

# African Countries and the WTO Negotiations on the Dispute Settlement Understanding

by

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## I. Introduction

The dispute settlement system of the World Trade Organization (WTO) is recognised as one of the central pillars of the multilateral trading system. The credibility of the WTO owes much to its ability to enforce the commitments entered into by its Members. In fact, Article 3.2 of the Dispute Settlement Understanding (DSU) provides that the dispute settlement system is a central element in providing security and predictability to the multilateral trading system. Its uniqueness in the system prompted WTO Members to specifically exclude the DSU negotiations from the single undertaking<sup>1</sup>. They were of the firm belief that a strengthened and effective dispute settlement would be beneficial for all Members and that it would be inappropriate to make linkages with other negotiating issues. Increasingly, the frequency with which a Member has recourse to the dispute settlement mechanism is partly being used to determine the extent of its participation in the multilateral trading system. A look at the statistics reveals that it is mostly the leading trading nations which are making extensive use of the dispute settlement system. African countries and least-developed countries have rarely made use of the WTO dispute settlement system, even though other developing countries, particular those in Asia and Latin America are increasingly making use of it.<sup>2</sup>

The situation under the GATT was no different. African and other developing countries, including those which are now making use of the WTO dispute settlement system, hardly made use of the GATT dispute settlement system. As a group, developing countries accounted for less than 10 per cent of the cases initiated by the GATT contracting parties.<sup>3</sup> The lack of use of the dispute settlement system by African and other developing countries and its structural weaknesses, including the lack of precise time-limits and the ability of countries to block the establishment of panels and prevent the adoption of panel reports, made the reform of the dispute settlement system one of the priorities during the Uruguay Round. To a large extent, the negotiators achieved their objectives. The DSU introduced fixed time-limits for almost all the stages in the process and, most importantly, circumscribed the right of Members to block the establishment of panels or the adoption of panel reports. Under the new system, Members can exercise this right only when there is a consensus against the establishment of a panel or the adoption of a panel report or an Appellate Body report.

Since the new dispute settlement system went into force in January 1995, there has been an unprecedented number of cases initiated by Members. As of September 2006, WTO Members had requested consultations in three-hundred and forty-eight cases leading to the establishment of 142 panels and the adoption of 102 reports by the Dispute Settlement Body (DSB). The increase in the

number of cases could be interpreted as a sign of confidence in the new dispute settlement system by WTO Members, especially considering that developing countries as a group account for nearly 40 per

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<sup>1</sup> Paragraph 47 of the Doha Ministerial Declaration. WT/MIN(01)/DEC/1; 20 November 2001.

<sup>2</sup> It should be noted, however, that some leading trading nations such as Singapore, Chinese Taipei and Hong Kong, China have not made extensive use of the dispute settlement system.. The only least-developed country to have requested consultations under the DSU is Bangladesh in the case on *India – Antidumping Measures on Batteries from Bangladesh*, WT/DS306.

<sup>3</sup> See GATT, GATT Activities 1991: An Annual Review of the work of the GATT (Geneva: GATT July 1992) p.50.

cent of this figure.<sup>4</sup> It could also be interpreted that Members have become more protectionist since the implementation of the WTO Agreement in January 1995. In other words, the sharp increase in the number of disputes should not be confused with confidence in the dispute settlement mechanism. It could also well be that the more automatic procedures and the relatively easy access to the dispute settlement mechanism have encouraged Members to initiate cases under the DSU. Whereas this view may be plausible, the high number of cases which have been settled "out-of-court" coupled with the decisions that have been handed down by Panels and the Appellate Body seem to suggest that Members have generally not initiated frivolous cases.<sup>5</sup>

From an institutional perspective, however, what may be important is the general satisfaction with the operation of the DSU. In other words, whether or not Members have become more protectionist after the implementation of the WTO Agreement is not that important, as the DSU has effectively acted as a bulwark against such protectionist tendencies. With the exception of a few cases where implementation has been delayed, almost all the complaints have been satisfactorily resolved either through the WTO system or through bilateral negotiations between the parties. Generally, WTO Members seem to be content with the operation of the DSU, insofar as it has reduced significantly the threat of unilateralism in international trade relations and established a rules-based system in which economic and political power have become largely irrelevant in determining the outcome of disputes.<sup>6</sup>

Notwithstanding the improvement in the WTO rules and procedures for the settlement of disputes, African countries have complained that because of their lack of expertise in WTO matters, high legal costs and other impediments, they have not been able to take full advantage of the improved rules and procedures to enforce their rights under the WTO Agreement. A cursory glance at the cases which have been initiated since the WTO came into force reveals that it is mostly the bigger and the relatively advanced developing countries such as Argentina, Brazil, Chile, India and Thailand which have been involved in the process either as complainants or respondents. It cannot even be taken for granted that these countries have the requisite knowledge and skill in prosecuting or defending cases. It is common knowledge that some of them retain established law firms or the Advisory Centre on WTO Law to represent them in WTO proceedings. To date, African countries which have participated in the dispute settlement process have done so only as third parties and not as complainants.<sup>7</sup> A limited number of cases have been initiated against Egypt and South Africa<sup>8</sup>.

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<sup>4</sup> Lacarte-Muro and Gappah, "Developing Countries and the WTO legal and Dispute Settlement System: A View from the Bench, JIEL (2000) p.395

<sup>5</sup> As at 15 September 2006, 102 panel and 66 Appellate Body reports had been adopted by the Dispute Settlement Body. Mutually agreed solutions had been reached in about 70 cases.

<sup>6</sup>In *European Communities – Measures Affecting Trade in Commercial Vessels*, WT/DS301, the Panel stated that: "...based on an interpretation of Article 23.1 of the DSU in accordance with the ordinary meaning of its terms in their context and in light of the object and purpose of the provision, that the obligation to have recourse to the DSU when Members 'seek the redress of a violation...' covers any act of a Member in response to what it considers to be a violation of a WTO obligation by another Member whereby that first Member attempts unilaterally to restore the balance of rights and obligations by seeking the removal of the WTO-inconsistent measure, by seeking compensation from that Member, or by suspending concessions or obligations under the WTO Agreement in relation to that Member.": para 7.207 at p.126.

<sup>7</sup>In *EC – Bananas*, WT/DS27, Cameroon, Cote d'Ivoire, Ghana and Senegal participated as third parties with a view to safeguarding their preferences under the EC's banana regime. In *EC – Export Subsidies on Sugar*, WT/DS265/266/283, Cote d'Ivoire, Kenya, Madagascar, Malawi, Mauritius, Swaziland and Tanzania participated as third parties to defend their preferences under the Sugar protocol. In *US – Subsidies on Upland Cotton*, WT/DS267, Benin and Chad participated as third parties given the importance of cotton to their economies. In *EC – Asbestos*, WT/DS135, Zimbabwe participated as a third party because of its broader export interest in asbestos. In *US – Shrimp*, WT/DS58, Nigeria and Senegal participated as third parties because of their export interest in shrimps.

<sup>8</sup>The two African countries which are relatively active are Egypt and South Africa, which happen to have Africa's biggest economies. Two cases have been initiated against South Africa, namely *South Africa – Anti-Dumping Duties on the Import of Certain Pharmaceutical Products from India*, WT/DS168 and *South Africa – Definitive Anti-Dumping Measures on Blanketing from Turkey*, WT/DS288. Four cases have been initiated against Egypt, namely *Egypt – Import Prohibition on Canned Tuna with Soyabean Oil*, WT/DS205; *Egypt – Definitive Anti-Dumping Duties on Steel Rebar from Turkey*, WT/DS211, *Egypt – Measures Affecting Imports of Textile and Apparel Products*, WT/DS305 and *Egypt – Anti-dumping*

For the large number of African countries which cannot probably afford the services of international law firms or are not members of the Advisory Centre on WTO Law, the only options open to them are to seek bilateral negotiated settlements with the opposing parties, abandon any potential claims that they may have, or seek assistance under Article 27.2 of the DSU which relevantly provides that the WTO Secretariat shall make available "a qualified legal expert...to any developing country Member which so requests. This expert shall assist...in a manner ensuring the continued impartiality of the Secretariat". Pursuant to this provision, the WTO Secretariat has recruited two part-time consultants to assist developing countries which may want to have recourse to the DSU.

While these experts have done their best to accommodate all requests, a number of African and other developing countries have questioned the depth of the assistance provided by them. Due to the lack of adequate resources and the proviso that the "impartiality of the Secretariat" should be upheld at all times, important constraints have been placed on the sort of assistance that could be provided to developing-country Members. At the pre-Panel/Appellate Body stage, the assistance rendered so far has basically involved making preliminary informal determinations as to the chances of a Member successfully initiating or defending a case. At the Panel/Appellate Body stage, the assistance has mainly consisted of commenting on the submissions prepared by a Member's team of lawyers and responding to queries on an *ad-hoc* basis.

For a significant number of African countries, especially those not conversant with GATT/WTO jurisprudence, the assistance provided by the WTO Secretariat is woefully inadequate. They expect the legal experts to be more proactive in the sense of being involved in all the stages of the process. They expect them to draft their submissions to the Panel/Appellate Body and respond to any queries or questions that may be posed by the Panel/Appellate Body, the parties or third parties. While, in principle, this would be the optimal assistance that could be provided by the WTO Secretariat, it has been ruled out for the reason given above.

In the face of this limitation, the crucial issue is what can be done to strengthen the capacity of African countries to make use of the WTO dispute settlement mechanism to safeguard and promote their interests in the multilateral trading system. In the current DSU negotiations, African countries have been quite active and tabled far-ranging proposals with a view to increasing their access to the system and also to obtain favourable rules in the DSU to safeguard and promote their interests.<sup>9</sup> The purpose of this paper is to examine these proposals and assess whether, if adopted, they would increase the participation of African countries in the dispute settlement system.

The paper is divided into five sections. The second section examines some of the reasons why African countries have not been making use of the dispute settlement system and considers the possible consequences for African countries for not participating in the development of jurisprudence which would partly define the rights and obligations of Members. The third section examines systemic issues raised by African countries, including the scope of the interpretative powers of the General Council, and also proposals relating to the pre-panel phase. This section considers whether it would be in the interest of African countries if the consultative process was strengthened and whether the present time-frame for consultations is adequate from their perspective. The fourth section examines proposals tabled by African countries relating to the panel and Appellate Body phase. It considers among other things whether African countries should press for enhanced third party rights as reflected in the Chairman's text of 28 May 2003 and the feasibility of the proposal relating to the

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*Duties on Matches from Pakistan*, WT/DS327. Egypt participated as a third party in *EC – Bed Linen*, WT/DS 141 and *EC – Provisional Steel Safeguards*, WT/DS260.

<sup>9</sup> See document TN/DS/W/42. Other proposals considered are the following: Submission of the African Group to the Special Session of the Dispute Settlement Body (TN/DS/W/15, 25 September 2002); Submission of the African Group to the Special Session of the Committee on Trade and Development (TN/CTD/W/3/Rev.2; 17 July 2002) and the Responses of the African Group to questions posed by other Members (JOB (03)/55; 10 March 2003).

involvement of other institutions such as UNCTAD in the dispute settlement process. The fifth section examines proposals relating to the implementation phase, including those on financial compensation and collective retaliation. The paper concludes with some summary observations.

## **II. Possible reasons for Africa's low involvement in the dispute settlement process and its consequences**

There are several possible reasons why African countries have not been making use of the dispute settlement system of the WTO to enforce their rights and legitimate expectations. These include the share of African countries in world trade, which was estimated last year to be around 2 per cent by the WTO. With this low figure, it may be argued that it is not surprising that African countries are not making use of the dispute settlement system. They export mostly a few commodities and the priority for them is to remove supply-side constraints which have prevented them from increasing and diversifying their exports. While this argument may be persuasive, it ignores the fact that African countries do often complain about their exports being subject routinely to arbitrary non-tariff measures such as sanitary and phytosanitary measures, technical regulations and standards and overly stringent rules of origin. More importantly, should the barriers to their exports remain, they would eventually find it difficult to increase and diversify their exports.

It has also been suggested that African countries do not have an incentive to institute proceedings at the WTO given the fact that most of their exports receive preferential treatment in their major export markets – the European Communities and the United States. These preferences are non-reciprocal and could be revoked at any time by the preference-giving country without providing any reasons. Some African countries may entertain the fear that initiating actions at the WTO might irritate their major trading partners and put at risk the preferences which they so much depend on. Associated with this reason is the fact that most African countries depend on their major trading partners for budgetary support. With the value of their trade so small and sometimes far less than the Official Development Assistance (ODA) they receive from donor countries, it would make economic sense to continue receiving support from donor governments rather than to initiate actions at the WTO which might not result in increased export earnings. It has been further suggested that traditional African culture has always exhorted the value of settling disputes through mediation and conciliation as opposed to litigation which is perceived as an antagonistic procedure likely to damage relations between countries.

Another possible reason is related to the lack of expertise and resources to engage international law firms to represent them in dispute settlement proceedings. The Trade Ministries of most African countries are inadequately staffed and several do not even have trained international trade lawyers. While the WTO has tried to address this problem by providing training to African trade officials in line with Article 27.2 of the DSU, the impact has not been very significant. For a start, the duration of the dispute settlement courses is too short; they are usually held over four to five days. With the growing complexity of WTO Agreements and the case law, more time would be needed to build the capacity of African trade officials, especially where the officials have not had any prior exposure to international trade law. Also, there ought to be follow-up courses to keep the trained officials abreast of developments in WTO law.

A complicating factor in building and strengthening the capacity of African trade officials is the high turnover of staff in developing-country administrations. People who obtain knowledge about the WTO and its dispute settlement system are likely to be lured away by the private sector which can offer far more attractive salaries than that offered by the government. The point has been made that it would be far more cost-efficient for African countries to engage international law firms or the Advisory Centre on WTO Law in the isolated cases they may be involved in in the future, rather than to expend resources training and retaining full-time trade lawyers who may never actually have the

opportunity to practise their art. It would appear that in most African countries, the Trade Ministries are staffed by many economists and a few lawyers, probably reflecting this view.

Another related problem is the prohibitive rates charged by international law firms. Given that very few African countries are members of the Advisory Centre on WTO Law, those which are not may have no option other than to seek the services of international law firms which are usually based in Brussels or Washington.<sup>10</sup> According to Gregory Shaffer, the typical hourly rate charged by these firms is US\$600. He also asserts that "[l]awyers for Kodak and Fuji in the Japan-Photographic Film case respectively charged their clients fees in excess of US\$10 million". For a number of African and poor developing countries, it would simply not make economic sense for them to spend such huge amounts when the total value of their export of a particular product may not significantly be in excess of the legal fees they would be charged.

Unlike many developed or advanced developing countries, where there is a strong partnership between government and industry, in most African countries such partnerships are tenuous at best. It is known that in countries such as Brazil and India, which are among the most active users of the dispute settlement system, the private sector routinely pays the legal fees of international law firms to represent their interests in WTO dispute settlement proceedings. There is also the complicating factor that there are no proper institutional structures or mechanisms in place detailing the procedures to be followed if exporters should encounter any market access problems in foreign markets.

A further reason may be the uncertainty whether the responding Member would faithfully implement the DSB's recommendations and rulings within the reasonable period of time either fixed by an arbitrator pursuant to Article 21.3(c) of the DSU or mutually agreed between the parties or approved by the DSB. As a guideline, the reasonable period of time shall normally not exceed fifteen months from the date of adoption of the report by the DSB. For many African countries which rely on a few export products and markets, this could prove excessive considering the weak state of their industries. Unless, the industry facing barriers is able to find new markets during the period of implementation of the DSB's recommendations and rulings, there is the possibility that it could cease to exist. Given this uncertainty, many African countries prefer to settle disputes through consultations, the advantages being that it is less expensive and could produce results much more quickly. It has also been suggested that there are less incentives for African countries to resort to dispute settlement considering that they cannot effectively retaliate against a Member which fails to implement the DSB's recommendations and rulings.

It is clear from the foregoing that there are a number of factors which account for the non-utilization of the dispute settlement system by African countries to enforce their rights and legitimate expectations under the WTO Agreement. The question is whether by not participating in the dispute settlement mechanism, African countries are losing the opportunity to contribute to the development of jurisprudence by panels and the Appellate Body. It may be argued that Africa has other priorities and should not waste scarce resources on dispute settlement. Priority should be given to enhancing market access and removing supply-side constraints, which have prevented them from diversifying their exports and markets. That dispute settlement would only become relevant when Africa has the goods and services to sell in global markets.

While African countries have been relatively active in the DSU negotiations, they have been much more active in the negotiations on agriculture and non-agricultural market access. This would appear to endorse the view that they attach more importance to market access than to dispute settlement. Winning cases through the WTO dispute settlement system would not necessarily ensure market access, as the responding Member may have some difficulties in implementing the DSB's

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<sup>10</sup>Only three African countries are members of the Advisory Centre on WTO Law, namely Egypt, Kenya and Mauritius. Least-Developed Countries can, however, avail themselves of the services provided by the Centre.

recommendations or rulings. In fact, it could potentially have the opposite effect when the complaining Member has to suspend equivalent concessions or other obligations following the lack of implementation or an agreement on a compensatory package.

Presumably, the reason why African countries are focusing more on the market access negotiations is because they want to ensure that any agreements reached are cast in tight language to prevent future disputes. Their experience with current special and differential treatment (SDT) provisions in the WTO Agreements has reinforced their belief in legal certainty. Many of the SDT provisions are cast in hortatory language and have failed to deliver the market access that African and other developing countries expected. Past attempts to use dispute settlement to enforce the provisions of Part IV of the GATT did not yield any positive results.<sup>11</sup> The wide differences in the views of developed countries and those of developing countries on the scope of paragraph 44 of the Doha Ministerial Declaration and the resulting failure to make significant progress in reviewing and strengthening SDT provisions have also convinced African and other developing countries to focus more on market access issues in the current round of negotiations.

On the other hand, it has been argued that by failing to participate in the dispute settlement system, African countries are losing the opportunity to contribute to the shaping of "international trade principles and jurisprudence that will govern multilateral trade relations for years to come".<sup>12</sup> While participation in the dispute settlement system is important, we do not believe that Africa's trade interests have been prejudiced by its limited involvement in the dispute settlement process. The objective of the dispute settlement system of the WTO is not to create new legal principles that would define or regulate multilateral trade relationships between countries, but to assist the parties to find a solution to their dispute. While it is conceivable that in discharging this role, panels and the Appellate Body might adopt an interpretation which may be at odds with treaty language and thereby indirectly create new obligations, the instances of that happening are very limited. Indeed, Article 3.2 of the DSU makes it clear that the purpose of dispute settlement is to preserve the rights and obligations of Members under the covered agreements and that the recommendations and rulings of the DSB could not add to or diminish the rights and obligations provided in the covered agreements.

WTO Members have jealously guarded their rights and have not hesitated to criticise the Appellate Body anytime that they feel that it has strayed from its terms of reference and adopted an interpretation which would upset the balance of rights and obligations carefully crafted during the Uruguay Round. In *EC- Asbestos*, where the Appellate Body broadly interpreted Article 13 of the DSU relating to its right to receive unsolicited *amicus curiae* briefs, WTO Members convened a special meeting of the General Council to discuss what they saw as judicial activism on the part of the Appellate Body. The representative of Turkey noted that:

"The DSU did not empower the Appellate Body to decide on such a crucial issue ... [T]he Appellate Body should have foreseen to a certain extent the reactions its decision would provoke. Article 13 of the DSU did not give a discretionary power to the Appellate Body. The absence of rules concerning *amicus* briefs did not give a free hand to the Appellate Body but showed the limits of its authority as well as the limits

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<sup>11</sup> In *United Kingdom – Dollar Area Quotas*, the argument by the United Kingdom that it was maintaining trade restrictions to further the interests of certain Caribbean countries was rejected by the Panel. In *Norway – Restrictions on Imports of Certain Textile Products*, the argument by Norway that its restrictions on the export of textile products by Hong Kong, China and its preferential treatment of exports from six developing countries were justified by Part IV of the GATT was rejected by the Panel.

<sup>12</sup> Mosoti Victor, "Does Africa need the WTO Dispute Settlement System", ICTSD, 2003 and "Africa in the First Decade of WTO Dispute Settlement", *Journal of International Economic Law*, 9(2), pp 457-453, 2006.

of the system. The Appellate Body should have informed members of the need for new rules instead of elaborating on them."<sup>13</sup>

Similar concerns about the additional procedure adopted by the Appellate Body to accept *amicus* briefs were expressed by other delegations, including Jamaica:

"[Jamaica] was concerned that with its decision, the Appellate Body had expanded access and the rights of non-Members to the dispute settlement process and, by corollary, had diminished members' rights in this critical area of the WTO activities. The Appellate Body had taken this decision without any legislative mandate that could reasonably be construed as a basis to do so ... The Uruguay Round Agreements were a delicate balance of rights and obligations, and the Appellate Body was a part of that balance. In carrying out its functions, the Appellate Body should act with full regard for legislative authority and for the substantive and procedural rights of Members".<sup>14</sup>

In *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products: Recourse to Article 21.5 of the DSU by New Zealand and the United States*,<sup>15</sup> some Members expressed concern about the interpretation of Article 9.1(c) by the Appellate Body:

"[T]here were several aspects of the analysis in the Appellate Body Report that ... should be of concern to other Members from a systemic standpoint. First, and most disturbing, was the new test that the Appellate Body had read into the text of the Agreement on Agriculture for purposes of determining whether a "payment" existed under Article 9.1(c) of that Agreement. The Appellate Body had stated that to determine whether a "payment" existed, one had to compare the price of the good to the "proper value" of the good, and for the Appellate Body, "proper value" meant the cost of production of the good. Cost of production appeared nowhere in the text of the Agreement on Agriculture, nor was it clear why "proper value", which itself was a term that did not appear in the Agreement on Agriculture equated to cost of production. There were several questions raised by the Appellate Body's reliance on the cost of production. Cost of production was not a general benchmark under the WTO. The Appellate Body had rejected the use of any market price as representing the proper value of a good. It was odd that the WTO would not consider the market as being a good indicator of the value of goods ... There was nothing in the Agreement on Agriculture to suggest that Members had agreed that the cost of production for a private party, not even a government entity, would be relevant in determining whether another private party was receiving a "payment" under Article 9.1(c) of the Agreement on Agriculture. Just as a practical matter, it struck the United States as a particularly unworkable standard given that most Members would not have access to a private party's cost of production data."<sup>16</sup>

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<sup>13</sup> WT/GC/M/60; 23 January 2001, para. 79, p.20. See further the *United States – Final Dumping Determination on Softwood Lumber from Canada: Recourse to Article 21.5 of the DSU by Canada*, where the United States expressed serious concerns and disappointment with the reasoning of the Appellate Body in this case: WT/DSB/M/219; 6 October 2006, paras 65-77 at pp 17-20. See also United States criticism of the Appellate Body's report in the case on *United States – Laws, Regulations and Methodology for calculating Dumping Margins*, WT/DS294.

<sup>14</sup> WT/GC/M/60; 23 January 2001, para. 89, p.23.

<sup>15</sup> WT/DS103/RW and WT/DS103/AB/RW; WT/DS113/RW and WT/DS113/AB/RW.

<sup>16</sup> WT/DSB/M/116; 31 January 2002, paras 33-34 at p.8.

These cases prove that WTO Members fearlessly defend their rights and obligations and that the Appellate Body has little room to manoeuvre. Indeed, the Appellate Body itself has alluded to the fact that its functions are circumscribed and it does not have the authority to make law. In *United States – Wool Shirts and Blouses*, the Appellate Body held that:

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

It should also be borne in mind that the principle of *stare decisis* is not embedded in the *DSU* meaning that panels do not necessarily have to follow the decisions of other panels or the Appellate Body in subsequent cases. The facts of cases may at times be similar, but there are bound to be some differences underscoring the need for each case to be decided on its own merits. While the arguments of the parties to the dispute and those of third parties might influence the thinking of panels and the Appellate Body on certain issues, ultimately it is the treaty language which is decisive. By focusing more on the market access issues and insisting on tight legal language to reflect the agreed rules and capture the concessions that would be traded among Members, it could be said that the strategy of African countries is the appropriate one. Not only would it assist them to increase their exports and diversify their markets, but also in the event of disagreement, they are likely to prevail as panels and the Appellate Body would give effect to the ordinary meaning of the terms of the agreement reached by the Members in accordance with the Vienna Convention on the Law of Treaties.

In summary, it cannot be disputed that it would be in the interests of African countries if they started participating in the dispute settlement mechanism to enforce their rights and legitimate expectations, whenever necessary. However, there is no clear evidence to suggest that non-participation in the system in the past has been damaging to their trade interests. Arguably, some of their exports might have been impeded as a result of unauthorised barriers, but the greater majority of African exports enter their major markets unhindered. The greatest obstacle to the integration of African countries in the multilateral trading system is the existence of numerous supply-side constraints which have prevented them from increasing and diversifying their exports to take advantage of the preferences under schemes such as the African Growth and Opportunity Act (AGOA) and the Cotonou Agreement. In that regard, African countries need to adopt consistent policies which would ensure micro and macro-economic stability and pave the way for sustainable growth and development. The international community must be supportive by increasing aid for trade and improving access for products of export interest to African countries.

African countries realize the importance of the dispute settlement system, hence the submission of detailed proposals to the Special Session of the Dispute Settlement Body to facilitate greater access and ensure the reaping of tangible benefits from the system. To achieve this objective in the medium to long term, it would be advisable for African countries to participate as third parties as often as possible in many disputes so as to become acquainted with the rules and procedures both at the panel and the Appellate Body stages.<sup>17</sup> Since joining the WTO in December 2001, China has participated in almost every case as a third party with a view to building its capacity in WTO dispute

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<sup>17</sup>It should be noted that participating as a third party could also be expensive if the Member chooses to engage private counsel to represent it in the proceedings. However, the costs should generally be less than participating as complainants or respondents, especially where the third party only addresses issues of direct relevance to it.

settlement. The European Communities and the United States as a matter of routine participate in all cases not directly involving them as third parties.

### **III. Proposals of Systemic Importance and those Relating to the Pre-Panel Phase**

#### **III:1 Issues of Systemic Importance**

It is the proposal of African countries that where there is a conflict between provisions of any covered Agreement or between any covered Agreements, "the panel or Appellate Body shall refer the matter to the General Council for a determination. In reaching the determination, the General Council may exercise the authority conferred under paragraph 2 of Article IX of the WTO Agreement". This proposal was discussed in the Special Session, but it failed to attract broad support among the membership. Among the concerns expressed were that it would lengthen the process and also put panels and the Appellate Body in a straitjacket, as they could not apply established conflict rules to resolve disputes. In the past, panels and the Appellate Body have been able to resolve such situations of conflict without referring the matter to the General Council. They have adopted an approach that had permitted them to interpret the provisions in a harmonious manner. In *Korea – Dairy*, the Appellate Body observed that:

In light of the interpretive principle of effectiveness, it is the *duty* of any treaty interpreter to "read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously." An important corollary of this principle is that a treaty should be interpreted as a whole, and, in particular, its sections and parts should be read as a whole. Article II:2 of the *WTO Agreement* expressly manifests the intention of the Uruguay Round negotiators that the provisions of the *WTO Agreement* and the Multilateral Trade Agreements included in its Annexes 1, 2 and 3 must be read as a whole.

There was the concern that the adoption of this proposal would politicise the dispute settlement process and create unnecessary tensions. Under Article IX:2 of the WTO Agreement, the General Council can adopt authoritative interpretations by a three-fourths majority. This opens up the possibility that the majority can push through an interpretation which is at odds with the treaty language. Panels and the Appellate Body might find it difficult to apply the majority's interpretation if it was not in sync with their overall reasoning in the case. In light of these objections, the African Group's proposal was not reflected in the Chairman's proposal of 28 May 2003.

#### **III.2 Consultations Phase**

The basic issue is whether the consultations phase should be strengthened. Some WTO Members seem to be of the view that countries use the consultations phase to drag out the process and that there is usually no commitment to genuinely engage in good faith to resolve the dispute. This view is countered by those who believe that consultations play an indispensable role in the process and saves not only time but resources of the WTO and the parties engaged in the dispute. At the DSB meeting on 20 June 2005, the representative of Chile informed the DSB that it was withdrawing its consultations request in the case on *European Communities - Definitive Safeguard Measure on Salmon*, following the decision by the European Communities to remove the safeguard measures. She said that this case demonstrated that it was not always necessary for cases to go to the panel stage. African countries tend to share this view given their lack of expertise and inadequate financial resources to go through all the phases of the dispute settlement system. They have therefore advocated for a strengthening of the consultations provisions in the DSU.

### **III.2.1 Request to be joined in consultations**

African countries have proposed an amendment to the DSU, so that requests by least-developed and developing countries to participate in consultations would always be accommodated. Under the current rules, Members do not have an automatic right to participate in consultations, especially when they were requested under Article XXIII of the GATT 1994. While countries can easily join in consultations requested under Article XXII of the GATT 1994, they need to make their request within 10 days after the date of the circulation of the request and demonstrate that they have a "substantial trade interest" in the case. A number of countries have had their requests to participate in consultations rejected either because their request was not made within 10 days of the circulation of the request or they could not demonstrate that they had a "substantial trade interest" in the case.

There is the view among developing countries that the DSU is quite vague and gives too much discretion to the responding Member to decide whether or not a country has a "substantial trade interest". The DSU does not define the term "substantial trade interest" leaving it to countries to apply their own criteria. It has also been said that the Article is not consistent as it refers both to "substantial trade interest" and "substantial interest". It is not known if the terms are interchangeable, and if they are not, how each should be interpreted. Under GATT practice in the market access area, a country would be considered as having a "substantial interest" in a product if its market share constituted 10 per cent or more of total trade. It is not clear if this benchmark has any relevance as far as the test under Article 4.11 of the DSU is concerned. While Article 4.11 recognises the right of a country whose request to join in the consultations has been refused to request new consultations in respect of a matter, it has hardly been made use of by developing countries, including African countries for a number of reasons, such as the lack of resources and expertise. Participating in consultations with other countries gives developing countries an opportunity to build capacity and know first-hand how the system operates.

The main reason given by countries which oppose an automatic right to be joined in consultations is that it would lengthen the process, especially where there are many interested countries and also diminish the ability of the parties to reach mutually agreed solutions. They stress that the purpose of the WTO dispute settlement system is to settle a dispute between the disputing parties and that while the interests of other countries may be important, they are not such as to supplant the primary objective of the system. There can be no doubt that African and other developing countries would greatly benefit from flexible rules in this area. The challenge therefore seems to be how to find an appropriate balance between the interests of developing countries and that of the parties to the dispute. It should be pointed out that the Chairman's text virtually maintained the status quo; countries wishing to be joined in consultations would need to demonstrate that they have a "substantial trade interest" in the matter. In a recent proposal, Argentina, Brazil, Canada, India, Mexico, New Zealand and Norway have proposed an "all or nothing" approach, under which the responding Member could choose either to reject or accept all requests to be joined in the consultations under Article XXII of the GATT 1994.<sup>18</sup>

### **III.2.2 Time-frame for consultations**

Although this issue was not directly addressed by the African Group, it would appear that they are in support of maintaining the current time-frame, which allows the parties to consult for sixty days, after which a request for the establishment of a panel could be made assuming that the consultations fail to settle the dispute between them. Some developed countries want the time-frame to be reduced from sixty to thirty days. They argue that thirty days is enough if the parties are really interested in

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<sup>18</sup> TN/DS/M/23; 26 May 2005, paras 2-3 at pp 1-2.

finding a solution to their dispute. The view of several developing countries is that given their lack of financial and human resources, they need a longer time-frame to engage in fruitful consultations.

### **III.2.3 Demonstration that the special interests of developing countries have been taken into account**

The proposal by the African Group to the Committee on Trade and Development provides that:

"in the proceedings developed-country Members shall present evidence of, and in the written decisions, the panels and the Appellate Body shall indicate, how special attention has been given to particular problems and interests of developing country Members during the stage of consultations".<sup>19</sup>

This proposal in effect combines the language of Articles 4.10 and 12.11 of the DSU. The concern of African and other developing countries is that the present language in Article 4.10 is very weak. It uses the word "should" instead of "shall", thus imposing no legal obligation on developed countries to give special attention to the particular problems and interests of developing-country Members. The Chairman's text proposes a tightening up of the language in the article by replacing "should" with "shall". This proposal was not received enthusiastically by other developing countries, who pointed out that what was needed was rather operationalization of the Article in terms of establishing detailed procedures which have to be followed by developed-country Members. It was not enough for a developed-country to merely assert that it had taken into account the interests of the developing-country Member, and later decide to pursue the case by requesting the establishment of a panel to examine the consistency of the measures of the developing-country member with a covered agreement. It is the expectation of African countries that this proposal would oblige developed countries to engage in good faith consultations with them, instead of treating consultations as a mere perfunctory exercise.

### **III.2.4 Measures withdrawn before, or in the course, of consultations**

African countries are proposing that Article 3.6 of the DSU should be amended by re-numbering the current provision as paragraph (a) and adding the following paragraphs:

(b) Developed-country Members that adopt measures against developing or least-developed country Members and withdraw them in the course of consultations or 90 days before the commencement of consultations pursuant to Article 4 of this Understanding shall notify them individually or jointly to the DSB within 60 days of their withdrawal. The notification shall, describe the measure and the reason or circumstances for the withdrawal, state whether consultations were held and finalised, and indicate the amount of injury to the developing or least-developed country Member resulting from the measure. Disputes over the amount of injury may be referred to arbitration under Article 25 of this Understanding.

(c) Where injury has resulted from the withdrawn measure, and if the developing or least-developed country Member so requests, the DSB may recommend monetary and any other appropriate compensation taking into account the nature of injury suffered. The level of compensation shall be determined by arbitration in accordance with Article 25 of this Understanding and shall be implemented *mutatis mutandis* in accordance with Articles 21 and 22.

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<sup>19</sup> TN/CTD/W/3/Rev.2; 17 July 2002.

(d) The requests referred to in paragraph (c) may be made at the meeting of the DSB considering the notification of the withdrawn measures or subsequently within a period of 60 days, unless there are exceptional circumstances justifying the consideration of the request at a later date.

The underlying reason for this proposal seems to be that African and other developing countries should not suffer any damage as a result of inconsistent measures adopted by a developed-country Member, which are later withdrawn either before the commencement or during consultations between the parties. For African countries which do not have competitive industries, the mere imposition of trade-restrictive measures could have devastating consequences on the industry affected. Depending on the length of time the measures are implemented, some industries may not survive. Thus, the mere withdrawal of the measures might not be enough. It is in this sense that African countries are seeking retroactive compensation. It should be noted that Mexico has made a similar proposal.

When this proposal was discussed in the Special Session, it received very little support. While some Members were sympathetic to the underlying reasons behind this proposal, others thought that it would introduce a very fundamental change to the way the DSU has operated since its inception. For these countries, the mandate of the Special Session was restricted to making improvements and clarifications and that the proposed amendment by African countries was clearly not within the ambit of the mandate. Apart from this philosophical debate, the proposal may raise some practical problems. First, it would be difficult to convince some developing countries that the proposal should be applicable only when the responding Member is a developed country. A country whose industry has suffered irreparable damage would like to be compensated by the country which has adopted the WTO-inconsistent irrespective of its status as a developed or a developing country. Exempting developing countries from the application of this measure would send a bad signal that it is okay for developing countries to adopt trade-restrictive measures against each other. The increasing number of disputes between developing countries suggests that such a decision would be at odds with the current thinking and practice of several developing countries.

Second, it is difficult to understand why the parties should make an elaborate notification to the DSB when the measure is withdrawn before consultations under the DSU take place. Third, unless a joint notification was made by both parties, it would be difficult to expect the developed-country Member to acknowledge in its notification that the measure that it adopted was in violation of its WTO obligations and that it had caused injury to a developing-country Member. Fourth, the level of compensation need not be determined by arbitration. While arbitration could be resorted to when the parties are in disagreement as to the amount of level of nullification and impairment, compensation in WTO law is always voluntary and a party could not be mandated to provide compensation.

#### **IV. Proposals Relating to the Panel and Appellate Body Phase**

##### **IV.1 Development Perspective in the Terms of Reference of Panels**

African countries are proposing that Article 7 of the DSU concerning the terms of reference of panels should be amended by adding paragraphs 4 and 5 as follows:

4. Where a developing or least-developed country Member is a party to any dispute under this Understanding, the panels, in consultation with relevant development institutions where necessary, shall consider and make specific findings on the development implications of the issues raised in the dispute and shall specifically consider any adverse impact that findings may have on the social and economic welfare of the developing or least-developed country Member. The DSB shall fully take those findings into account in making its recommendations and rulings.

5. This Understanding is an important mechanism for achieving the development objectives of the WTO Agreement. Accordingly, the findings of the panels and the Appellate Body, and the recommendations and rulings of the DSB shall fully take into account the development needs of developing and least-developed country Members. The General Council shall review this Understanding every five years in order to consider and adopt appropriate improvements to ensure the achievement of the development objectives of the WTO Agreement.

This proposal received very little support when it was discussed in the Special Session and was not reflected in the Chairman's text. A number of concerns were raised by Members. There was the view that it would hamper the work of panels and delay the dispute settlement process. It was also stated this proposal would divert panellists from their primary function which was to settle trade disputes in accordance with the agreements reached by WTO Members. By virtue of their background, several panellists may not be well-equipped to undertake such socio-economic analyses. There was the fear that involvement of institutions such as UNCTAD, UNDP and ILO would politicize the dispute settlement process and undermine its rules-based nature much to the detriment of all Members.

While the International Monetary Fund has a role to play in Article XV of the GATT 1994 in relation to balance of payments, what is being proposed by African countries goes further than that. If carried to its logical conclusion, this proposal would oblige panels, for example, to ignore WTO rules when it is adjudged by the relevant development institutions that the withdrawal of an inconsistent WTO measure by a developing country Member would harm its country's socio-economic interests. Such a ruling would not inspire confidence in the dispute settlement system and compromise its role as a central element in guaranteeing security and predictability to the multilateral trading system.

## **IV.2 Third Parties**

### **IV.2.1 Definition of "Substantial Interest"**

As previously noted, the DSU does not define the term "substantial interest" nor does it provide useful guidance on how it may be interpreted. As a result of this omission, countries apply different criteria, with some countries insisting on a higher threshold. Some countries insist on countries having at least a 10 per cent market share in accordance with GATT practice. For African countries, a higher threshold would not be in their interest given the fact that their share in most products in their major markets are below 5 per cent. It is against this background that African countries have proposed the following definition to be added to the existing paragraph 2 of Article 10 of the DSU:

"For purposes of developing and least-developed country Members, the term "substantial interest" shall be interpreted to include, any amount of international trade; trade impact on major domestic macro-economic indicators such as employment, national income, and foreign exchange reserves; the gaining of expertise in the procedural, substantive, and systemic issues relating to this Understanding; and protecting long-term development interests that any measures inconsistent with covered agreements and any findings, recommendations and rulings could affect".

This proposed definition was rejected by the major trading partners who thought that it would make the participation of all developing countries automatic regardless of whether or not they have a substantial interest in the matter. The apprehension is that if you have too many countries participating as third parties, it could lengthen the dispute settlement process and also make it difficult

for the parties to explore the possibility of reaching a mutually agreed solution. The Chairman's text leans in favour of requesting countries seeking third party rights to have a substantial interest in the case. From a practical point of view, it is doubtful if this proposal would substantially change the current practice. Members which request third party rights at the DSB meeting at which a panel is established are automatically granted third party rights, so are Members which communicate their interest within 10 days of the establishment of the panel.

#### **IV.2.2 Access to Meetings and Documentation**

The African Group proposes that paragraph 3 of Article 10 of the DSU should be replaced with the following language:

"Third parties shall receive all the documentation relating to the dispute from the parties, other third parties, and the panel without prejudice to the provisions of paragraph 2 of Article 18. Third parties, if they request, shall have a right to attend the proceedings and to be availed the opportunity to put written and oral questions to the parties and other third parties during the proceedings."

In the discussions in the Special Session, there was a broad consensus on the need to enhance the third-party rights, particularly in terms of improving access to meetings and documentation. The Chairman's text reflects the views of Members on this issue by providing that third parties shall be entitled to receive all submissions of the parties and of other third parties, except those portions containing privileged information, up until the issuance of the interim report to the parties. The submissions of third parties shall be made available to the parties, other third parties and the panel, and they shall be entitled to attend all substantive meetings of the panel with the parties preceding the issuance of the interim report, except those meetings or portions thereof, where privileged information would be discussed. The text further provides that third parties shall have the opportunity to be heard by the panel and also their submissions shall be reflected in the panel report. They shall be entitled to receive the descriptive part of the report containing their arguments and be able to provide comments within the period specified by the panel. In some respects, the Chairman's text goes further than the proposal by the African Group. A recent proposal by the group of seven countries also recommended an enhancement of third party along the lines in the Chairman's text.<sup>20</sup>

#### **IV.2.3 Third Participants in Appellate Body proceedings**

The proposal by the African Group advocates the replacement of Article 17.4 with the following language:

"The parties to the dispute may appeal a panel report. Third parties in the panel proceedings, if they request, shall have a right to attend the proceedings and have an opportunity to be heard and to make written submissions to the Appellate Body. Their submissions shall also be given to the parties to the dispute and shall be reflected in the Appellate Body report."

The language in the Chairman's text does not differ significantly from the proposal by the African Group. Under the Chairman's text, it is stated explicitly that third parties which had notified the DSB of their substantial interest in a matter pursuant to Article 10.2 of the DSU "shall have an opportunity to be heard and make written submissions to the Appellate Body". The text goes further in proposing that a Member which had not notified its substantial interest in a matter pursuant to Article 10.2, but had subsequently notified the DSB and the Appellate Body of its substantial interest

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<sup>20</sup> TN/DS/M/23; 26 May 2005, para. 4 at p.2.

in a matter within 10 days of the filing of a notice of appeal, shall also have an opportunity to be heard and to make written submissions to the Appellate Body.

While this proposal was supported by a significant number of developing countries, including African countries, the view was expressed that it could delay the proceedings at the Appellate level, especially where there were many Members interested in participating in the proceedings. The argument was made that the primary function of the dispute settlement system was to resolve disputes between the parties in a prompt and satisfactory manner. The counter-argument advanced was that some Members may only become aware of the systemic implications of a case after the panel report had been circulated and that it would be unfair to exclude them from the process when their interests would be affected. Given the wide differences in the views of Members, consensus could not be reached on the Chairman's proposal. In their recent proposal, the group of seven countries expressed support for the Chairman's proposal, *albeit* indirectly by urging that Members which did not participate as third parties in the panel proceedings should be allowed to participate as third parties at the appellate stage:

"Given the systemic interest in issues considered at the appellate stage and the interest of members to make their views known, there was no valid reason for denying them that opportunity. Additionally, amending Article 17.4 of the DSU to incorporate the right of members to join as third parties at the appeal stage would allow Members with limited resources to participate in the process. They would not have to participate in the panel proceedings before they could be allowed to participate in the appellate proceedings".<sup>21</sup>

This proposal has two key advantages for African countries. First, it would help build and strengthen the capacity of African countries in this highly complex area. Having the opportunity to participate as third parties in both panel and Appellate Body proceedings would let them know first-hand how the system works. The experience that would be acquired would become very handy, once African countries start participating actively in the dispute settlement system

#### **IV.3 Composition of Panels**

The African Group and the LDC Group have proposed that in disputes involving a developing country or a least-developed country, one of the panellists should come from a developing country or a least-developed country, as the case may be. The reason behind this proposal seems to be that a panellist from a developing country or a least-developed country is likely to show greater appreciation of the prevailing conditions in the developing or least-developed country and the arguments presented to the Panel than a panellist from a developed country. The other argument is that the selection of panellists from developing countries helps to build and strengthen their capacity to participate more effectively in the dispute settlement system.

While it may be true that panellists from developing countries are likely to show greater appreciation of the prevailing conditions in the developing or least-developed country and the arguments presented by it to the Panel than a panellist from a developed country, it is doubtful if this would influence the eventual outcome of the dispute. The rules of the WTO cannot be ignored in order to give a favourable decision to the developing-country Member. The interests of developing countries would be better guaranteed under the relevant WTO Agreements rather than under the DSU. If there is a mandatory special and differential treatment provision in a WTO Agreement, the panel or the Appellate Body would have no option but to take due account of it regardless of whether one or more of the panellists are from developed or developing countries.

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<sup>21</sup> *Ibid*, para. 5 at pp 2-3.

Furthermore, the argument that panellists from developing countries help build and strengthen the capacity of developing countries in WTO dispute settlement is not entirely persuasive. Several of the panellists who have been appointed from developing countries do not have any government affiliation and as such it is difficult to see in which way they could be said to be contributing to the building and strengthening of a country's capacity to participate in the dispute settlement system. Some credence could be given to this argument if the panellists were later to advise their governments. Furthermore, there seems to be a pattern of selecting panellists from a few developing countries. In the case of Africa, most of the panellists have come from either Egypt or South Africa. Thus, it is inaccurate to argue that these panellists are helping to build the capacity of African countries. In any event, what African countries need is sustained training and continued exposure in order for them to build capacity in this area.

The African Group have not expressed any definite views on the proposal by the EC for a system of permanent panellists. Africa's interests could be safeguarded under the proposed system if the method of selection of the panellists is as transparent as the method for selecting Appellate Body members. Depending on the total number of panellists who will be appointed, the different regions of Africa could each have a representative.

#### **IV.4 Scope of Article 13 of the DSU**

African countries propose that Article 13 of the DSU should be amended by adding the following as paragraph 3:

3. "For purposes of this Article, "the right to seek information and technical advice" shall not be construed as a requirement to receive unsolicited information or technical advice."

It is clear from the formulation that African countries want panels and the Appellate Body to give a very narrow interpretation of Article 13 of the DSU. Put in another way, they want the judicial bodies to exercise restraint and reverse their earlier rulings permitting NGOs, IGOs and other bodies to submit *amicus curiae* briefs. The discussion of this issue was polarised in the Special Session with a significant number of developing countries criticising panels and the Appellate Body for exceeding their authority and adopting a very flexible interpretation of this article. This view was not shared by developed countries who seemed to be of the view that it was within the rights of panels and the Appellate Body to make such determinations. If the discussions in the Special Session offer a clue, it would be difficult for consensus to be achieved on this proposal. It should be mentioned that India and a group of other developing countries have tabled a similar proposal.

#### **IV.5 Separate Opinions of Panellists and Appellate Body members**

The African Group has proposed that panellists and members of the Appellate Body should each deliver a separate opinion, unless they are in agreement. With this in view, the Group has called for the replacement of Articles 14.3 and 17.11 with the following language:

"[Each panellist [Appellate Body member] shall deliver a fully reasoned, separate written opinion stating clearly the party which has prevailed in the dispute. Where two or more [panellists] [members] are in agreement, they may decide to provide a joint opinion. The majority opinion shall be the decision of the [panel] [Appellate Body].]"

This proposal was strongly opposed by several Members in the Special Session. They argued that it would undermine the authority of the Appellate Body and the collegiality which currently exists among its members enabling them to work together effectively and efficiently. The argument is also made that it is necessary to preserve the anonymity of panellists and Appellate Body members. A

further reason is that under the current rules and procedures, it is possible for a panellist or an Appellate Body member to write a separate opinion and that no purpose would be served by specifying this in the DSU. It is recalled in that in the recent *EU-GSP* case, one panellist wrote a separate opinion on one of the issues under consideration.

It is the view of African countries that while it is true that under the current system, it is possible for a panellist or a member of the Appellate Body to write a separate opinion, the whole system is structured in a such a way as to discourage the issuance of separate opinions. African countries do not share the view that separate opinions would undermine the credibility of the dispute settlement system. Insofar as the decisions are well-reasoned, they could actually enhance the credibility of panels and the Appellate Body.

## **V. The Implementation Phase**

### **V.1 Development Perspective in the Implementation of Recommendations and Rulings**

The African Group has proposed that Article 21.2 of the DSU should be amended by adding the following:

"In this regard, notwithstanding any finding of inconsistency of measures with a covered agreement, the DSB, if requested by the developing-country Member and fully taking into account the findings of the panel or Appellate Body, as well as the reports of relevant development institutions where appropriate, on the development implications of the issues raised in the dispute, may recommend arbitration in accordance with Article 25 for purposes of drawing up an adjustment programme under which the developing-country Member will gradually implement the recommendations and rulings."

This proposal failed to attract broad support when it was discussed in the Special Session. The view was expressed that it would undermine security and predictability, as its sole objective is to delay the implementation of the recommendations and rulings of the DSB. It should be noted that in determining the reasonable period of time for the implementation of the DSB's recommendations and rulings, arbitrators have in the past taken into account the special situation of developing countries. In *Indonesia - Autos*, the arbitrator, for example, noted that:

"Indonesia is not only a developing country, it is a developing country that is currently in dire economic and financial situation. Indonesia itself states that its economy is "near collapse". In these very peculiar circumstances, I consider it appropriate to give full weight to matters affecting the interests of Indonesia as a developing country pursuant to the provisions of Article 21.2 of the DSU. I, therefore, conclude that an additional period of six months over and above the six-month period required for the completion of Indonesia's domestic rule making process constitutes a reasonable period of time for implementation of the recommendations and rulings of the DSB in this case."<sup>22</sup>

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<sup>22</sup> *Indonesia – Certain Measures Affecting the Automobile Industry*, Award of the Arbitrator, WT/DS54/15, para. 24 at p10.

## **V.2 Monetary Compensation and Computation of Injury**

The African Group has proposed the amendment of Article 21.8 of the DSU by adding the following:

"Further, if the case is one brought by a developing-country Member against a developed-country member, the DSB may recommend monetary and other appropriate compensation taking into account the injury suffered. The quantification of injury and compensation shall be computed as from the date of the adoption of the measure found to be inconsistent with covered agreements until the date of its withdrawal."

This proposal did not attract broad support when it was discussed in the Special Session. A number of countries were concerned that it would fundamentally alter the way the DSU operates by introducing retroactivity into the system. There was also some uneasiness about introducing monetary compensation into the system. It must be pointed out that while compensation has predominantly taken the form of reducing barriers on products of export interest to the prevailing Member, there was at least in one case (US – Copyright), where the parties agreed on a financial package. It should be noted that the facts of this case were quite unique and it should not be taken as a precedent for future cases.

In the GATT/WTO, compensation has always been voluntary and it can be expected that the greater majority of Members would like it to remain that way. Operationally, it would be difficult for the DSB to come to a consensus decision on this issue, assuming if the principle was accepted by Members. It is likely that some Members would question why injury and compensation should be calculated from the date of the adoption of the measure and not the date of the establishment of the panel or the date of the adoption of the panel report. If injury and compensation were to be calculated from the date of the adoption of the measure, it could lead to "unjust enrichment", especially where there was no trade to the responding Member prior to the initiation of the action or if exports only commenced some years after the introduction of the measure.

## **V.3 Collective Enforcement of Recommendations and Rulings**

The African Group has proposed that Article 22.6 of the DSU should be amended by renaming the current provision as paragraph (a) and adding the following paragraphs (b), (c) and (d) to it:

(b) "The following principles and procedures shall apply to requests for collective suspension of concessions under paragraph (c):

(i) Before making such a request, the developing or least-developed country Member shall refer the matter to arbitration for determination of the level of nullification and impairment, which shall be done taking into account the legitimate expectations of the developing or least-developed country Member. The arbitration shall further take into account any impediment to the attainment of the development objectives of the WTO Agreement as further elaborated by the developing or least-developed country Member.

(ii) The arbitration shall consider whether suspension of concessions or other obligations in other sectors by the developing or least-developed country Member would be appropriate to effectively encourage the withdrawal of the measure found to be inconsistent with a covered Agreement, taking into account possible effects on that developing or least-developed country Member.

(iii) Where the DSB grants authorisation to Members to suspend concessions or other obligations under paragraph (c), the level of suspension for each Member authorized shall be such as to secure, full compensation for the injury to the developing or least-developed country Member, the protection of its development interests, and the timely and effective implementation of the recommendations and rulings.

(c) Where the case is one brought by a developing or least-developed country Member against a developed-country Member and the situation described in paragraph 2 occurs, and in order to promote the timely and effective implementation of recommendations and rulings, the DSB, upon request, shall grant authorization to the developing or least-developed country Member and any other Members to suspend concessions or other obligations within 30 days.

(d) The DSB shall review the operation of paragraph 6 of this Article not later than five years after its implementation with a view to ensuring its effectiveness and in this regard may adopt appropriate measures and amendments to this Understanding.

This proposal failed to attract broad support when it was discussed in the Special Session. The view was expressed that it would fundamentally alter the DSU in several respects. It was pointed out in that connection that the primary function of the dispute settlement system was to settle disputes between the disputing Members. While other Members may have a systemic interest in a particular case, they should not have the right to take action reserved exclusively for the parties to the dispute. This point was stressed by Poland during the discussion on the Mexican proposal under which Members would be able to negotiate their right to suspend concessions and other obligations to other Members:

"The introduction of this concept to the DSU would be an unfortunate development for at least three reasons. First, it would undermine one of the basic tenets of the dispute settlement system and the multilateral trading system, which was that the rights of Members should be protected under multilateral surveillance and that it was up to each and every Member to ensure that its rights and legitimate expectations were not being impaired or nullified. Second, if Members were able to negotiate away the remedies that they were entitled to, it might discourage parties from negotiating seriously to find mutually agreed solutions to their disputes, which was also one of the objectives of the dispute settlement system. Third, it would diminish transparency of the system, as the surveillance powers of the DSB would be severely compromised."

It is a cardinal principle of WTO law that suspension of concessions must be equivalent to the level of nullification and impairment. It follows that if collective retaliation is to be accepted, it would deprive this principle of its practical significance. From the view point of African and other small and weak developing countries, retaliation has to be massive and disproportional to the level of nullification and impairment if it is to be effective and induce compliance. The underlying reasons of the African proposal are twofold. The first is to bring maximum pressure on the developed country Member to implement as rapidly as possible the recommendations and rulings of the DSB. The second is an attempt to deal with the incapacity of most developing countries to retaliate. It would be recalled that in the *Bananas* case, Ecuador chose not to retaliate against the European Union, although it had been given authorization by the DSB. It realized that retaliatory action would be ineffective in terms of compelling the European Union to implement the recommendations and rulings of the DSB and that it would also harm its own economy. While a number of Members were sympathetic to these reasons, they still thought that this proposal was too "revolutionary" and impracticable to implement.

## **V.4 Responsibilities of the Secretariat**

### **V.4.1 Disclosure of information to developing country Members**

The African Group has proposed that Article 27.1 of the DSU should be amended by adding the following:

"The Secretariat shall provide all relevant legal, historical and procedural research and other material relating to a dispute to the developing and least-developed country Members that are parties or third parties in the dispute. The material shall cover the specific rights and obligations relating to the particular issues raised in the dispute."

This proposal failed to attract broad support when it was discussed in the Special Session explaining its omission from the Chairman's text. The view was expressed that it would not be appropriate for the Secretariat to hand over confidential documents pertaining to the case to a party to the dispute.

### **V.4.2 Legal Assistance in Dispute Settlement**

The African Group has proposed that Article 27.2 of the DSU should be amended by adding the following:

"The Secretariat shall maintain a geographically balanced roster of legal experts from which developing and least-developed country Members may select experts to assist them in dispute settlement proceedings. Notwithstanding the reference to impartiality in the provision of legal and other services by the Secretariat, the legal expert shall fully discharge the functions of counsel to the developing or least-developed country Member party to a dispute."

A number of countries were supportive of this proposal when it was discussed in the Special Session. The Chairman's text partially reflects this proposal. The view was expressed that with the establishment of the Advisory Centre on WTO, it was not necessary to pursue further this proposal. While it is true that the Advisory Centre has filled a vacuum, it still charges for the services that it renders to developing-country Members depending on their state of economic development and ability to pay. African and other developing countries want to have the legal services rendered at no cost. Should donor countries increase funding for the Centre to enable it to provide its services at no cost to African countries, there may not be enough grounds to pursue this proposal. Until that is done, African countries should keep this proposal on the table.

### **V.4.3 WTO Fund on Dispute Settlement**

The African Group has proposed the introduction of a new Article 28 in the DSU:

1. "There shall be a fund on dispute settlement to facilitate the effective utilization by developing and least-developed country Members of this Understanding in the settlement of disputes arising from the covered agreements.
2. The fund established under paragraph 1 of this Article shall be financed from the regular WTO budget. However, to ensure its adequacy, the fund may additionally be funded from extra-budgetary sources, which may include voluntary contributions from Members.

3. The General Council shall annually review the adequacy and utilization of the fund with a view to improving its effectiveness and in this regard may adopt appropriate measures and amendments to this Understanding."

Varying degrees of support were expressed for this proposal when it was discussed in the Special Session. The Chairman's text partially reflects this proposal. Some concerns were expressed on the funding coming out of the regular budget of the WTO. It is likely that the developed-country Members would like to limit access to this fund, assuming there is a consensus to establish it. They would like the beneficiaries to be least-developed countries and other poor developing countries. There would be the reluctance to fund the legal challenges of advanced developing countries, who have the human and financial resources to participate actively in the system.

## **VI. Concluding remarks**

The active participation of African countries in the negotiations for the reform of the Dispute Settlement Understanding is to be welcomed given the central role played by the system in guaranteeing security and predictability in the multilateral trading system. With a new determination to become active users of the system, it is hoped that African countries would be able to promote and safeguard their interests and legitimate expectations. While some of the proposals of the African Group would strengthen the dispute settlement system in terms of improving access and the remedies, their adoption would not necessarily lead to increased use of the system by African countries.

Effective participation in the dispute settlement system would require African countries in the medium to long term to put in place measures which would strengthen the collaboration between industry and government. It would be helpful to have a dedicated office for trade complaints staffed with qualified people. The office should be non-partisan and should investigate complaints lodged by exporters. Given capacity constraints, African countries could consider pulling their resources together as they have done in the context of the DDA negotiations and establish a joint office to handle their trade disputes with other countries. An optimal result in the long term, however, would be for each country to develop its own capacity given the increasing trade frictions among African countries.

As an interim measure, it would be advisable for African countries to participate as third parties in as many cases as possible and use the services of the Advisory Centre on WTO Law and other international law firms which are willing to take cases on a *pro bono* basis or at discounted rates.

While greater use of the dispute settlement system by African countries should be encouraged, it is to be noted that the greatest obstacles to the integration of African countries in the multilateral trading system are supply-side constraints which have impeded their efforts to increase and diversify their exports. There is no evidence on record to demonstrate that the limited use of the dispute settlement system has been damaging to the export interests of African countries. In fact, the bulk of African exports enter their major markets unhindered under preferential conditions. Priorities for African countries in the DDA negotiations appear to be the safeguarding of these preferences and the securing of enhanced market access generally for products of export interest to them. They appear to have taken the view that it would be more productive to expend their limited resources on getting cast-iron commitments in their favour rather than litigating on past commitments which are sometimes couched in hortatory language. As African countries increase their share in world trade, it could be expected that they would resort to the dispute settlement system more frequently to protect their rights and legitimate expectations.