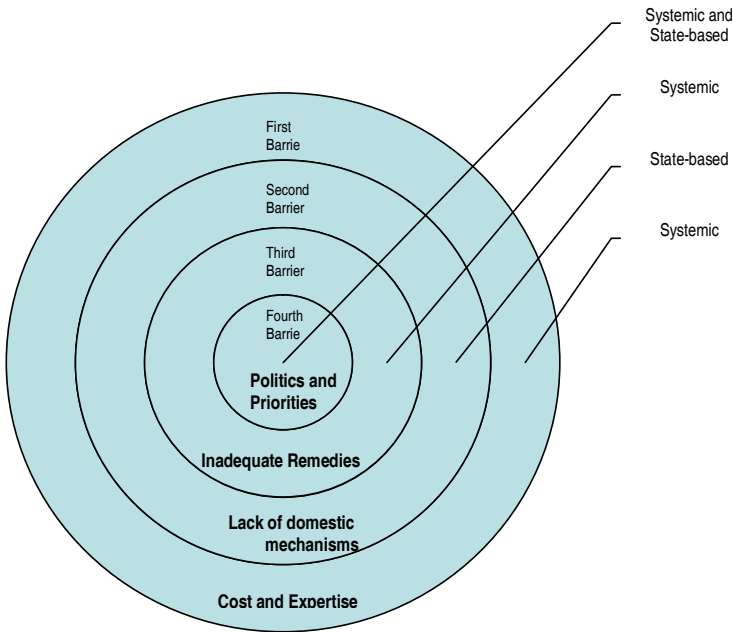
<sup>48</sup> Bown and Hoekman, *supra* note 20, at 10.

<sup>49</sup> Edwin Kessie and Kofi Addo, *African Countries and the WTO Negotiations on the Dispute Settlement Understanding*, available at <http://ictsd.net/downloads/2008/05/african-countries-and-the-wto-negotiations-on-the-dispute-settlement-understanding.pdf>.

to make law through interpretation of the provisions,<sup>50</sup> which determines the scope for members to bring disputes under them.<sup>51</sup> The importance of WTO jurisprudence is enhanced by the difficulty to amend or interpret WTO law through political processes.<sup>52</sup>

### III. Barriers to Access for African Members

The underutilisation of the WTO DSM is best characterised as four barriers: excessive cost and inadequate expertise; lack of domestic mechanisms; inadequate remedies; and political concerns and other priorities. These barriers may be likened to accessing a gift through layers of wrapping paper – all layers must be removed for access to occur. This is depicted in the following diagram:



<sup>50</sup> Shaffer, *supra* note 20, at 11. This is particularly the case in Appellate Body proceedings. To date not a single Appellate Body proceeding has involved an African Member as a primary party in the dispute.

<sup>51</sup> In practice, panels and the Appellate Body have not held back in filling gaps in WTO law. The way the Appellate Body dealt with the receipt of unsolicited *amicus curiae* briefs in *EC – Asbestos* has been seen as judicial activism which should instead have been referred to the members for creation of a new rule: Kessie and Addo, *supra* note 49.

<sup>52</sup> Shaffer, *supra* note 20, at 10.

## **Table 1 – Cumulative characterisation of barriers to access for African Members**

The first and third barriers are systemic, in that they arise from the inherent functioning of the WTO DSM: it is costly to bring an action and there is no award of costs made; it is a complicated system calling for persons with legal expertise; and remedies are prospective only. The second barrier is state-based, in that several African members lack domestic mechanisms to investigate issues and decide whether to bring a dispute; there is also a lack of awareness in domestic industry of WTO issues and a lack of procedures in place for liaison between industry and government. The third barrier is also systemic – trade sanctions as a remedy work only for major players. The fourth barrier is both systemic and state-based, in that power remains a dominant factor in an otherwise primitive system of international law, allowing cross-issue threats such as removal of international aid to be used to silence African members from bringing a dispute. Further, within states, there are cultural preferences against formal dispute processes as well as a discrepancy in some instances between what is best for the trading position of the state and what is best for the personal position of its representatives on trade matters.

### ***The First Barrier: Cost and Expertise***

Various commentators have sought to place an average figure on the cost of bringing a dispute through the DSM, with Bown and Hoekman estimating the figure at US\$500,000,<sup>53</sup> Shaffer at US\$300-400,000,<sup>54</sup> and Indonesia has apparently spent US\$1,000,000 in legal costs through to panel report in *Indonesia – Autos*.<sup>55</sup> The relative cost of using the DSM is higher in a smaller

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<sup>53</sup> Bown and Hoekman, *supra* note 20, at 12.

<sup>54</sup> Shaffer, *supra* note 20, at 46.

<sup>55</sup> Gregory C. Shaffer, *Weaknesses and Proposed Improvements to the WTO Dispute Settlement System: An Economic and Market-Oriented View*, (2005), available at <http://www.ppl.nl/bibliographies/wto/files/5300.pdf>. See more recently, Gregory C. Shaffer, *Developing Country Use of the WTO Dispute Settlement System: Why it Matters, the Barriers Posed*, (2006) 6 FRONTIERS OF ECONOMICS AND GLOBALIZATION (2006) 167-90. Even disputes resolved during the consultation phase can be costly, because the consultations tend to occur in Geneva. Perhaps if Article 4.10 of the DSU were properly applied, the consultations would take place in the relevant African Member's capital.

claim, because the cost is applied over lower trade stakes. Most developing countries have small value and volume of exports, across a diverse range of products, and so there are fewer economies of scale to litigating,<sup>56</sup> and in many instances the overall volume of trade in one commodity will make it unfeasible to bring an action.<sup>57</sup> A WTO member will only file a complaint if the legal fees are less than the discounted gain in profits the complainant would receive from increased market access if the WTO-inconsistent measure were removed,<sup>58</sup> and this is less likely to occur where the quantum in dispute is lower, due to lower overall trade volumes. For example, all goods exported from Gambia are below \$1 million value, and Djibouti is not far behind with 90.7 per cent of its exports falling in this bracket.<sup>59</sup> It will never be fruitful for Gambia to spend equivalent to half its annual exports in a particular commodity to address any alleged inconsistency in WTO law. Consequently all disputes involving low trade stakes are effectively beyond WTO oversight.

There are also fewer economies of scale in terms of the value that repeat users of the system enjoy, where the cost of developing expertise may be allocated across a number of cases.<sup>60</sup> As Nordström has said, 'notionally equal rules provide unequal opportunities for the member states. Small trading nations are effectively discriminated'.<sup>61</sup> Further, there is no small claim or feasible fast track procedure in WTO law that would otherwise make smaller claims cheaper to litigate, nor is complexity necessarily directly proportionate to the size of the trade stakes at issue. The only alternatives are the alternative dispute resolution mechanisms<sup>62</sup> or the 1966 fast track procedures,<sup>63</sup> but these

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<sup>56</sup> Shaffer, *supra* note 20, at 15.

<sup>57</sup> Ms Basemera Peace, then Acting Director of Trade and Industry of the Ministry of Commerce, Industry, Investment, Promotion, Tourism and Cooperatives, Rwanda, said that even if there were no issue of cost and expertise, Rwanda would not bring a dispute, regardless of its nature, because the overall volume of trade in Rwanda in any one commodity is too small for it to be feasible to warrant bringing an action (Interview, August 2006, Kigali).

<sup>58</sup> See Bown and Hoekman, *supra* note 20, at 9.

<sup>59</sup> Håkan Nordström, *Access to Justice in the WTO – The Case for Small Claims Procedures*, ICTSD 2006, 9.

<sup>60</sup> Gregory C. Shaffer, *The Challenges of WTO Law: Strategies for Developing Country Adaptation*, (2006) *WORLD TRADE REVIEW*, available at <http://ssrn.com/abstract=873938>.

<sup>61</sup> Nordström, *supra* note 59, at 4.

<sup>62</sup> These include Article 5 good offices, conciliation and mediation, and Article 25 arbitration.

<sup>63</sup> Fast track procedures are for developing countries bringing actions against developed countries. See Decision (BISD 14S/18) of 5 April 1966.

are rarely used.<sup>64</sup> Small claims procedures are common in domestic systems, and could be adopted in the WTO DSM. It could not only have tighter timetables but also streamlined procedures (such as ‘documents only’ dispute settlement), a lighter evidentiary burden, and limited use of legal representatives.<sup>65</sup> Such a procedure could be adopted upon agreement between the parties or upon election by a developing country Member party to the dispute. A form of arbitration is already theoretically available under Article 25 of the DSU, but has not yet been used in practice. It may not be ideal in disputes involving a large power imbalance.

In addition to the lack of small claims procedure, there is no provision for expedited procedures in circumstances where established breaches from a previous dispute can be relied upon.<sup>66</sup> This could easily be used where a breach is able to stand independently from the country that has argued it. For example in *US-Cotton* the finding that section 1207(a) of the *United States Farm Security and Rural Investment Act* of 2002 was inconsistent with Article 9.1(a) of the *Agreement on Subsidies and Countervailing Measures* is a finding that stands independently in any other dispute relating to the US subsidies on cotton. Why couldn’t Mali rely on the established breach in *US – Cotton*, and move directly to proving the impact of the breach?

Members such as Tanzania and Zimbabwe have formally raised the difficulties that are created by the high litigation costs in the WTO DSM<sup>67</sup> The African Group more broadly has referred to the DSM as being complicated and overly expensive.<sup>68</sup> Complexity is caused in part by the success of the system, in the sense of the high number of disputes brought before it. In the

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<sup>64</sup> Article 5 has been requested only once for mediation between the EC and Thailand/Philippines (WT/GC/66, 16 October 2002 and WT/GC/66/Add.1), and Article 25 has not been used as an alternative to the panel procedure, perhaps because there are no perceived cost advantages. The 1966 fast track procedures has not been used since the WTO was created, and indeed developing countries appear to need more time, not less time, to prepare their submissions.

<sup>65</sup> See Nordström, *supra* note 59.

<sup>66</sup> Article 23 of the DSU. Even in a recent zeroing case, where the parties had agreed on breach, the panel went through the motions and made its own determination of the issue: *United States – Anti-Dumping Measure on Shrimp from Ecuador*, DS335.

<sup>67</sup> See, *Proposals on the DSU*, by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe, TN/DS/W/19 (20 September 2002) at 2.

<sup>68</sup> WTO Doc TN/DS/W/15 (25 September 2002).



48 years of the GATT there were 305 disputes brought,<sup>69</sup> and in just 14 years of the WTO thus far, there have been nearly 400 disputes brought. Although the system is designed to be agreements-based and to favour strict legal formalism the reality is that there is increasing reference to and reliance upon panel and Appellate Body reports,<sup>70</sup> as this promotes the security and predictability of the system. Cost bears a positive correlation to complexity, and so it can be expected that as the corpus of WTO law develops, so will the cost involved. Already it has been referred to as a 'challenging maze'.<sup>71</sup>

Panel and Appellate Body reports regularly run for hundreds of pages, as opposed to little more than a dozen pages under the GATT regime.<sup>72</sup> Without some limitation being applied, it can only be expected that the length of reports and submissions will continue to grow, and this can greatly increase the cost of legal advice (in reviewing relevant previous decisions on point) and the level of expertise required to master WTO law. It would be appropriate for all written reports, and party submissions for that matter, to be limited to a maximum of 10,000 words, or 25 pages. Further, although nothing in the DSU prevents a WTO member from submitting an *amicus curiae* brief,<sup>73</sup> in the interests of reducing cost and complexity in the system, it is preferable to resist allowance of *amicus curiae* briefs, leaving the same to the discretion of the panels.<sup>74</sup> It is preferable to leave it up to panels and Appellate Bodies to be able to call upon experts and even NGOs to advise them, without receiving unsolicited advice.

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<sup>69</sup> JOHN H. JACKSON, *THE WORLD TRADING SYSTEM, LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS*, (2<sup>ND</sup> ED., 1997), at 120.

<sup>70</sup> For further discussion see Raj Bhala *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication*, (1999) 9 *JOURNAL OF TRANSNATIONAL LAW AND POLICY* 1.

<sup>71</sup> Marongwe, *supra* note 17.

<sup>72</sup> Shaffer, *supra* note 20, at 9.

<sup>73</sup> See Appellate Body in *EC – Trade Description of Sardines*, WT/DS231/AB/R, paras 161-5.

<sup>74</sup> WTO Doc TN/DS/W/15 (25 September 2002). The African Group propose that unrequested information should not be referred to as *amicus curiae* briefs as this suggests those making the briefs are respected experts giving advice as opposed to unrequested entities providing support for a party's case. Unsolicited information is problematic for African WTO Members from a cost and expertise point of view because their resources are stretched enough already, and because it creates a structural bias in that most NGOs that have the resources to prepare and submit *amicus* briefs are in developed countries.

The complexity of the DSM means that experts are needed to advise and assist Members involved in WTO proceedings, and this expertise is costly to develop or outsource. Even the US and the EU Member governments themselves rely on external sources of funding and support to bring a dispute. Private firms, industry associations, private sector lawyers and consultants do much of the pre-litigation work in gathering information and developing legal arguments.<sup>75</sup> Most African Members, with the exception of South Africa, have an extremely limited supply of individuals with international trade law qualifications. Those who do possess relevant qualifications are usually stationed in Geneva, attempting to cover the sometimes five or more simultaneous meetings within the WTO,<sup>76</sup> or even within the WTO and UNCTAD.<sup>77</sup> This leaves those in the trade ministry in the Member's capital with the responsibility but not the expertise to make trade policy, and to make decisions as to dispute settlement in consultation with their colleagues.

Few African Universities have law schools that teach international trade law. Those who manage to obtain this expertise often use it as a means to live and work overseas, usually in a developed country. Consequently there is a lack of expertise in the capital, not only in advising the government,<sup>78</sup> but also in raising awareness and advising industry and local trade associations

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<sup>75</sup> GREGORY C. SHAFFER, *DEFENDING INTERESTS: PUBLIC/PRIVATE PARTNERSHIPS IN WTO LITIGATION* (2003).

<sup>76</sup> Not all African WTO Members even have a mission in Geneva, take for example Malawi. For a discussion, see Sanoussi Bilal & Stefan Szepesi, *How Regional Economic Communities can Facilitate Participation in the WTO: The Experience of Mauritius and Zambia, Managing the Challenges of WTO Participation: Case Study 27*, available at [www.wto.org/english/res\\_e/booksp\\_e/casestudies\\_e/case27\\_e.htm](http://www.wto.org/english/res_e/booksp_e/casestudies_e/case27_e.htm).

<sup>77</sup> In practice of course, African Member representatives tend to spread out to cover the meetings and report back to one another.

<sup>78</sup> See for example, Rwanda: Ms Basemera Peace, then Acting Director of Trade and Industry of the Ministry of Commerce, Industry, Investment, Promotion, Tourism and Cooperatives, Rwanda, said that Rwanda has only one person who understands WTO Law. The others have done basic courses but do not have expertise as such. The Ugandan Ministry of Tourism, Trade and Industry (MTTI) has five people in the capital and no people in Geneva except the ambassador and two members from the Department of Foreign Affairs, none of whom have trade expertise or are employed specifically on WTO matters. Nichodemus Rudaheranwa and Vernetta B. Atingi-Ego, *Uganda's Participation in the WTO: Institutional Challenges, Managing the Challenges of WTO Participation: Case Study 41*, available at [www.wto.org/english/res\\_e/booksp\\_e/casestudies\\_e/case41\\_e.htm](http://www.wto.org/english/res_e/booksp_e/casestudies_e/case41_e.htm) refer to there being two people in Geneva, and Mr Peter Elimu Elyetu, Principal Commercial Officer of the Ministry of Tourism, Trade and Industry, Uganda on 31 July 2006 indicated that there are three part-time people in Geneva.

on their WTO rights.<sup>79</sup> Given the degree of complexity involved in WTO Law, it can take some years to develop the requisite expertise through qualifications and experience. In Members with a life expectancy as low as 40 years, and an AIDS rate approaching 40 per cent, this itself can be a challenge.<sup>80</sup> Swaziland recently surpassed Botswana as the country with the world's highest known rates of HIV/AIDS infection,<sup>81</sup> and these are both WTO Members.

The Technical Cooperation Division of the WTO Secretariat is responsible for providing advice and assistance to developing country Members under Article 27.2 of the DSU, but the challenge has been with the wording 'the expert shall assist the developing country Member in a manner ensuring the continued impartiality of the Secretariat'. Acting on behalf of a developing country Member in a dispute is seen as making the Secretariat partial. Shaffer has referred to the WTO's public legitimacy as being too fragile for a section of the WTO Secretariat to initiate complaints against WTO member governments on behalf of its developing and least developed country Members.<sup>82</sup> Two trade experts have been appointed in a part-time consulting capacity to fill this role, however their assistance is limited to general advice in the preliminary phases of a dispute, and interviewees from African members were mostly unaware of this resource being available to them, or have questioned the depth of the assistance provided.<sup>83</sup> Hoekman has proposed that there be an independent Special Prosecutor or Advocate to identify potential WTO violations on behalf of developing countries,<sup>84</sup> while Shaffer has suggested a role similar to that assumed by the European Commission before the European Court of Justice.<sup>85</sup> If such developments were considered

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<sup>79</sup> Shaffer, *supra* note 20, at 17.

<sup>80</sup> See for example, Zambia, which is listed in the CIA Factbook as having a life expectancy of 40.03 years. Officially the AIDS rate at 2003 was 16.5 per cent but the real rate is much higher than this: Interview with Charles Carey, General Manager of Finance Bank in Zambia, 17 August 2006 in Lusaka, Zambia.

<sup>81</sup> CIA Factbook: Swaziland, available at [www.cia.gov/library/publications/the-world-factbook/geos/wz.html](http://www.cia.gov/library/publications/the-world-factbook/geos/wz.html)

<sup>82</sup> Shaffer, *supra* note 20, at 30.

<sup>83</sup> Kessie and Addo, *supra* note 49.

<sup>84</sup> Bernard Hoekman, *Strengthening the Global Trade Architecture for Development*, (2002) 1(1) WORLD TRADE REVIEW 36.

<sup>85</sup> Shaffer, *supra* note 60, at 9.

to irreparably conflict with the impartiality of the Secretariat, there is no reason an external body could not be charged with the task, via a pseudo-legal aid system. Such services and support offered by the WTO Secretariat and other governmental, intergovernmental and non-governmental bodies need to be more widely publicised, most suitably through a webpage on the WTO website dedicated to setting out the relevant forms of assistance available, and brochures sent quarterly to African trade ministries.

What then, about legal aid, and pro bono legal advice, which are common 'access to justice' features in domestic systems? There is no legal aid, although the African Group has proposed as part of the Doha Round negotiations on the DSU that a standing fund be established from a tax on member contributions.<sup>86</sup> Trust funds have been used in other international dispute settlement fora, such as the International Court of Justice, the Permanent Court of Arbitration and the International Tribunal for the Law of the Sea.<sup>87</sup> Also, with the exception of a few generous private firms, such as White & Case, which acted pro bono for Benin and Chad, third parties in *US – Cotton*, there is little pro bono legal work done on behalf of poorer countries.<sup>88</sup> There is little evidence of 'self-interested and altruistic' private sector actors that Bown and Hoekman consider should subsidise developing country access to expertise.<sup>89</sup> However the Advisory Centre on WTO Law (ACWL)<sup>90</sup> offers much potential to address this first barrier, being set up to address the issue

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<sup>86</sup> WTO Doc. TN/DS/W/15, adopted 25 September 2002. *Cf* Human, who says that a fund created by taxes on member contributions would set a precedent for taxing WTO Members to achieve social justice objectives and before long there would be taxes for social, labour and environmental objectives, so perhaps a fund is not the best way to achieve the desired outcome: Interview on 4 October 2006 with Johann Human, Counselor, Rules Division, World Trade Organization.

<sup>87</sup> Johan Weusmann and Lambert Botha, *The Reform of the SADC Dispute Settlement Mechanism – Observations and Lessons Learned from the Process*, in Hartzenberg, *supra* note 3, 133 at 146. *See also*, Cesare Romano, *International Justice and Developing Countries: A Qualitative Analysis*, (2002) 1(2) *THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS* 565.

<sup>88</sup> Bown and Hoekman, *supra* note 20, at 2.

<sup>89</sup> *Id.* at 5.

<sup>90</sup> The ACWL was set up outside the WTO and effectively bypasses issues of neutrality arising in Article 27.2 of the DSU. *See*, Petina Gappah, *The Role of the Advisory Centre on WTO Law in Assisting African Countries in WTO Dispute Settlement*, in Hartzenberg, *supra* note 3, 61 at 69. *See also* Kim Van der Borght, *The Advisory Centre on WTO Law: Advancing Fairness and Equality*, (1999) 2(4) *JOURNAL OF INTERNATIONAL ECONOMIC LAW* 723.

of cost and expertise<sup>91</sup> through offering subsidised legal services to developing countries.<sup>92</sup> Larger and more active developing countries, such as India, have used its assistance to develop their own expertise.<sup>93</sup> The cost of bringing a dispute of medium complexity using the ACWL, assuming the membership fee has been paid (not applicable if least developed countries) is approximately US\$77,700,<sup>94</sup> compared to US\$555,000 using the average private firm.<sup>95</sup>

However the ACWL faces three main problems. First, it has limited capacity: only eight lawyers plus one or two secondees from developing country trade ministries. A high level trade ministry official from Kenya was of the opinion that the ACWL is 'too thin on the ground' because they requested assistance from the ACWL and were told that he 'should have come six months ago'.<sup>96</sup> Second, there is low awareness of the ACWL's existence by individuals working in African trade ministries.<sup>97</sup> This may account for the 'lukewarm reception' Gappah has described the ACWL as being given by African countries, and why few African countries are members.<sup>98</sup> Third, the ACWL only assists in relation to legal advice and assistance. It does not really get involved in evidence gathering processes.<sup>99</sup> The cost of litigation support

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<sup>91</sup> The Preamble to the *Agreement Establishing the Advisory Centre on WTO Law* says that developing countries and least developed countries have limited expertise in WTO law and the management of complex trade disputes and their ability to acquire such expertise is subject to severe financial and institutional constraints.

<sup>92</sup> It has been funded through one-off contributions from developed country WTO Members. It is notable that some of the major players in the DSM, such as the US, EC and Japan are not contributors (although some individual Members in the EC are).

<sup>93</sup> Shaffer, *supra* note 20, at 31.

<sup>94</sup> Based on 1100 hours at US\$70 per hour.

<sup>95</sup> Based on 1100 hours at US\$500 per hour. Even this is a highly conservative estimate as ACWL staff typically spend two or three times as many hours as they actually bill their clients, so the shadow cost it is more likely to be 2500 hours at US\$500 per hour, or \$1.25 million in legal costs.

<sup>96</sup> Interview on 24 July 2006 with Mr Elijah Manyara, Deputy Director, Department of External Trade, Ministry of Trade and Industry, Kenya.

<sup>97</sup> Interviewees in Malawi were not aware of its existence, and in Swaziland, advice on a potential dispute was sought from a private law firm and the cost of obtaining that advice was sufficient for them to decide there was no way they would ever formally bring an action. If they had have known about the ACWL, surely they would have used it.

<sup>98</sup> Petina Gappah, *The Role of the Advisory Centre on WTO Law in Assisting African Countries in WTO Dispute Settlement*, in Hartzenberg, *supra* note 3, 61 at 75.

<sup>99</sup> BERNARD HOEKMAN AND MICHEL M. KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: THE WTO AND BEYOND*, (2<sup>ND</sup> ED., 2001), 94.

including data collection, economic analysis and hiring of expert witnesses, plus the cost of travel, accommodation, communication, paralegal and secretarial assistance,<sup>100</sup> must still be borne by the developing country Member, unless a non-governmental organisation is able to assist in this regard. The African Group has said that the ACWL ‘should not be considered as panacea for all institutional and human capacity constraints of developing countries. Its terms of reference are equivocal in certain instances, and it does not cover all developing countries’.<sup>101</sup>

In any event, not all African Members are content with experts who fly in briefly to give them advice but often don’t understand their system or its dynamics. They would prefer to develop internal expertise but are challenged in many ways. First, there tends to be a high turnover of staff in developing country administrations, given that those with expertise are often lured to the private sector or overseas.<sup>102</sup> This means developing trade expertise within African trade ministries must be a constant and substantial effort. Second, where capacity enhancement programs are sponsored through international aid or the efforts of relevant non-governmental organisations, the person sent to attend may not even be primarily employed in trade policy-making.<sup>103</sup> It may be someone who is chosen for the opportunity to receive the *per diems* (a daily allowance paid to attendees to cover their costs of accommodation and food whilst on the course) to access essential items or consumer durables not available in their home country, or even to save the money to pay for living expenses. Apparently a regular course attendee from one African country managed to use accumulated *per diems* to buy an apartment.<sup>104</sup>

Possible solutions to the above challenges include measures like secondments from African trade ministries to those of developed country trade ministries, and vice versa.<sup>105</sup> The ACWL already has a secondment

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<sup>100</sup> Bown and Hoekman, *supra* note 20, at 12.

<sup>101</sup> WTO Doc TN/DS/W/15 (25 September 2002).

<sup>102</sup> Kessie and Addo, *supra* note 49.

<sup>103</sup> Michel M. Kostecki, *Technical Assistance Services in Trade-Policy*, ICTSD Resource Paper No.2, International Centre for Trade and Sustainable Development, November 2001, 20.

<sup>104</sup> Interview on 7 September 2006 with Professor Gerhard Erasmus, Senior Research Fellow, Trade Law Centre for Southern Africa (TRALAC).

<sup>105</sup> *Id.* at 8.

program in place,<sup>106</sup> in which it bears the travel and accommodation costs of secondees.<sup>107</sup> A Master in International Trade Law could be offered as a distance learning course, provided the relevant students have adequate access to the internet.<sup>108</sup> This would reduce the overall cost as compared to having the students physically live and study in a developed country, would lower the incidence of graduates seeking permanent residency after graduation, would allow the students to keep working while they are studying, and to liaise with their colleagues at work who are studying the same course. It could be funded through a combination of university fee waivers and international aid or NGO support. With trade law qualifications as a base, African WTO Members could feasibly engage as third parties in a number of disputes as a means of gaining worthwhile experience.<sup>109</sup> This is a tactic that China has readily employed in the six years since it gained entry to the WTO.<sup>110</sup> Even the US joins as a third party in most cases where it is not a complainant or respondent, so clearly it sees a relationship between participation in the DSM and protection of its trade interests.<sup>111</sup>

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<sup>106</sup> Secondments of nine government officials from least developed countries and developing country Members of the ACWL: *ACWL Secondment Programme for Trade Lawyers*. The programme was launched in March 2005. There are also internships offered within the WTO Secretariat.

<sup>107</sup> For the secondment period 2005-2006, payments to secondees included a return economy airfare, an installation and removal grant of approximately US\$2500, a monthly payment of approximately US\$3800, and health and accident insurance: *ACWL Secondment Programme for Trade Lawyers*, 3. These payments are funded through separate contributions from Canada, Denmark, Sweden and Norway.

<sup>108</sup> To date, face to face courses are preferred, with students travelling abroad to study or academics visiting African capitals. An example of the latter approach is the Danish International Development Agency, DANIDA, which has funded a Masters in International Trade Law at the University of Dar es Salaam, Tanzania. There were 24 people who enrolled in 2005 and a further 26 in 2006, coming from African trade ministries, and also from the private sector.

<sup>109</sup> The African Group has proposed, as a 'concrete contribution towards capacity building', that developing countries be allowed to be third parties in any case they wish to, without having to demonstrate any particular interest in the subject matter of the dispute: WTO Doc TN/DS/W/15 (25 September 2002). Capacity development through third parties also supported by Magda Shahin, *Egypt's Challenges and Future Options for Participating in the WTO Dispute Settlement System*, Africa Dialogue on WTO Dispute Settlement And Sustainable Development, Mombasa Kenya, 2-3 November 2006, 16; and Michael S. Matsebula, *Involvement of the Private Sector in the WTO Dispute Settlement Process: Participation of the Swaziland Sugar Industry in the EC Sugar Subsidies Case*, Africa Dialogue On WTO Dispute Settlement And Sustainable Development, Mombasa Kenya, 2-3 November 2006, 6.

<sup>110</sup> Kessie and Addo, *supra* note 49.

<sup>111</sup> See for example, *Australia — Measures Affecting the Importation of Apples from New Zealand*, DS367; *Colombia — Indicative Prices and Restrictions on Ports of Entry*, DS366; and *Chile — Definitive Safeguard Measures on Certain Milk Products*, DS356.

Finally, it may not in any event be the most efficient path to develop trade expertise within individual African Members, given that most are likely to be only one off users of the system. But there does need to be a sufficient basic layer of expertise for someone in the Ministry to 'decide on the overall litigation strategy, review the planned arguments, review the drafts' and so on.<sup>112</sup> A better approach would be to develop pooled expertise, probably at the level of regional trade agreements – the South Africa Customs Union (SACU), Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), etc.<sup>113</sup> The source of expertise can be a combination of internally developed or pooled expertise and expertise drawn in for particular issues. For example Benin's involvement in *US – Cotton* was supported by a research by Oxfam and the International Food and Policy Research Institute (IFPRI), and legal expertise provided by White & Case. This combination of technical expertise from different disciplines is an effective way to maximise resources.<sup>114</sup> UNCTAD and private centres such as the Trade Law Centre for Southern Africa (TRALAC) also have a role to play. Having these all available through a single hub or portal, preferably based in one of the regional trading blocs in Africa, would be most effective.

In the meantime, support for the ACWL could be expanded,<sup>115</sup> perhaps through the application of normative pressure on the most frequent users of the DSM to contribute towards the ACWL endowment fund (seeing that the US, EC and Japan are not currently member contributors).<sup>116</sup> This would enable the ACWL to hire more lawyers, expand their capacity to advise in pre-dispute and consultations stages and waive the membership fee for developing

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<sup>112</sup> Gary Horlick, *Introduction*, in Hartzenberg, *supra* note 3, 11.

<sup>113</sup> This approach is supported by Matsebula, see Michael S. Matsebula, *European Community's Subsidies on Sugar: Observations on African Participation as a Third Party in the Challenge at the WTO*, in Hartzenberg, *supra* note 3, 81 at 103.

<sup>114</sup> Hilton Zunkel, *An African Awakening in US Upland Cotton – Lessons from LDCs*, in Hartzenberg, *supra* note 3, 105 at 116.

<sup>115</sup> Held has said that initiatives like the ACWL WTO legal advisory centre need to be built upon: DAVID HELD, *GLOBAL SOCIAL DEMOCRACY: TOWARD A NEW GLOBAL COVENANT* (2003), available from the website for the Centre for the Study of Global Governance. Note that the ACWL has not yet acted on behalf of an African WTO Member in a WTO dispute.

<sup>116</sup> Members must promptly pay a one-time contribution of US\$1 million to the ACWL's Endowment Fund and/or make annual contributions during the first five years of the Centre's operation, totalling US\$1.25 million: Article 6.2, *Agreement Establishing the Advisory Centre on WTO Law*. At the time of writing, only ten developed WTO Members have done this: Canada, Denmark, Finland, Ireland, Italy, Netherlands, Norway, Sweden, Switzerland, and United Kingdom.



countries.<sup>117</sup> It may be most effective to aim for an early settlement.<sup>118</sup> This is the least costly path, and also has the greatest likelihood of their domestic industries surviving the trade distortion being complained of. Perhaps an African branch of the ACWL could be created, to reduce the travel costs of African Member representatives in liaising with their legal advisors. There were discussions in 2002 on creating a regional centre on WTO law in Cairo,<sup>119</sup> and an interviewee mentioned that UNCTAD had plans to establish a centre in Kenya for the WTO, but it is unclear whether these plans will come to fruition. Instead, or perhaps also, pooled expertise could be developed at the customs union level.<sup>120</sup> COMESA expressed an interest in serving this role on behalf of its 20 members, provided appropriate funding was provided, and SADC is already in the process of notification to the WTO (this would not, however, give it the right to bring disputes on behalf of its members).<sup>121</sup>

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<sup>117</sup> The 25 African Members that are least-developed countries are automatically members, without payment of a fee. Of the 15 other African WTO Members, all of which are developing countries, only three have paid to join (Egypt, Kenya and Tunisia). It is likely the others will only do so on an 'as needed' basis, which is perfectly understandable: See *The ACWL after Four Years: A Progress Report by the Management Board*, ACWL/GA/2005/1; ACWL/MB/2005/1, 5 October 2005, 3. Mandatory Endowment Fund contributions to join the ACWL are US \$300,000 for Category A developing countries (most developed); US \$100,000 for Category B, and US \$50,000 for Category C (less developed): Annex II, *Agreement Establishing the Advisory Centre on WTO Law*, such classifications being determined by reference to the countries' share of the world trade with an upward correction reflecting their per capita income (GNP per capita): *Ibid*, note 2. According to Bown and Hoekman, such indicia may be an inaccurate reflection of a country's ability to afford ACWL contributions: Bown and Hoekman, *supra* note 20, at 18-19. For example, Morocco, Nigeria and South Africa would pay US\$100,000 to join the ACWL, and as the estimate for legal costs to defend an action is US\$500,000, it would be worth joining the ACWL to bring a dispute as the saving, assuming the matter proceeded through to Appellate Body stage, would be US\$333,400, based on the joining fee plus US\$66,600 in ACWL legal fees (\$US150 per hour @ 444 hours).

<sup>118</sup> For the value of settlement negotiations, see, Marc L. Busch and Eric Reinhardt, *Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes*, (2000) 24(1&2) *FORDHAM INTERNATIONAL LAW JOURNAL* 158.

<sup>119</sup> Mosoti, *supra* note 17, at 86.

<sup>120</sup> Similarly, Mosoti has suggested that a legal monitoring unit be set up within the African Group, and that regional advisory centres on WTO law should be established to offer training, monitor issues, and carry out fact finding and analysis to assist a member to prepare for a dispute: Mosoti, *supra* note 2, at 453.

<sup>121</sup> Other possible groupings for pooled expertise include SADC, with thirteen members, the G90 and its three sub-groups, namely the ACP Group, the Africa Group (all African countries except Morocco), and the Least Developed Countries group. Plus there are coalition groupings around specific issues such as the G20, G33, Group on Cotton, and Like Minded Group. It is unlikely, however, that any of the African trading blocs will follow in the footsteps of the EC in becoming a member in addition to their constitutive states being Members. According to Human, the EC becoming a member was part of negotiating history and will never happen again: Interview on 4 October 2006 with Johann Human, Counselor, Rules Division, World Trade Organization.

However, neither COMESA nor SADC currently have representatives in Geneva.<sup>122</sup> In any event, some provision could be made for ‘class actions’, where one WTO Member brings a dispute on behalf of a group of WTO Members, with the costs being apportioned between them.<sup>123</sup> This would also help make actions feasible where the trade stakes are low in terms of trade volume in a single product by an individual African WTO member. Most likely South Africa could play a leading role in this regard, given that cost and expertise are not issues they experience. It is notable, however, that many of the complaints raised by southern African Members were complaints against South Africa!

Further, given that as per Article 3(8), any failure to comply with WTO obligations is considered *prima facie* to constitute a case of nullification or impairment (such that there is no need to prove damage) and that there is a presumption of legal and economic interest in bringing proceedings, whether or not the Member has a direct and personal interest,<sup>124</sup> perhaps then developed country trade ministries should be prevailed upon to bring an action on behalf of poorer WTO Members who lack the resources and expertise to do it themselves. This could be a form of international aid for the African WTO Member, and even a beneficial foreign policy tool for the developed country member motivated to act on the African Member’s behalf.

### ***The Second Barrier: Domestic Mechanisms***

Implementation of WTO obligations often requires developing countries to create entirely new regulatory institutions and regimes.<sup>125</sup> It has been estimated that it would take 50 per cent of the government’s budget for Malawi to fully comply with all WTO agreements.<sup>126</sup> Another estimate is that

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<sup>122</sup> Bilal and Szepesi, *supra* note 76, at 13.

<sup>123</sup> This proposal is supported by Mandindi of Malawi: Interview on 15 August 2006 with Mr Harrison Mandindi, Director of Trade, Ministry of Trade and Private Sector Development, Malawi. Gappah, a lawyer at the ACWL, said that there is nothing to stop the blocs acting on behalf of their members in an informal way, and certainly the ACWL is happy to spread the costs over various Complainants: Interview on 4 October 2006 with Petina Gappah, Counsel, Advisory Centre on WTO Law (ACWL), Geneva.

<sup>124</sup> Lamy, *supra* note 8. See for example the involvement of the US in *EC – Bananas*, even though the US itself does not export bananas.

<sup>125</sup> Gregory C. Shaffer, *Can WTO Technical Assistance and Capacity Building Serve Developing Countries?*, 25 January 2005, available at <http://ssrn.com/abstract=653842>, at 15.

<sup>126</sup> Kandiero, *supra* note 9, at 6.

implementation of just three of the WTO Agreements, namely Custom Valuation, the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), and the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement), costs a developing country around US\$150 million.<sup>127</sup> Aside from the cost, implementing domestic legislation requires convincing members of parliament of its merit, and this can be difficult if parliamentary representatives know little about the WTO or its potential to benefit their economy.

Before legislation can be implemented, it has to be drafted, and this in itself can require significant expertise which may be lacking, particularly if the ministry responsible for drafting is the Attorney-General's Department and not the trade ministry. For example, the Malawian Director of Trade indicated that trade remedies legislation drafted by the trade ministry is just sitting with the parliament, which does not understand it and so it 'just lies around unpassed'.<sup>128</sup> The lack of implementing domestic legislation can prevent African WTO Members from maximising trade advantages, just as it can prevent them from defending their trade interests (such as, applying dumping duties).<sup>129</sup> There are even some situations where a trade 'remedy' is readily available to African WTO Members without their realising it, for example many tariff rates are unbound, meaning that if there is fear of potential harm to domestic industry, the government is free to simply raise the tariffs, without having to address the requirements set out in the agreements on safeguards, dumping, and subsidies and countervailing measures.<sup>130</sup>

Given that the large majority of WTO Members have excellent resources and have implemented WTO law in their domestic legislation, it begs the

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<sup>127</sup> Michael J. Finger and Philip Schuler, *Implementation of Uruguay Round Commitments: The Development Challenge*, (2000) 23 *THE WORLD ECONOMY* 511.

<sup>128</sup> Meeting on 15 August 2006 with Mr Harrison Mandindi, Director of Trade, Ministry of Trade and Private Sector Development.

<sup>129</sup> See for example, Malawi, which faced a dumping problem in the market for second hand clothing, which caused textiles and clothing factories in Malawi to go out of business. Malawi needed anti-dumping legislation and to apply safeguard and countervailing measures: Kandiero, *supra* note 9, at 8.

<sup>130</sup> Of course, some countries may be restricted by loan conditions imposed by the IMF or the World Bank.

question – why is there not model legislation, similar to what the United Nations Commission on International Trade Law (UNCITRAL) produces in the realm of private, international commercial law? The author suggested this in several interviews, and it came to light that such model laws, mainly trade remedies legislation, are already in existence at the WTO Secretariat, but are kept secret. A Ghanaian interviewee said that they were given a model law in around 2001 but were told not to show or tell anyone about it.<sup>131</sup> Why? According to Erasmus, it is due to a concern that private consultants will take the model laws and use them.<sup>132</sup> According to Human at the WTO Secretariat, it is because they are a member-driven organisation, and they cannot be seen to be telling Members what to do. However, if a Member State requests, the Secretariat can provide the documents if requested, and can even provide a delegation to visit the Member and assist in tailoring the model laws to their local situation and dictates of domestic trade policy.<sup>133</sup> The problem is that African Members ‘don’t know what they don’t know’. Surely online information, and letters or brochures sent by the WTO Secretariat offering assistance, would address this lack of awareness.

The assumption that model laws should not be openly published because of concerns over sovereignty should be challenged. Certainly such a charge is never levelled at UNCITRAL. It is understood that model laws are exactly that – a model that States may choose to follow, or adapt, or ignore. Another rationale for the Secretariat not making the model laws freely available is that there are options included within them, the choice of which will depend on the degree of trade liberalisation favoured in domestic policy by the Members concerned. There is a risk that if the options throughout the model law are not done carefully, the resulting legislation may be internally inconsistent. However what is needed is a basic model law at the level of the lowest common denominator, with finetuning remaining a future option. The WTO Secretariat should work with UNCITRAL to settle the existing secret

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<sup>131</sup> Interview on 9 September 2006 with Mr Lawrence Y. Sae-Brawusi, Director, Ministry of Trade, Industry, PSD and PSI, Ghana.

<sup>132</sup> Interview on 7 September 2006 with Professor Gerhard Erasmus, Senior Research Fellow, Trade Law Centre for Southern Africa (TRALAC).

<sup>133</sup> Interview on 4 October 2006 with Johann Human, Counselor, Rules Division, World Trade Organization.

model laws on safeguard, anti-dumping and countervailing measures into basic complete pieces of legislation, which can then be posted on the WTO website and sent in hard copy to developing country trade ministries for their information.

To be effective, a trade ministry needs to have mechanisms and procedures in place for receipt and investigation of complaints from industry. In some WTO Members, complaints are simply raised at the front desk in the trade ministry office, and the person receiving the complaint decides whether to do anything about it. There may be no investigative organ to gather data and assess the legal merits of the complaint.<sup>134</sup> Managing and monitoring dumping and subsidies investigations require specialised agencies, which are often lacking. For example, in Rwanda, there is no national body for dumping or countervailing measures, and no focal point within the trade ministry responsible for this.<sup>135</sup>

For industry to raise trade issues with the government in the first place, awareness and participation by industry in WTO matters is essential.<sup>136</sup> In developed countries that are repeat users of the system, it is typically industry that brings trade issues to the attention of government, and convinces them to bring a dispute through providing trade data and expert evidence. Governments routinely act in WTO matters through public-private partnerships, with the private sector funding lawyers, economists, and other consultants to assist with evidence gathering and legal submissions.<sup>137</sup> Compare this to the situation in most of the African Members visited, where there is low awareness amongst industry as to the importance and relevance of the WTO, and a lack of mechanisms in place for regular liaison with industry in order to identify trade issues they may be experiencing. Domestic industry may simply not realise that they could be using the WTO to gain better market access or to obtain access to markets that are presently blocked

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<sup>134</sup> *Id.*

<sup>135</sup> Interview August 2006 with Basamera Peace, Acting Director of Trade and Industry of the Ministry of Commerce, Industry, Investment, Promotion, Tourism and Cooperatives, Rwanda.

<sup>136</sup> It may be the case that most industry in Africa is run by foreign investors, who do not lobby the African governments to bring disputes because they would be bringing them against their home States – this would be a suitable topic for future research.

<sup>137</sup> Shaffer, *supra* note 20, at 14 and 21.

due to improper measures by their trading competitors. Without an informed, active private sector that can provide essential input, it is unlikely a government will launch a dispute.<sup>138</sup> Indeed the Organisation for Economic Cooperation and Development (OECD) guidelines refer to the need for domestic mechanisms to include consultation between three key stakeholders – government, private industry, and civil society.<sup>139</sup> What is needed is regular interaction between these three which will help in identifying trade barriers and prioritising which of them is the most harmful.<sup>140</sup>

South Africa has the most developed domestic mechanisms out of the African Members but even it has faced challenges in successfully coordinating between the capital and representatives in Geneva.<sup>141</sup> The other repeat player in the DSM is Egypt, where it has been said that ‘the absence of an engaged Egyptian private sector, weak public-private partnership and lack of sufficient awareness impact negatively on the use of the WTO DSM’.<sup>142</sup> Others, such as Kenya and Uganda, are in the primary stages of developing industry consultative mechanisms. Kenya has benefited from active NGOs which inform and assist industry,<sup>143</sup> and from assistance through the Joint Integrated Technical Assistance Programme (JITAP)<sup>144</sup> in coordinating liaison between government, the private sector and civil society through the National Committee on WTO (NCWTO). However there are issues with the NCWTO, such as lack of operating budget, lack of regular meetings and regular

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<sup>138</sup> Bown and Hoekman, *supra* note 20, at 14.

<sup>139</sup> OECD, *The DAC Guidelines: Strengthening Trade Capacity For Development*, 2001, available at [www.oecd.org/dac/trade](http://www.oecd.org/dac/trade).

<sup>140</sup> Shaffer, *supra* note 60, at 8.

<sup>141</sup> See Gustav Brink, *International Trade Dispute Resolution: Case Study on the Possibility of South Africa Utilizing the WTO Dispute Settlement System*, Africa Dialogue On WTO Dispute Settlement And Sustainable Development, Mombasa Kenya, 2-3 November 2006, 5. One of the problems identified is the lack of succession planning, with the loss of key staff being difficult to replace: *Id.* at 10.

<sup>142</sup> Shahin, *supra* note 109, at 2.

<sup>143</sup> Walter Odhiambo, Paul Kamau and Dorothy McCormick, *Kenya's Participation in the WTO: Lessons Learned*, Managing the Challenges Of WTO Participation: Case Study 20, available at [www.wto.org/english/res\\_e/booksp\\_e/casestudies\\_e/case20\\_e.htm](http://www.wto.org/english/res_e/booksp_e/casestudies_e/case20_e.htm).

<sup>144</sup> The Joint Integrated Technical Assistance Programme for African Countries (JITAP) is an initiative implemented jointly by the International Trade Centre (ITC), the United Nations Commission on Trade and Development (UNCTAD) and the WTO to strengthen the capacity of African countries to take advantage of WTO membership.

membership, lack of legal or institutional framework, and involvement by invitation only, with some key players not being invited, and actions taken by the trade ministry being contrary to what has been agreed within the NCWTO.<sup>145</sup> Similarly in Uganda, the Inter-institutional Trade Committee (IITC), which includes government, the private sector, trade associations, civil society and academia,<sup>146</sup> whilst being effective in influencing Uganda's trade policy position, is criticised for not being institutionally independent from the Ugandan trade ministry.<sup>147</sup> However, independence may not be necessary, given that ultimately the government decides on trade policy, and the committee is only for consultation. There is nothing to stop industry bodies working together to lobby the government outside of the IITC.

Aside from liaison between government and industry, there is a significant need for liaison between government ministries within each WTO Member on issues of policy and disputes. In relation to policy, taking Kenya as an example, there is an unacceptable degree of fragmentation, where the WTO and COMESA are handled by the Ministry of Trade and Industry, EAC matters are handled by the Ministry of Foreign Affairs, ACP-EU Cotonou matters by the Ministry of Planning and National Development, and the Ministry of Agriculture convenes a sub-committee on agriculture.<sup>148</sup> If an industry wishes Kenya to join a dispute as a third party, the first step involves industry convincing the relevant trade ministry, who then must convince the Attorney-General's chambers of the Ministry of Justice to bring the action. This can take time, because the Attorney-General's office is usually overburdened and under-equipped, particularly to understand and appreciate the significance of specialised issues of international trade law. Notice must then be communicated to the Member's representative in Geneva, who in turn must communicate it to the DSB. All of the above must take place within the three week deadline from the commencement of the primary dispute Kenya wishes to join.

To address the issue of liaison between stakeholders, African WTO Members should institute a program of secondments or staff rotations between their trade and justice ministries. This would ensure that, if the trade ministry

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<sup>145</sup> *Id.* at 8. See also, Ochieng and Majanja, *supra* note 26, at 11.

<sup>146</sup> Rudaheranwa and Atingi-Ego, *supra* note 78, at 2.

<sup>147</sup> *Id.* at 4.

<sup>148</sup> Odhiambo, Kamau and McCormick, *supra* note 143, at 2 and 11.

were to refer a dispute to the Attorney-General's office, there would be someone there already familiar with trade policy and WTO law. Liaison with private industry stakeholders could be promoted through the creation of a 'best practice model' based upon an examination by business consultants of the models for industry liaison developed in other countries. Business consultants could again be used to research the complaints and investigation mechanisms in other WTO Members and to devise a simple, low cost mechanism which could be recommended to African WTO Members.<sup>149</sup> The basic task of raising awareness within African Member industries of the importance of the WTO can in the first instance fall back to the WTO Secretariat itself, and to organisations such as the ACWL and non-government organisations. Publication and dissemination of trade briefings setting out case studies on issues relevant to African industries would also be appropriate.

Lack of trade data can also affect the ability of African trade ministries to bring a dispute.<sup>150</sup> Often data is collected manually rather than electronically, and collation and analysis of data is sporadic. For example Mbekeani reported that, in 2004, Botswana was using three year old trade data to formulate national trade policy.<sup>151</sup> Without proper internal mechanisms for collecting relevant information, usually at the borders, there is little chance of proving vital aspects of a case, for example in dumping, proof that there has been a surge of imports at a price below their 'normal' value. Unlike in developed countries, the private sector typically lacks the capacity to carry out its own independent investigations to collect factual data.<sup>152</sup> There needs to be capacity enhancement initiatives, including the mechanisms for gathering expert evidence more broadly, which NGO's often assist with.<sup>153</sup> It also includes

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<sup>149</sup> Shaffer, *supra* note 20, at 9.

<sup>150</sup> Hoekman and Kostecki refer to this as the 'upstream' collection of data as compared to the 'downstream' dimension of enforcement of legal rights: Hoekman and Kostecki, *supra* note 99, at 94-5.

<sup>151</sup> Kennedy K. Mbekeani, *Inter-Agency Policy Co-ordination in Botswana*, Managing the Challenges of WTO Participation: Case Study 6, available at [www.wto.org/english/res\\_e/booksp\\_e/casestudies\\_e/case6\\_e.htm](http://www.wto.org/english/res_e/booksp_e/casestudies_e/case6_e.htm).

<sup>152</sup> Ochieng and Majanja, *supra* note 26, 13.

<sup>153</sup> See for example, the assistance Benin obtained as third party in *US – Cotton* from the International Food Policy Research Institute, undertaking research funded by the German government. See Nicholas Minot and Lisa Daniels, *Impact of global cotton markets on rural poverty in Benin*, MSSD Discussion Paper No. 48, November 2002, available at [www.cgiar.org/ifpri/divs/mssd/dp.htm](http://www.cgiar.org/ifpri/divs/mssd/dp.htm).



mechanisms more generally for collecting, collating and analysing empirical trade data, to use to formulate trade policy and to defend trade interests through the DSM. JITAP, as referred to above, is already doing some good work in providing technical assistance for trade data collection, as does UNCTAD's Trade Analysis and Information System (TRAINS),<sup>154</sup> and the World Integrated Trade Solution (WITS).<sup>155</sup> The WTO Secretariat has also established Reference Centres in Africa with computer equipment and training. The Integrated Framework for Trade-Related Technical Assistance to Least-Developed Countries (IF) has been endorsed by the membership as a viable model for least developed country trade development.<sup>156</sup> The IF helps to improve coordination between the WTO and the World Bank, IMF, UNCTAD, and regional organisations and banks, and bilateral government donors. Further, a Technical Expertise Trust Fund has been established by the ACWL to help finance the acquiring of technical expertise which is often required in WTO proceedings.<sup>157</sup> However, implementation of these programs should be capacity enhancing and eventually be run by the domestic government. They should also be supported by basic trade infrastructure development, including modern transport systems, storage and distribution facilities, and use of technology in border control.<sup>158</sup> These matters are beyond the scope of the present paper but it is important to place the domestic mechanisms proposed in the overall developmental context.<sup>159</sup>

### ***The Third Barrier: Remedies***

As the DSM is prospective, the rulings simply recommend that measures be brought into conformity with WTO obligations, leaving aside awards of

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<sup>154</sup> See, [http://r0.unctad.org/trains\\_new/index.shtml](http://r0.unctad.org/trains_new/index.shtml) (27 March 2007).

<sup>155</sup> This is software that has been developed jointly by the World Bank and UNCTAD, see, <http://wits.worldbank.org/witsweb/> (27 March 2007).

<sup>156</sup> *WTO Ministerial Conference, Ministerial Declaration*, WT/MIN(01)/DEC/1 (20 November 2001), at para 43.

<sup>157</sup> *ACWL Report On Operations 2005*, January 2006, 8. It was used for example in 2005 to obtain expert testimony to be used in *Korea – Paper*. The issue, however, is awareness of its availability.

<sup>158</sup> Kandiero, *supra* note 9, at 8.

<sup>159</sup> According to Erasmus, LEAST DEVELOPED COUNTRIES should have a 'contractual entitlement' to capacity building support when implementing new commitments in the WTO: Gerhard Erasmus, *The Non-Participation by African States in the Dispute Settlement System of the WTO: Reasons and Consequences*, in Hartzenberg, *supra* note 3, at 187.

retrospective damages, interest, and costs.<sup>160</sup> There is also no allowance for the issuance of injunctions to suspend the challenged measure pending a determination. Except in limited instances, such as the application of anti-dumping duties and countervailing measures in response to prohibited subsidies, the complainant Member simply has to continue suffering throughout the entire dispute settlement process, and indeed beyond it, until the Member in breach complies. Some remedies are available like negotiated or arbitrated compensation following expiry of the agreed or arbitrated reasonable time period for compliance, and/or authorised suspension of trade concessions to balance out the nullification or impairment of benefits.<sup>161</sup> Seeking these remedies can itself be lengthy and complex affair, with decision making being referred back to the original panel, wherever possible.<sup>162</sup>

These remedies are considered powerful by public international law standards, and are the envy of other bodies such as the International Court of Justice of the UN, which has no enforcement capacity whatsoever. How effective are they, though, for African Members, should they choose to bring a dispute? The answer is – not at all. The rationale behind the coercive remedies is to put pressure on the non-compliant Member to bring its measures into conformity with its WTO obligations. Developing countries simply lack the leverage for trade sanctions to be effective.<sup>163</sup> The only harm caused by trade sanctions will be to itself, in terms of reduced access its people have to the products formerly imported from the offending WTO Member. Retaliation is trade restrictive and does not in the end help either the ‘sanctioner’ or the ‘sanctioned’.<sup>164</sup>

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<sup>160</sup> Article 3(7) of the DSU. The standard terms of reference of panels under Article 7 of the DSU are ‘To examine, in the light of the relevant provisions ... the matter referred to the DSB ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s).’ Also see Article 19 which provides that if a measure is found to be inconsistent with the Respondent Member’s WTO obligations a recommendation is made for the Member to bring the measure into conformity with that agreement, and may include suggestions of how this could be done.

<sup>161</sup> Article 3(7) of the DSU provides that compensation is a temporary remedy that is resorted to only where an immediate withdrawal of the measure is impracticable. Article 22 of the DSU provides for voluntary or negotiated compensation, failing which the DSB can authorise suspension of concessions. They apply from 30 days after the expiry of the reasonable time period. If the failing Member disagrees there is arbitration and no suspension occurs during this 60 day period.

<sup>162</sup> Article 21(5) of the DSU.

<sup>163</sup> Shaffer, *supra* note 20, at 7.

<sup>164</sup> See Petros C. Mavroidis, *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, (2000) 11 EUROPEAN JOURNAL OF INTERNATIONAL LAW, 763 and Jim Powell, *Why Trade Retaliation Closes markets and Impoverishes People*, Cato Policy Analysis (1990), available at [www.cato.org/pubs/pas/pa-143.html](http://www.cato.org/pubs/pas/pa-143.html).

The African Group has referred to trade retaliation as being skewed against African Members.<sup>165</sup> They are simply not in a position to retaliate,<sup>166</sup> and even if they were, the three years it typically takes before the retaliation stage is reached are likely to be sufficient to wipe out the affected industry.<sup>167</sup> There is simply no built-in provision for SDT for developing countries when it comes to remedies and compliance.<sup>168</sup> An order or agreement for the payment of compensation is not itself a remedy because compensation does not usually come in the form of a sum of money, but rather in the form of additional trade concessions, which African Members may not be readily able to take advantage of due to supply side constraints. Further, African Members are rightly unconvinced of the value in bringing dispute settlement proceedings where there have already been notorious delays and failures to comply by the most powerful WTO Members, such as *US – Cotton*, *US – Byrd Amendment*, *EC – Bananas*, and *EC – Sugar*. In theory, the DSB should have close and careful surveillance of implementation, but in practice the status reports it receives<sup>169</sup> from non-compliant WTO Members are so vacuous and general as to be a mere formality.<sup>170</sup>

An automatic suggestion is that the system be altered to resemble typical domestic legal systems, in which retrospective damages,<sup>171</sup> costs and interest are claimable, along with enforcement mechanisms such as asset seizure.

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<sup>165</sup> WTO Doc TN/DS/W/15 (25 September 2002).

<sup>166</sup> Robert E. Hudec, *The Adequacy of WTO Dispute Settlement Remedies: A Developing Country Perspective*, in BERNARD HOEKMAN, AADITYA ATOO AND PHILIP ENGLISH (EDS.) *DEVELOPMENT, TRADE AND THE WTO* (YEAR), at 87-88.

<sup>167</sup> See Alavi, *supra* note 2, at 25.

<sup>168</sup> Virachai Plasai, *Compliance and Remedies against Non-Compliance under the WTO system: toward a more Balanced Regime for All Members*, ICTSD South America Dialogue on WTO Dispute Settlement and Sustainable Development, Sao Paulo, Brazil 22-23 June 2006, at 15.

<sup>169</sup> Article 21(6) of the DSU.

<sup>170</sup> Plasai, *supra* note 168, at 13.

<sup>171</sup> For example suggested by Manyara, Kenya: interview on 24 July 2006 with Mr Elijah Manyara, Deputy Director, Department of External Trade, Ministry of Trade and Industry, Kenya. It is also supported by the African Group more generally: WTO Doc TN/DS/W/15 (25 September 2002). See also support from WTO commentators: Busch, M.L and Reinhardt, E. *supra* note 20, at 733; Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach*, (2000) 94(2) *AMERICAN JOURNAL OF INTERNATIONAL LAW* 335; Mavroidis, *supra* note 164, at 43.

This however is unlikely to occur, because the US and EC are unlikely to agree to it,<sup>172</sup> and because there is an underlying assumption that WTO Members introduce trade policy in good faith, and only know there is a breach of their WTO obligations when it is held as such by a panel or the Appellate Body. Therefore they should get some reasonable period of time to bring their measures into conformity, and coercion should only be a last resort. This approach is grounded in diplomacy and sovereignty, and is preferable actually for African Members, because damages and costs would be a two-edged sword, payable not only to them, but also by them if they lose. This litigation risk may only further deter use of the DSM by African Members. Some have suggested that damages and costs only be claimable by developing countries,<sup>173</sup> and only against developed countries, but this would only create inconsistency, where recovery depended on which country the action was brought against. It may also send a 'bad signal' to developing countries as to the lesser importance of observing their WTO obligations as between one another.<sup>174</sup>

There has been a willingness by WTO adjudicatory bodies to allow for cross-retaliation pursuant to Article 22.3 of the DSU, in circumstances where it is not 'practicable or effective' to retaliate under the same area of trade as in dispute. Such approval was granted to Ecuador, in *EC – Bananas II*, to bring retaliation in intellectual property in relation to a dispute over goods. This did not prove feasible for Ecuador, and indeed risked breach of independent treaty obligations under the Berne Convention. Brazil also considered cross-retaliation under TRIPS in the wake of the *US – Upland Cotton* Appellate Body ruling. This may indeed work to compel compliance, as the US is very sensitive about acquiring and protecting its current and prospective intellectual property interests.<sup>175</sup> However, to take advantage of cross-retaliation under TRIPS, the relevant Member must have the intellectual and physical capital required to produce patented drugs for a period of time, and few African Members would be in such a position.

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<sup>172</sup> As Shaffer has said, any change providing for orders for costs and damages must be supported by the US and EC for the change to come in during the Doha Round: Shaffer, *supra* note 20, at 7.

<sup>173</sup> WTO Doc. TN/DS/W/15, adopted 25 September 2002.

<sup>174</sup> Kessie and Addo, *supra* note 49.

<sup>175</sup> On cross-retaliation, see Maristela Basso and Edson Beas, *Cross-retaliation through TRIPS in Cotton Dispute?*, (May 2005) 5 ICTSD BRIDGES 19; Hudec, *supra* note 166, at 87-88.

What about a more powerful WTO Member retaliating against a non-compliant WTO Member in conjunction with, or on behalf of, an African WTO Member?<sup>176</sup> This may be described as joint retaliation, collective retaliation, subrogated retaliation, or even auctioned retaliation, reflecting that the trade benefits obtained by the Member assisting in retaliation may be passed back to the African Member. Developing countries have been proposing collective retaliation for some time, in fact since 1965 under the GATT.<sup>177</sup> It certainly appears allowable, given that Article 60.2(a) of the *Vienna Convention on the Law of Treaties* (1969) provides for collective enforcement of rights in a multilateral treaty through the suspension of operation of all or part of the treaty in relation to the member in breach by other members in relation to the member.<sup>178</sup> However the issue is whether other WTO Members would be willing to act in this capacity, given that it will impact their own trade (not necessarily in a positive manner) and also potentially their trade relationship with the Member against whom they are collectively retaliating.<sup>179</sup>

Yenkong has suggested that for collective retaliation to work, it should be tied to the violation and not the level of nullification or impairment, so as to make the cost of maintaining the inconsistent measure too great for the violating member.<sup>180</sup> However this would involve shifting the whole basis for remedies to a punitive one, which has virtually no chance of endorsement

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<sup>176</sup> This proposal is supported by many, including Manyara of Kenya: interview on 24 July 2006 with Mr Elijah Manyara, Deputy Director, Department of External Trade, Ministry of Trade and Industry, Kenya; Botswana, the African Group more broadly WTO Doc TN/DS/W/15 (25 September 2002); Hudec, *supra* note 167; Mosoti, *supra* note 21, at 82; Mexico, TN/DS/W/40, 6; and Kyle Bagwell, Petros C. Mavroidis and Robert W. Staiger, *The Case for Tradable Remedies in WTO Dispute Settlement*, in SIMON J. EVENETT AND BERNARD HOEKMAN (EDS.), ECONOMIC DEVELOPMENT AND MULTILATERAL TRADE COOPERATION, (2006), available at [www.ycsg.yale.edu/focus/researchPapers.html](http://www.ycsg.yale.edu/focus/researchPapers.html).

<sup>177</sup> GATT Doc COM.TD/F/W.1, 27 April 1965 and. COM.TD/F/W.4, 11 October 1965. According to Hudec 'industrial countries were quite content with membership in a legal system in which they could hurt others but some of the others could not really hurt them': Hudec, *supra* note 166.

<sup>178</sup> The Vienna Convention is applicable as the customary rules of interpretation of public international law, referred to in Article 3.2 of the DSU.

<sup>179</sup> See Decision by the Arbitrators in *EC – Hormones (US) Article 22.6*, WT/DS26/ARB, 12 July 1999, para 73 and footnote 29, where it is recognised that suspension of concessions or other obligations is always likely to harm the requesting party itself, and more so where there is a great imbalance in terms of trade volume and economic power between the parties.

<sup>180</sup> Yenkon, *supra* note 16.

by the Members. Instead it would be preferable to calculate proportionate equivalence, expressed as a percentage of export value.<sup>181</sup> The products targeted could be those with a high cross elasticity of demand so that domestic consumers did not perceive themselves to be suffering as a result. However the overall effect would be a contraction in trade, at least until compliance takes place, and this runs contrary to the fundamental goal of trade liberalisation.

Perhaps it would be more realistic to allow for an option for developed countries to 'buy out' of their compliance. If, for example, the large agribusiness interests in the United States are so important to the US government to support,<sup>182</sup> they should continue with their cotton subsidies in breach of their WTO obligations but compensate fellow Members affected by this measure on an ongoing basis, with compensation being in cash or in trade concessions, at the option of the affected Member.<sup>183</sup> This would give all parties an effective remedy, and would shift the question for the United States from 'comply or not to comply' to 'keep up the subsidies as long as we can afford to pay off those affected'. It moves the issue from politics to economics. It creates transparency and accountability. The consumers in the United States already pay twice, first in taxes to their government which is used to pay the subsidies, and second in the higher prices they pay for cotton products. This way they would pay three times, and this may shift public opinion. Maybe this is what the US is already doing, but selling the payments to its people as aid rather than compensation – in 2002 Burkina Faso received US\$10 million in US aid and lost \$13.7 million in export earnings due to the

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<sup>181</sup> For example, if the harm to Benin in cotton was US\$13.7 million per annum which was equivalent to seven per cent of its total exports, then this proportion of the total exports of the non-compliant member could be the level for collective retaliation – for example, if seven per cent of the value of US exports was US\$1 trillion, this value of US imports could be prevented entry or subject to additional tariffs, in collective retaliating markets (the greater the value of trade affected, the more collective retaliating Members that would be involved).

<sup>182</sup> In 2004 the figure of US\$264 million was paid to a handful of agribusiness firms, and one company alone, Allenberg Cotton of Cordova, received \$35 million in Step 2 payments alone. See Ken Cook and Chris Campbell, *US Taxpayers Spent \$264 Million in 2004 on Cotton Export Subsidies Ruled Illegal by WTO*, ENVIRONMENTAL WORKING GROUP, June 2005, available at [www.ewg.org/issues.agriculture/20050609/step2analysis.php](http://www.ewg.org/issues.agriculture/20050609/step2analysis.php).

<sup>183</sup> Cf., SHAFFER, who sees this as a risk and prefers to block it by providing for an increasing amount of compensation from two years after compensation has started being paid: Shaffer, *supra* note 20, at 32.

US cotton subsidies; Chad received US\$5.7 million and lost roughly the same amount, and Togo received US\$4 million but lost US\$7.4 million.<sup>184</sup>

To give effect to this compensation buy out, there would need to be a piggyback process whereby non-complainants (be they third parties or non-parties) could prove the trade impact of a measure where a decision already exists as to its non-compliance. This is not merely a fast track process but one which skips steps and piggybacks on the original dispute for findings of breach, impact on world market prices, etc. Already Benin and Chad, as third parties in *US – Cotton*, sought a ruling pursuant to Article 24.1 of the DSU that they had suffered serious prejudice as well as Brazil, but the Appellate Body chose not to rule on the issue.<sup>185</sup> Yenkong has proposed more generally that third parties be given greater rights, such as Article 22.6 arbitration to calculate retrospective damages, and Article 22.2 to seek authorisation for trade retaliation, on the basis that often the choice to be third party rather than co-complainant is made because of resource constraints.<sup>186</sup>

The difference here is that for non-parties, or affected third parties, a right for compensation would arise from the moment the agreed or arbitrated reasonable time period for compliance expires.<sup>187</sup> This would be reasonable because, at that moment, the assumption of good faith in favour of the non-compliant WTO Member would be exhausted. It could be considered *mala fides* to continue acting in breach of its WTO obligations, such that any other Member that can show the non-compliant measure impacts on their trade interests would be entitled to seek compensation, calculated from the date of expiry of the reasonable time period. This proposal is supported by several of the interviewees,<sup>188</sup> but would require changes to the DSU.

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<sup>184</sup> Kimberley Pfiefer, Gawain Kripke and Emily Alpert, *Finding the Moral Fiber: Why Reform is Urgently Needed for a Fair Cotton Trade*, Oxfam Briefing Paper 69, October 2004, available at [www.oxfamamerica.org/resources/files/finding\\_moral\\_fiber](http://www.oxfamamerica.org/resources/files/finding_moral_fiber).

<sup>185</sup> See Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, paras 504-512.

<sup>186</sup> Yenkong, *supra* note 16.

<sup>187</sup> Article 21 of the DSU provides for arbitration to establish a reasonable period of time, should the parties be unable to agree upon it.

<sup>188</sup> For example, interview on 24 July 2006 with Mr Elijah Manyara, Deputy Director, Department of External Trade, Ministry of Trade and Industry, Kenya.

Presently under Article 11, the panel has to make an objective assessment of the whole matter before it, and under Article 3.2, *res judicata* applies whilst precedent does not.<sup>189</sup> Nationalists in major players such as the US may see such proposed changes to impinge on their state sovereignty<sup>190</sup> – but it would not be precedent per se, but simply reliance on an already established breach. It would not be arguing an analogous situation in which a previous ruling would be applied, but the very same measure that has already been found to be WTO inconsistent. Surely it would be stranger to have two panels making different rulings on the same violation than it would be to have the same finding of violation applied in relation to later complainants?

There may also be some scope for interim relief, such as the reduction or avoidance of the measure in issue pending panel determination of the dispute. But extreme suggestions such as Udombana's far reaching proposal<sup>191</sup> that African WTO Members unilaterally withdraw trade until there is evidence of good faith performance of WTO obligations by industrialised countries are unlikely to satisfy anyone's interests, despite the reliance by industrialised countries on poor countries for raw materials such as cocoa and coffee beans.<sup>192</sup> Any mechanism for interim measures of protection must be system-driven and not unilateral, and to reduce unfairness and the risk of vexatious actions, some re-balancing would be necessary for Members whose measures are found to actually be WTO-consistent.

### ***The Fourth Barrier: Politics and Priority***

Although the WTO legal system has been hailed as a shift from diplomacy to genuine legalism,<sup>193</sup> this is not to say that politics, and the balance of power,

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<sup>189</sup> The Panel in *EC – Bed Linen (Article 21.5 India)* applied the substantive mechanism of *res judicata* without labelling it as such, by refusing to re-litigate a previously determined legal issue: see DAVID PALMETER AND PETROS C. MAVROIDIS, *DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION – PRACTICE AND PROCEDURE* (2<sup>ND</sup> EDITION 2004), at 42.

<sup>190</sup> Shaffer, *supra* note 20, at 40.

<sup>191</sup> Udombana, *supra* note 20, at 1195.

<sup>192</sup> *Id.* at 1198.

<sup>193</sup> Joseph H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, (2003) 13 *AMERICAN REVIEW OF INTERNATIONAL ARBITRATION* 177.



does not play a key role. There are broad political considerations which stem from the fact that the large majority of African WTO Members are aid recipient nations.<sup>194</sup> It is important to African countries to avoid irritating their major trading partners,<sup>195</sup> whom they mostly trade with under preferential arrangements such as Economic Partnership Agreements (EPAs) with the EU (and their predecessor, the Cotonou Agreement) and African Growth and Opportunity Act (AGOA) with the US, which are outside of the DSM.<sup>196</sup> Some African Members lack the freedom to effect trade policy change in any event, being tied to excessive liberalisation of their economies on the prescription of the World Bank and IMF.<sup>197</sup>

Shaffer refers to the fear of political and economic pressure from the US and EC that makes developing countries abandon otherwise justified legal claims.<sup>198</sup> These are not idle fears. For example in 1999 in the US, campaigners proposed cutting off funding to agencies that encouraged African countries adopt intellectual property laws exceeding the basic TRIPS Agreement requirements.<sup>199</sup> Kenya has not raised its issues over fish and flowers with the EU for fear of being locked out of the EU market.<sup>200</sup> As such, 'political considerations play a pivotal part in deciding whether or not to dispute'.<sup>201</sup> If a dispute is brought, respondents such as the US and EC can strategically choose to absorb high litigation costs associated with dragging out a WTO case and force the developing country to settle.<sup>202</sup> Busch and Reinhardt have

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<sup>194</sup> Bown has said that exporters are less likely to participate in the WTO DSM where their country is involved in a preferential trade agreement with the respondent and is reliant on the respondent for bilateral assistance: Chad P. Bown, *Participation in WTO Dispute Settlement: Complainants, Interested Parties and Free Riders*, (2005) 19(2) *WORLD BANK ECONOMIC REVIEW* 287, 291.

<sup>195</sup> Kessie and Addo, *supra* note 51.

<sup>196</sup> Perhaps under these mechanisms, which are WTO-compatible in terms of Article XXIV of the GATT, there will be greater scope for disputes under them to be brought through the WTO DSM.

<sup>197</sup> Interview on 15 August with Mr Harrison Mandindi, Director of Trade, Ministry of Trade and Private Sector Development, Malawi; Ochieng and Majanja, *supra* note 26, at 9.

<sup>198</sup> Shaffer, *supra* note 20, at 6.

<sup>199</sup> Angene Wilson, *Good News about AIDS-Case Countries: Lesotho, Kenya, Malawi and South Africa* (2004), available at [www.rpcr.org](http://www.rpcr.org).

<sup>200</sup> Ochieng and Majanja, *supra* note 26, at 15.

<sup>201</sup> *Id.*

<sup>202</sup> Shaffer, *supra* note 20, at 13.

shown this statistically, where rich complainants are far more likely to get respondents to concede than are poor complainants.<sup>203</sup>

International aid, AIDS medication, and food aid have all been threatened to be removed by powerful WTO Members as a means of coercing developing countries into refraining from bringing a dispute<sup>204</sup> or taking certain positions in the DSU negotiations.<sup>205</sup> Brazil was able in *US – Cotton*, given its size and relative strength compared to most developing countries, to resist threats by the US during consultations of having its aid removed, and yet even later, after trade retaliation in the sum of US\$3 billion was authorised in favour of Brazil, the US threatened to remove US\$2 billion worth of trade preferences.<sup>206</sup> If Brazil can eventually coerce the US to comply with the cotton ruling, which in keeping with the MFN principle will be multilateralised, African countries stand to gain the most. A 2006 World Bank Report indicated that liberalising the cotton market would impact the global economy positively by over US\$283 million, more than half of which benefit would go to African countries.<sup>207</sup>

The reality is also that African Member governments do not give WTO matters high priority. Many African Member governments have far more pressing and urgent priorities than trade, and where priority is to be given to

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<sup>203</sup> Busch and Reinhardt, *supra* note 20, at 731.

<sup>204</sup> Mr Manyara of Kenya referred to the threat of international aid being removed being prevalent not only in dispute consultations but even in negotiations, saying that ‘if you take a hard line they threaten you with this’: interview on 24 July 2006 with Mr Elijah Manyara, Deputy Director, Department of External Trade, Ministry of Trade and Industry, Kenya. *See also* Schaffer, who reported on the threat by the US to remove food aid from one African Member if it brought a WTO complaint over its cotton subsidies, and a threat to remove funding to combat the AIDS epidemic if another African failed to accept its AGOA package within an unreasonably short time period: Shaffer, *supra* note 60, at 16.

<sup>205</sup> Mosoti, *supra* note 20, at 80, footnote 47.

<sup>206</sup> *See, Cross-retaliation in Cotton and FSC Compliance*, BRIDGES, Year 9 No. 9, September – October 2005, 10, available at [www.ictsd.org/monthly/index.htm](http://www.ictsd.org/monthly/index.htm). Also, BBC reported that the US Deputy Secretary of State Robert Zoellick threatened that there is always a danger that ‘things start to slip out of control’ and ‘if one decides to retaliate, who knows, maybe others will too’: *US-Brazil rift on cotton depend*, BBC NEWS, 7 October 2005, available at <http://news.bbc.co.uk/1/hi/business/4317846.stm>.

<sup>207</sup> Referred to in *Proposed Modalities for Cotton Under the Mandate of the Hong Kong Ministerial declaration*, WTO Sub-Committee on Cotton, TN/AG/SCC/GEN/4, para 12.

trade, it is more likely to negotiations than disputes.<sup>208</sup> Also, for some WTO Members such as Botswana, for whom monopoly-based diamond mining accounts for a third of GDP and 70-80 per cent of export earnings, there was for a long time little belief in needing to participate in WTO negotiations.<sup>209</sup> Botswana Institute for Development Policy Analysis (BIDPA) says the renewed interest in the WTO is due to the fact that diamonds are capital intensive and do not contribute much to employment rates, and because of the erosion of preferences to the EC.<sup>210</sup> Similarly most of the SACU members had little individual engagement with the WTO, because South Africa set the external tariffs for all SACU members. When South Africa negotiated an FTA with the EU this was a *de facto* agreement with all SACU member states.

There is no easy answer to questions of politics and priority. Political considerations affect the decision of even the most powerful WTO Members when it comes to bringing a dispute. Even the 'United States' of Africa, South Africa, would not bring a dispute, according to Brink, even if it were provided a substantial proportion of the necessary resources and capacity by industry, because the government's priority is negotiating a free trade agreement with China.<sup>211</sup> Even in Australia, a decision was made not to raise a dispute in relation to Japan's measures on rice for fear of the ramifications this would have on Australia's beef exports to Japan. Perhaps the African Members should just engage in a sort of 'actionless action', to use the Taoist concept, whereby they do nothing but achieve some outcome. For example, without bringing a complaint against the US over the cotton subsidies, the Cotton Four (Benin, Mali, Chad and Burkina Faso) has benefited in the Doha round through achieving a commitment for faster and deeper reductions in trade-distorting domestic subsidies to cotton than the general schedules for domestic farm subsidies.<sup>212</sup>

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<sup>208</sup> Mosoti, *supra* note 2 at 453. Take for example Rwanda, which has one representative in Geneva to cover both negotiations and disputes. Their main priorities are GATS and Development, not disputes: Interview with Ms Basemera Peace, then Acting Director of Trade and Industry of the Ministry of Commerce, Industry, Investment, Promotion, Tourism and Cooperatives, Rwanda in Kigali on 2 August 2006.

<sup>209</sup> Mbekeani, *supra* note 151, at 2, quoting an advisory in the Ministry of Trade, Botswana.

<sup>210</sup> *Id.*

<sup>211</sup> Brink, *supra* note 141, at 13.

<sup>212</sup> Ken Heydon, *After the WTO Hong Kong Ministerial Meeting: What is at Stake?*, OECD Trade Policy Working Paper No. 27 (2006), at 4.

This is not to say that no attempt should be made to address the fourth barrier. Politics can be positively harnessed through the application of normative pressure by other WTO Members against those that use bullying tactics in relation to the weaker WTO Members. What is proposed here is a rule against variations in international aid and trade preferences for the period of the dispute and two years beyond it, with payments to be no lower than the average paid and granted in the five years prior to the dispute being brought. Alternatively, perhaps the ACWL could be given a public interest advocacy role, whereby it could bring an action as complainant in its own right for breach of the DSU against non-compliant Members. For this to occur, the rules of standing under the DSU would require amendment.

It is overall an issue of development to move from reactive to proactive governance, and development is itself a broad issue. The absence of trade on the broader development agenda in some African Members, such as Malawi<sup>213</sup> and Uganda,<sup>214</sup> is of concern and needs to be addressed. Also needing to be addressed is the serious supply side constraints that most African WTO Members face. The Monterrey Consensus, an agreement to broaden and strengthen the participation of developing and transition countries in international economic decision-making and norm-setting, stressed that for many developing countries, particularly the poorest, which rely on a few commodity products, there is also a supply-side problem which manifests itself in a lack of capacity to diversify exports, a vulnerability to price fluctuations and a steady decline in terms of trade'.<sup>215</sup> African Members need investment to raise agricultural productivity and encourage diversification, trade-related infrastructure and competitive export industries. Africa is not currently attractive for international trade because the markets are small and landlocked, transportation costs are higher and less reliable than in other regions, and the continent is highly fragmented with poor governance in some countries, making the risks of doing business there higher for international players. Perhaps African countries should not be wasting their scarce resources on the WTO DSM, but instead should be focusing on enhancing market access

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<sup>213</sup> Kandiero, *supra* note 9 at 3.

<sup>214</sup> Rudaheranwa and Atingi-Ego, *supra* note 78, at 6.

<sup>215</sup> Kofi Annan, *In larger freedom: towards development, security and human rights for all*, Report of the Secretary-General to the UN GA, UN Doc A/59/2005, 21 March 2005, para 56.

and removing supply-side constraints.<sup>216</sup> Once trade volumes are larger, so may be the priority of the DSM to them. Also, if the Doha Development Agenda ever achieves the objectives set out,<sup>217</sup> this may also change the future of African involvement in the DSM.

#### IV. Efforts in DSU negotiations to date

The Doha mandate for trade negotiations includes improvements and clarifications of the DSU.<sup>218</sup> African WTO Members have largely acted through the African Group in making submissions in the DSU negotiations to date. They share similar proposals to those of developing countries more generally, including:<sup>219</sup>

- Improved application of Article 27.2 of the DSU through increasing the number of consultants, setting up an independent legal unit within or outside the WTO Secretariat, appointing a permanent defence counsel, or establishing special arrangements with private lawyers, applying the criteria that the strict requirement of impartiality of the Secretariat be relaxed and that the resources be adequate to assist developing countries during all phases of the process;
- Reducing the timeframes for dispute settlement involving developing countries through making the 1966 procedures compulsory;
- Expanding Article 22 of the DSU to provide for compensation for losses experienced by developing country Members bringing a dispute against developed country members; and also to provide for joint retaliation or mandatory rulings rather than recommendations the violating measure be removed;

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<sup>216</sup> Kessie and Addo, *supra* note 49.

<sup>217</sup> Paragraph 44 of the Doha Ministerial Declaration specifies the mandate of the Doha negotiations regarding SDT provisions. See a proposed *Framework Agreement on Special and Differential Treatment*, WT/GC/W/442.

<sup>218</sup> Doha Ministerial Declaration, WTO/MIN(01)/DEC/1, § 30, 20 November 2001.

<sup>219</sup> South Centre, *Issues regarding the review of the WTO Dispute Settlement Mechanism*, Trade-related Agenda, Development and Equity (TRADE) Working Paper 1, February 1999, available at <http://www.southcentre.org/publications/workingpapers/wp01.pdf>.

- Implementing and strengthening provisions on SDT;
- Clarifying third party rights to eliminate the need for them to have trade interests to join disputes;
- Minimising abuse of process by major players through issue of costs orders against unsuccessful developed country complainants;<sup>220</sup> and
- Limitation in panel and Appellate Body activism through clear mandates.

Additionally, there have been six proposals from African countries in the DSU negotiations,<sup>221</sup> which were prepared with the assistance of NGOs.<sup>222</sup> The African Group proposal from September 2002<sup>223</sup> gives a comprehensive discussion of all the issues, which include, in addition to the above:

- A proposed tax on member contributions to create permanent standing fund which developing Members can access for bringing and responding to disputes;
- Introduction of damages calculated from the commencement of the dispute;
- Prevention of acceptance of unrequested information, that is *amicus curiae* briefs, by WTO adjudicatory bodies; and
- Replacement of consensus decision making in the Appellate Body with the provision of majority and minority decisions.

Despite the comprehensiveness of the African Group proposal, its contents have been largely ignored – the Chairman’s text of 16 May 2003 did not

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<sup>220</sup> This is to reduce frivolous cases, or repeated cases brought on the same grounds, see for example *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/D579 and *Argentina – Measures Affecting Textiles and Clothing*, WT/D577, both brought by the EC.

<sup>221</sup> See Kenya’s proposal TN/DS/W/42; a joint proposal TN/DS/W/15; proposal by LDC Group TN/DS/W/17; TN/DS/W/18; TN/DS/W/19 and *see also* TN/DS/W/42.

<sup>222</sup> For example the Agency for International Trade Information and Cooperation (AITIC), the International Centre for Trade and Sustainable Development (ICTSD), and the South Centre.

<sup>223</sup> WTO Doc. TN/DS/W/15, adopted 25 September 2002.

include most of the issues the African Group raised. According to Ng'ong'ola, the African proposals have no underlying philosophy on what type of DSM would best suit African interests.<sup>224</sup> Certainly the proposal did read as a 'shopping list' rather than a comprehensive, concerted plan of action.

## V. Recommendations

A large number of recommendations have been made herein, and the following table seeks to categorise them as systemic (based in the DSM itself), macro issues, or state-based, micro issues (and something African Members can work upon). It also makes an assessment of the feasibility of achieving the outcome and the likely challenges involved.

No	Recommendation	Type	Assessment
1	Embed a system of legal aid, likely through ACWL	Systemic	Entirely reasonable and achievable through pressure on main dispute players such as US and EC to contribute to ACWL
2	Encourage and facilitate pro bono contribution of legal services	Neither	Already signs of this happening, can give greater WTO publicity to pro bono involvement by private firms
3	Instigate a small claims procedure for disputes involving trade volumes of \$10 million per annum or less	Systemic	May be difficult, because small amount in dispute does not necessarily mean less complex issues are raised

<sup>224</sup> Clement Ng'ong'ola, *Africa's Contributions to Dispute Settlement Negotiations in the World Trade Organization: An Appraisal*, Southern Africa Trade Research Network, Working Paper No. 8, February 2004, 4.

4	Finalise and publicise model laws in the area of trade remedies	Systemic	If the WTO Secretariat liaises with UNCITRAL, basic level model laws should be feasible, and if it is clearly explained that they are simply a model, it will not affect the member-driven nature of the organisation
5	Expand the information available via the WTO website on support for developing countries	Systemic	Easily achieved – there are a great many worthwhile initiatives out there, and providing a development portal on the WTO website can help raise awareness of them
6	Enhance the capacity of regional trading blocs in Africa to act as regional hubs for WTO expertise	State-based	Depends on African Members' willingness to work together, with the support of funding, to develop regional hubs of expertise in lieu of local development of expertise
7	Encourage secondments between African ministries, particularly trade and justice ministries	State-based	This can be achieved at any time using a simple swap arrangement, for periods of six to 12 months with salaries being paid by home ministries
8	Facilitate secondments with other country trade ministries as a way of cross-fertilisation of ideas and expertise	State-based	This can be arranged by African Members, with some support for living expenses from the host ministry



9	Provide in the DSU that developed countries can bring an action on behalf of a developing country as a form of international aid, or by NGOs/ACWL acting in a public interest advocacy role	Systemic	Unlikely to be favoured, but consistent nonetheless with the notion that all Members have a substantial interest in compliance
10	Place caps on the length of panel and Appellate Body reports of 10,000 words, and increase the incidence of brief case study reporting	Systemic	Caps are likely to be resisted by panels and the Appellate Body; case study reporting already done on WTO website, can just promote more
11	Arrange a WTO Master in International Trade Law taught by distance under agreements with Universities around the world	Systemic or State-based	There is nothing to stop individual Members negotiating for a trade qualification funded through foreign aid, but African Members want a course that is accredited by a well known institution and so a WTO-accredited degree would be preferred, with involved institutions providing teaching on a pro bono basis
12	Continue initiatives for technical assistance in the area of trade data gathering and analysis	State-based	Achievable with time and resources, and technology transfer

13	Work to address supply side constraints, particularly around infrastructure such as power, roads and ports, but also human capital through education and health	State-based	Enormous task which will take many years and is unlikely to be achieved unless the agreed 0.7 per cent Official Development Assistance (ODA) figures are reached as agreed
14	Create a piggyback process, whereby from the expiry of reasonable time period for implementation, other affected Members can obtain compensation with only proving harm and otherwise relying on the findings of the panel in the original dispute	Systemic	Need to address erroneous criticism that would create a form of precedent; likely to receive significant resistance by the larger players
15	Develop best practice, streamlined models for liaison by the trade ministry with industry and civil society organisations	State-based	Achievable – processes are in place in many Members, and a study could devise a best practice model for implementation without a great deal of work
16	Provide for interim measures of protection pending dispute determination – for example, cessation of the disputed measure	Systemic	Likely to face significant resistance from major players

17	Allow for collective retaliation of authorised trade sanctions, through the sale of, or donation of, retaliation rights to larger players	Systemic	A significant change to the DSU which is likely to receive resistance and, even if implemented, may not be taken up by developed country Members
18	Allow rich Industrialised Members to buy-out compliance upon paying compensation to affected parties equivalent to the harm suffered by them for the non-compliance	Systemic	Already happening informally, being politically sold as aid rather than compensation
19	Require that international aid sums be maintained during any dispute involving an aid recipient Member, and for five years after dispute proceedings have been concluded	Systemic	Aid is discretionary and economic circumstances of donors and recipients can change, so this is likely to be resisted by donor Members
20	Address the issue of tariff escalation, which can encourage export of raw materials rather than establishing processing facilities in African Member countries	Systemic	Likely to be caught up in the general quagmire that is the Doha Round negotiations

## VI. Concluding Remarks

Despite the WTO DSM being broadly successful in its place as the ‘Jewel in the Crown’ of the multilateral trading system, it is considered to have failed African Members,<sup>225</sup> and some go so far as to say that it puts the entire integrity of the system in jeopardy.<sup>226</sup> It is unfortunate that WTO law does not presently give weaker countries the same protection that many domestic legal systems afford their weaker citizens.<sup>227</sup> The result is that African WTO Members are ‘neither fully integrated into nor integrating into the multilateral trading system’.<sup>228</sup> There are no perfect or easy solutions. Barriers to access are major, cumulative, and are both systemic and state-based. Some action can be taken to improve access, and *ad hoc* efforts are already being made. Negotiations for amendment to the DSU, as part of Doha Round, provide an excellent opportunity to address these barriers, although the delays currently being experienced despite the DSU negotiations being outside the single agreement concept, give cause for significant concern.

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<sup>225</sup> Shahin, *supra* note 109, at 2. Cf Benin’s view of the DSM as a kind of economic democracy at the multilateral level that, although being arduous and long, enables countries with limited resources to have their trade interests protected and preserved: Omichessan, *supra* note 44, at 3.

<sup>226</sup> Jan Bohanes, *Cost-sharing in International Dispute Settlement* (2002), available at [www.tralac.org](http://www.tralac.org).

<sup>227</sup> Hudec, *supra* note 166.

<sup>228</sup> Marongwe, *supra* note 20.