



Use of the WTO Dispute Settlement System by LDCs and LICs

Hands-On Introduction and Simulation Exercise

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Introduction

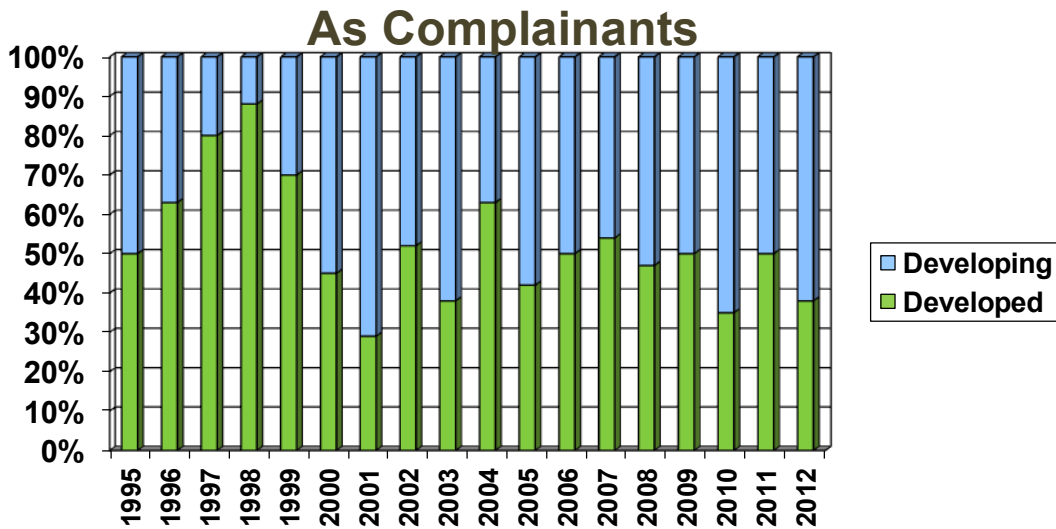
The *Marrakesh Agreement Establishing the World Trade Organization*, commonly referred to as the *WTO Agreement*, and the agreements annexed to it set out many wide-ranging rules concerning international trade in goods, trade in services and trade-related aspects of intellectual property rights. In view of the importance of their impact, economic and otherwise, it is not surprising that WTO Members frequently disagree on the correct interpretation and application of these rules. To resolve the resulting disputes, the WTO has a remarkable dispute settlement system, which is in many respects unique among international dispute settlement systems. Operational for eighteen years now, it has been more prolific than any other international, state-to-state dispute settlement system over the same period. Between 1 January 1995 and 31 December 2012, a total of 454 disputes had been brought to the WTO for resolution.¹ In more than a fifth of the disputes brought to the WTO for resolution, the parties were able to reach an amicable solution through consultations, or the dispute was otherwise resolved without recourse to adjudication. In other disputes, parties have resorted to adjudication. Between 1 January 1995 and 31 December 2012, such adjudication resulted in 183 reports of dispute settlement panels and 109 reports of the Appellate Body. During the same period, the International Court of Justice (ICJ) in The Hague rendered fifty-four judgments and six advisory opinions, and the International Tribunal for the Law of the Sea (ITLOS) in Hamburg rendered sixteen judgments and one advisory opinion.²

The WTO dispute settlement system, hereinafter 'WTO DSS', has been used by developed-country and developing-country Members of the WTO alike. In 2000, 2001, 2003, 2005, 2008, 2010 and 2012, developing-country Members brought more disputes to the WTO for resolution than developed-country Members.³

¹ This refers to the number of requests for consultations notified to the DSB until 31 December 2012. For statistical

² See www.icj-cij.org and www.itlos.org.

³ In 1995, 2006, 2009 and 2011, developing country and developed country Members initiated the same number of cases. From 1996 to 1999, in 2002, 2004 and 2007 developed country Members initiated more cases than developing country Members.



While most disputes are between developed-country Members, developing-country Members have frequently used the WTO DSS to resolve trade disputes between them.⁴ Particularly noteworthy is the successful use of the DSS by very small developing-country Members against the largest among the developed-country Members.⁵ In the WTO system, might is not necessarily right. The most active user of the system has been the United States, closely followed by the European Union. The system has, however, also been used 'against' the United States more often than against any other Member, the European Union being a distant second in this respect. The most active users of the system among developing country Members have been Brazil, Mexico, India, Argentina, Thailand, and in recent years, also China. The most frequent respondents among developing-country Members have been are China, India, Argentina, Brazil and Mexico.

Complainants		Respondents	
United States	105	United States	119
EU	87	EU	73
Canada	33	China	30
Brazil	26	India	22
Mexico	23	Argentina	22
India	21	Canada	17
Argentina	18	Japan	15

⁴ See www.worldtradelaw.net.

⁵ E.g. *US – Gambling (2005)*, a dispute between Antigua and Barbuda (a Caribbean island state with less than 90,000 inhabitants) and the United States.

Japan	17	Brazil	14
Korea	15	Korea	14
Thailand	13	Mexico	14

A number of disputes brought to the WTO DSS have triggered considerable controversy and public debate and have attracted much media attention. This has been the case, for example, for disputes on national legislation for the protection of the environment or public health, such as the *US – Shrimp (1998)* dispute on the US import ban on shrimp harvested with nets that kill sea turtles (complaints by India, Malaysia, Pakistan and Thailand); the *Brazil – Retreaded Tyres (2007)* dispute on a Brazilian ban on the import of retreaded tyres for environmental reasons (complaint by the European Union); the *EC – Approval and Marketing of Biotech Products (2006)* dispute on measures affecting the approval and marketing of genetically modified products in the European Union (complaint by *inter alia* Argentina); the *US – Clove Cigarettes (2012)* dispute concerning a tobacco-control measure taken by the United States that prohibits cigarettes with ‘characterizing flavours’ other than tobacco or menthol (complaint by Indonesia); and the *US – Tuna II (Mexico) (2012)* dispute concerning US regulation on the use of the dolphin-safe label on tuna cans (complaint by Mexico). Also the *EC – Bananas III (1997)* dispute on the European Communities’ preferential import regime for bananas was, for many years, headline news (complaints by *inter alia* Ecuador, Guatemala, Honduras, and Mexico). Note that all the disputes referred to above involved developing country Members as a complainant and/or respondent.

While the WTO DSS has been widely used by developing-country Members and in particular upper-middle and lower-middle income countries, in the past nineteen years it has been used much less by LICs. The predominant user of the WTO DSS among the LICs has been India (when it was still a LIC). Other LICs that have used the system include Bangladesh, Nicaragua, Pakistan and Vietnam, all of which, except Bangladesh, have now graduated to the category of lower-middle income countries. Bangladesh has been the only of the WTO’s 34 LDC Members that ever brought a dispute to the WTO. In 2004, Bangladesh filed a complaint against India on the latter’s imposition of anti-dumping duties on lead acid batteries.⁶ Note that no sub-Saharan African country, whether LIC, LDC or other, has ever used the WTO DSS as a complainant. Only Egypt and South Africa have been respondents in the WTO DSS.⁷

While LIC Members have made very little use of the WTO DSS to date, it should be noted that, with the exception of India, the system has also very seldom been used against them. India has been the respondent in 22 disputes to date. However, apart from India, only two LIC Members have ever been respondents in WTO disputes: Pakistan (2 complaints; by the European Union and the United States) and Nicaragua (2 complaints; by Colombia and Honduras). Note that the

⁶ *India – Anti-Dumping Measures on Batteries*, WT/DS 306 (complaint by Bangladesh). This dispute was settled through bilateral negotiations under Article 4 of the DSU.

⁷ For an early study, see Victor Mosoti, “Does Africa Need the WTO Dispute Settlement System”, 9 *Journal of International Economic Law* 457 (2006)

WTO DSS was never used against any sub-Saharan LIC.⁸ Likewise, the WTO DSS was never used against any LDC Member of the WTO. The involvement of LIC Members and LDC Members in disputes has been limited to involvement as third party in panel proceedings and third participants in Appellate Body proceedings. However, even that involvement was not extensive. Since 1995, Benin, Cameroon, Chad, Cote d'Ivoire, Ghana, Kenya, Madagascar, Malawi, Mauritius, Nigeria, Senegal, Tanzania, and Swaziland have been at least once a third party, but none of them is by any measure a regular third party in WTO dispute settlement proceedings.

This study focuses on the very limited use made to date of the WTO DSS by LICs and LDCs. It is divided in four parts. It aims to offer a practical, hands-on introduction to WTO dispute settlement for officials from LDCs and LICs. *Part 1* gives a general overview of the WTO DSS with special attention for the special and differential treatment 'available' for developing countries when they use the WTO DSS. *Part 2* deals with the challenges and opportunities for LDCs and LICs when the WTO DSS. *Part 3* discusses that the possible regional alternatives to WTO dispute settlement for African LDCs and LICs. *Part 4* deals with strategies for LDCs and LICs to effectively use the WTO DSS. Finally, *Part 5* of this study contains a simulation exercise, which brings out the many problems and issues LDCs and LICs may face when they use the WTO DSS.

Part 1: Overview of the WTO DSS

Part 1 of this study gives a general overview of the WTO DSS. It discusses in turn: (1) the genesis of the WTO DSS; (2) the jurisdiction of and access to the WTO DSS; (3) the key features of WTO dispute settlement; (4) the institutions of WTO dispute settlement; and (5) the process of WTO dispute settlement.⁹

1.1 Genesis of the WTO DSS

The WTO DSS, which has been in operation since 1 January 1995, is not an entirely novel system. On the contrary, this system is based on, and has taken on board, almost fifty years of experience in the resolution of trade disputes in the context of the GATT 1947. The GATT 1947 contained only two brief provisions on dispute settlement (Articles XXII and XXIII), which neither explicitly referred to 'dispute settlement' nor provided for detailed procedures to handle disputes. However, the GATT Contracting Parties 'transformed', in a highly pragmatic manner over a period of five decades, what was initially a rudimentary, power-based system for settling disputes through diplomatic negotiations into an elaborate, rules-based system for settling disputes through adjudication. While for decades quite successful in resolving disputes to the satisfaction of the parties, the GATT dispute settlement had some serious shortcomings

⁸ South Africa is or was a respondent in four disputes to date (DS 168, DS 288, DS 374 and DS 439)

⁹ For a detailed discussion of the WTO DSS, see Chapter 3, *WTO Dispute Settlement*, of P. Van den Bossche & W. Zdouc, *The Law and Policy of the World Trade Organization*, 3rd edition (Cambridge University Press, 2013). The introduction and part 1 of this study are based on that chapter.

which became ever more acute in the course of the 1980s. The most important shortcoming related to the fact that the findings and conclusions of the panels adjudicating disputes only became legally binding when adopted *by consensus* by the GATT Council. The responding party could thus prevent any unfavourable conclusions from becoming legally binding upon it. The WTO DSS, negotiated during the Uruguay Round (1986-1994) and provided for in the *Understanding on Rules and Procedures for the Settlement of Disputes*, commonly referred to as the *Dispute Settlement Understanding* or DSU, remedied this and a number of other shortcomings of the GATT dispute settlement system.¹⁰ The DSU is generally considered to be one of the most important achievements of the Uruguay Round negotiations. Claus-Dieter Ehlermann, a former Appellate Body Member and top EU official, noted in 2003 that the successful negotiation of the DSU is ‘an extraordinary achievement that comes close to a miracle’.¹¹ The WTO DSS is an important further step in that process of progressive ‘judicialisation’ of the settlement of international trade disputes and has features that are quite unique for state-to-state dispute settlement.

1.2 Jurisdiction of and access to the WTO DSS

The jurisdiction of the WTO DSS is compulsory. A responding Member has, as a matter of law, no choice but to accept the jurisdiction of the WTO DSS, when a complaint is brought against it. The jurisdiction is also exclusive. A complaining Member is obliged to bring any dispute arising under the covered agreements to the WTO DSS, rather than another system of dispute settlement. Furthermore the jurisdiction of the WTO DSS is very broad in scope. It covers disputes arising under the *WTO Agreement*, the DSU, the GATT 1994 and the eleven other multilateral agreements on trade in goods, the GATS and the Agreement on Trade Related Aspects of Intellectual Property Rights, the *TRIPS Agreement*, (i.e. the covered agreements). In principle, any act or omission attributable to a WTO Member can be a measure that is subject to WTO dispute settlement. Such measures also include a number of ‘atypical’ measures, such as: (1) action or conduct by private parties attributable to a Member; (2) measures that are no longer in force; (3) legislation ‘*as such*’ (as opposed to the actual application of this legislation in specific cases); (4) discretionary legislation (as opposed to mandatory legislation); (5) unwritten ‘norms or rules’ of Members; (6) on-going conduct by Members; and (7) measures by regional and local authorities.

Access to the WTO DSS is limited to WTO Members. A WTO Member can have recourse to the system when it claims that a benefit accruing to it under one of the covered agreements is being nullified or impaired. A complainant will almost always argue that the respondent violated a provision of WTO law and file a *violation complaint*. If the violation is shown, there is a presumption of nullification or impairment of a benefit. Alternatively, a complainant can file a *non-violation complaint*. In that case the complainant does not argue that the respondent violated a provision of WTO law but contends that the respondent has nevertheless nullified or

¹⁰ The DSU is attached to the *WTO Agreement* as Annex 2 thereof.

¹¹ Claus-Dieter Ehlermann, “Six Years on the Bench of the ‘World Trade Court’: Some Personal Experiences as Member of the Appellate Body of the World Trade Organization”, *Journal of World Trade*, 2002, 639.

impaired a benefit of the complainant under one of the covered agreements. Non-violation complaints are rare and have never been successful in WTO dispute settlement to date.

NGOs, industry associations, companies or individuals have no direct access to the WTO DSS. However, it should be noted that most disputes are brought to the WTO system for resolution at the instigation of companies and industry associations. Companies and industry associations are the 'driving force' behind the initiation of dispute settlement proceedings in most cases. Moreover, companies or industry associations will not only lobby governments to bring dispute settlement cases to the WTO, they (and their law firms) will often also play an important, 'behind-the-scenes' role in planning the legal strategy and drafting the submissions.¹² It could be argued that companies and industry associations have an 'indirect' access to the WTO DSS and make abundant use of this 'indirect' access. The legal system of some WTO Members (e.g. the EU and the US) explicitly provides for the possibility for companies and industry associations to bring a violation of WTO obligations, by another WTO Member, to the attention of their government and to 'induce' their government to start WTO dispute settlement proceedings against that Member.¹³ In many other Members the process of lobbying the government to bring WTO cases has not been regulated and institutionalized in the same manner, but the process is no less present.

1.3 Key features of WTO dispute settlement

The prime object and purpose of the WTO DSS is the *prompt settlement* of disputes through multilateral adjudication, and to provide *security and predictability* to the multilateral trading system. WTO dispute settlement has six key features, which in addition to the compulsory and exclusive jurisdiction of the WTO DSS and the process of WTO dispute settlement contribute to, if not explain, the importance and success of WTO dispute settlement to date. Some of these features set apart the WTO DSS from other international dispute settlement mechanisms.

1.3.1 Single, comprehensive and integrated dispute system

The WTO DSS is a single, comprehensive and integrated dispute settlement system. The rules of the DSU apply to all disputes arising under the covered agreements. Nevertheless, some of these covered agreements provide for some special and additional rules and procedures 'designed to deal with the particularities of dispute settlement relating to obligations arising under a specific covered agreement'. Moreover, note that for the 'benefit' of developing-country Members, Article 3.12 of the DSU states in relevant part:

¹² Also note that *amicus curiae* briefs written by non-governmental organizations may, if adopted by a party to the dispute, be included in the submissions filed by such a party.

¹³ In EU law, this possibility is provided for under the Trade Barriers Regulation. See Council Regulation (EC) No. 3286/94 on Community procedures for the exercise of rights under international trade rules, in particular those established under the WTO, OJ 1994, L349, 71, as amended by Council Regulation (EC) No. 356/95, OJ 1995, L41, 3. In US law this possibility is provided for under Section 301 of the 1974 Trade Act. See Section 301(a)(1) of the Trade Act 1974, 19 USC 2411(a)(1).

... if a complaint based on any of the covered agreements is brought by a developing country Member against a developed country Member, the complaining party shall have the right to invoke, as an alternative to the provisions contained in Articles 4, 5, 6 and 12 of this Understanding, the corresponding provisions of the Decision of 5 April 1966 ...

However, to date, the provisions of the 1966 Decision have been invoked only once, namely by Colombia in a 2007 dispute with the EU in the context of the *EC – Bananas III* dispute.¹⁴ The reason for the lack of enthusiasm for the provisions of the 1966 Decision is undoubtedly that the DSU provisions afford developing-country complaining parties treatment at least as favourable as, if not more favourable than, the treatment afforded by the 1966 Decision.

1.3.2 Different methods of dispute settlement

The DSU provides for four different methods to settle disputes between WTO Members: consultations or negotiations (Article 4 of the DSU); adjudication by panels and the Appellate Body (Articles 6 to 20 of the DSU); arbitration (Articles 21.3(c), 22.6 and 25 of the DSU); and good offices, conciliation and mediation (Article 5 of the DSU). Of these methods, arbitration under Article 25 and good offices, conciliation and mediation under Article 5 have only played a marginal role; in almost all WTO disputes, Members had recourse to consultations, and if those were unsuccessful, to adjudication. With regard to good offices, conciliation and mediation under Article 5 of the DSU, note the successful mediation of Deputy-Director-General Rufus Yerxa in 2002 in a dispute between the European Union and the Philippines and Thailand on the tariff treatment of canned tuna; and the unsuccessful good offices of Norway's foreign minister, Jonas Gahr Store in 2006 in the *EC – Bananas III* dispute between the European Union and Ecuador on the WTO-consistency of the EU's new 'tariff-only' banana import regime.

1.3.3 Multilateral dispute settlement

Pursuant to Article 23 of the DSU, Members must settle disputes with other Members over compliance with WTO obligations through the *multilateral* procedures of the DSU, rather than through *unilateral* action. Concerns regarding unilateral action taken by the United States against what it considered to be violations of GATT law were the driving force behind the Uruguay Round negotiations on dispute settlement, which eventually resulted in the DSU.

1.3.4 Preference for mutually acceptable solutions

The WTO DSS prefers Members to resolve a dispute through consultations, resulting in a mutually acceptable solution, rather than through adjudication. In other words, the DSU prefers parties *not* to go to court, but to settle their dispute amicably out of court. This is reflected in the requirement – further discussed below - that every WTO dispute settlement process starts

¹⁴ The 1966 Decision provides for compulsory good offices by the WTO Director-General. This mechanism was instrumental in the final settlement of the *EC – Bananas III* dispute.

with consultations, i.e. negotiations, between the parties to the dispute with the aim of reaching a mutually acceptable solution. In one out of five disputes brought to the WTO for resolution, the parties are able to reach such a mutually acceptable solution through consultations. In the only dispute brought by a LDC to date, namely *India – Anti-Dumping Measures on Batteries*, Bangladesh and India reached a mutually acceptable solution through consultations and thus did not have to take this dispute to court.

1.3.5 Clarification and rules of interpretation

Pursuant to Article 3.2, second sentence, of the DSU, the WTO DSS serves not only ‘to preserve the rights and obligations of Members under the covered agreements’, but also ‘to clarify the existing provisions of those agreements’. The scope and nature of this clarification mandate is, however, circumscribed by Article 3.2, third sentence, and 19.2 of the DSU, which explicitly precludes the system from adding to or diminishing the rights and obligations of Members. The DSU does not condone judicial activism. For panels and the Appellate Body to stay within their mandate to clarify existing provisions, it is therefore important that they interpret and apply the provisions concerned correctly, i.e. in accordance with customary rules of interpretation of international law, as codified in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*. Pursuant to Articles 31 and 32, panels and the Appellate Body interpret provisions of the covered agreements in accordance with the ordinary meaning of the words of the provision in their context and in the light of the object and purpose of the agreement involved; and if necessary and appropriate, they have recourse to supplementary means of interpretation.

1.3.6 Remedies for breach

The DSU provides for three types of remedy for breach of WTO law: one final remedy, namely, the withdrawal (or modification) of the WTO-inconsistent measure; and two temporary remedies which can be applied awaiting the withdrawal (or modification) of the WTO-inconsistent measure, namely, compensation *and* suspension of concessions or other obligations (commonly referred to as ‘retaliation’). A measure which was found to be WTO-inconsistent must be withdrawn immediately or, if that is impracticable, within a ‘reasonable period of time’. In more than 4 out of 5 disputes, the offending party withdraws (or modifies) the WTO-inconsistent measure by the end of the ‘reasonable period of time’. However, when the offending party fails to do so, and the parties are subsequently unable to agree on compensation for the harm that *will* result from the lack of compliance, the original complaining party may request authorization to retaliate against the offending party. Retaliation, often in the form of a drastic increase in the customs duties on strategically selected products, puts economic and political pressure on the offending party to withdraw (or modify) its WTO-inconsistent measure(s). To date, Members have imposed retaliatory measures in four disputes, while the number of disputes in which the DSB has authorized Members to do so is significantly higher. The effectiveness and/or appropriateness of retaliation – which is by definition trade destructive – is the subject of debate. As discussed below, it is questioned whether retaliation is in fact a realistic option for a small developing-

country Member (such as Ecuador in the *EC – Bananas (1997)* dispute or Antigua and Barbuda in the *US – Gambling (2005)* dispute) to choose in order to force a developed-country Member to bring its WTO-inconsistent measure into compliance with its obligations. Even when the complaining party is allowed to retaliate in other sectors or under other agreements than those at issue in the dispute (i.e. cross-retaliation), retaliation may ‘hurt’ the economic interests of the complaining party more than it ‘encourages’ the offending party to comply. This was the case for Ecuador as well as Antigua and Barbuda, which were authorized to cross-retaliate and suspend their obligations under the TRIPS Agreement in relation to the European Union and the United States, respectively. Neither Ecuador nor Antigua and Barbuda considered it would be in their interest to retaliate in this manner. With regard to LDCs, Article 24.1, third sentence, of the DSU states:

If nullification or impairment is found to result from a measure taken by a least-developed country Member, complaining parties shall exercise due restraint in asking for compensation or seeking authorization to suspend the application of concessions or other obligations pursuant to these procedures.

However, as there have been no disputes to date in which a LDC Member was the respondent, there has never been a situation in which such restraint on the part of complaining parties was called for.

Under customary international law, a State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused by this act. Under WTO law, however, such obligation does not exist. It is important to note that the compensation referred to above, as a temporary remedy for breach, only concerns compensation for the harm that *will* result from the lack of compliance after the expiry of the reasonable period of time for implementation. It does not concern the compensation for harm that was caused (often over a period of many years) by the WTO-inconsistent measure to the trade and the economy of the complaining Member. That harm is never uncompensated under WTO law. Generally speaking, remedies for breach of WTO law are prospective and not retroactive.

1.4 Institutions of WTO dispute settlement

Among the institutions involved in WTO dispute settlement one must distinguish between a political institution, the Dispute Settlement Body or DSB, and two independent, judicial-type institutions, the *ad hoc* dispute settlement panels and the standing Appellate Body.

1.4.1 Dispute Settlement Body

The DSB, which is composed of all WTO Members, administers the DSS. It has the authority to establish panels, adopt panel and Appellate Body reports, and authorise retaliation in case of non-compliance. It takes decisions on these important matters by *reverse consensus*. The ‘reverse’ consensus requirement means that the DSB is deemed to take a decision unless there

is a consensus among WTO Members *not* to take that decision. Since there will usually be at least one Member with a strong interest in the establishment of a panel, the adoption of the panel and/or Appellate Body reports or the authorisation to suspend concessions, it is unlikely that there will be a consensus in the DSB *not* to adopt these decisions. As a result, the DSB decisions on these matters are quasi-automatic.¹⁵

1.4.2 Panels

The actual adjudication of disputes brought to the WTO is done, at the first-instance level, by dispute settlement panels and, at the appellate level, by the Appellate Body. Panels are *ad hoc* bodies established for the purpose of adjudicating a particular dispute and are dissolved once they have accomplished this task. Panels are established by the DSB at the request of the complainant. While a respondent can still block the establishment of a panel at the first DSB meeting at which the establishment is discussed, at the second DSB meeting the panel is established by reverse consensus. The parties decide on the composition of the panel by mutual accord. However, if they fail to do so within twenty days after the establishment of the panel, either party can ask the Director-General of the WTO to appoint the panellists. Overall, i.e. since 1995, the Director-General composed 61 per cent of the panels. As a rule, panels are composed of three well-qualified governmental and/or non-governmental individuals, who are not nationals of the parties or third parties to the dispute. Note that Article 8.10 of the DSU states:

When a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panelist from a developing country Member.

In many panels dealing with disputes involving a developing-country Member, at least one of the panellists is indeed a national of a developing-country Member. Pursuant to the *Rules of Conduct* for WTO dispute settlement, panellists must be independent and impartial, avoid direct and indirect conflicts of interest and respect the confidentiality of proceedings. To date, no panellist has ever been found to have committed a material violation of the *Rules of Conduct*, which would result in his or her disqualification as a panellist.

With regard to the mandate of panels, i.e. the scope and nature of the task(s) entrusted to panels, several aspects deserve particular attention. *First*, almost all panels have standard terms of reference, which refer back to the complainant's request to establish a panel. Hence, a claim and/or measure falls within the panel's terms of reference, i.e. within its jurisdiction, only if that claim or measure is identified in the panel request. A panel cannot consider claims and/or measures, which are not identified in the panel request. *Second*, the standard of review of panels, as set forth in Article 11 of the DSU, is 'to make an objective assessment of the matter'. Pursuant to Article 11 of the DSU, a panel, as a trier of facts: (1) must base its findings

¹⁵ Note that the DSB takes other decisions, such as the appointment of Appellate Body Members, by positive consensus.

on a sufficient evidentiary basis on the record; (2) may not apply a double standard of proof; (3) must treat evidence in an ‘even-handed’ manner; (4) must consider evidence before it in its totality (which includes consideration of submitted evidence in relation to other evidence); and (5) should not disregard evidence that is relevant to the case of one of the parties. *Third*, panels may exercise judicial economy; they need only address (but at the same time are required to address at least) those claims, which must be addressed in order to resolve the matter at issue in the dispute. *Fourth*, with regard to the use by panels of experts, note that that disputes brought to panels for adjudication often involve complex factual, technical and scientific issues. These issues frequently play a central role in WTO dispute settlement proceedings. Article 13 of the DSU gives a panel the authority to seek information and technical advice from any individual or body, which it deems appropriate. It is important to note that, while a panel has broad authority to consult experts to help it to understand and evaluate the evidence submitted and the arguments made by the parties, a panel may not – with the help of its experts – make the case for one or the other party.

A panel report must, at a minimum, set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations it makes. Note that Article 12.11 of the DSU states:

Where one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures.

Where a panel concludes that a Member's measure is inconsistent with WTO law, it shall recommend that the Member concerned bring that measure into conformity with WTO law. Panels take decisions by consensus, or, if consensus cannot be achieved, by majority vote (2 to 1). Panellists can express a separate opinion in the panel report, be it dissenting or concurring. However, if they do, they must do so anonymously. To date, there have only been nine panel reports setting out a separate opinion of one of the panellists. A panel report is first *issued* to the parties, and subsequently – when the report is translated and available in English, French and Spanish - it is *circulated* to all Members and made available to the general public on the WTO website. As long as a report is only issued to the parties and not yet circulated to all Members, it is confidential. However, in practice, panel reports are often ‘leaked’ once they are issued to the parties. The recommendations and rulings of the panel become legally binding when they are adopted – by reverse consensus – by the DSB.

1.4.3 Appellate Body

The Appellate Body is a standing, i.e. permanent, international tribunal of seven judges, appointed by the DSB for a term of four years (renewable once). Pursuant to the *Rules of*

Conduct for WTO dispute settlement, Members of the Appellate Body must be independent and impartial, avoid direct and indirect conflicts of interest and respect the confidentiality of proceedings. The composition of the Appellate Body shall be broadly representative of WTO membership. The Appellate Body is currently composed of nationals of China, the EU, India, Korea, Mexico, South Africa and the United States. The Appellate Body hears and decides appeals in divisions of three of its Members. A division decides by consensus, and if consensus cannot be reached by majority vote (2 to 1). Appellate Body Members sitting on the division hearing an appeal can express a separate opinion in the Appellate Body report, be it dissenting or concurring. However, if they do, they must do so anonymously.

Only parties to the dispute can appeal a panel report. An appeal is limited to issues of law covered in the panel report and legal interpretations developed by the panel. Issues of fact cannot be appealed. However, the treatment of the facts or evidence by a panel may raise the question of whether the panel has made an objective assessment of the facts as required under Article 11 of the DSU. This is a legal issue and can therefore be examined by the Appellate Body. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel that were appealed. On occasion, the Appellate Body has also – in the absence of the authority to remand a case to the panel – felt compelled to ‘complete the legal analysis’ on issues not addressed by the panel. The Appellate Body did so in order to provide a prompt resolution of the dispute.

1.5 Process of WTO dispute settlement

The WTO dispute settlement process may – and often does – entail four major steps: (1) consultations; (2) panel proceedings; (3) Appellate Body proceedings; and (4) implementation and enforcement. The four-step WTO dispute settlement process has six features that are particularly noteworthy, partly because they distinguish WTO dispute settlement from other international dispute settlement mechanisms. These six features are: (1) the short timeframe for each of the steps in the process; (2) the confidentiality and resulting lack of transparency of the process; (3) the burden of proof in WTO dispute settlement proceedings, which is on the party that asserts the affirmative of a particular claim or defence; (4) the important role of private legal counsel in representing parties in WTO dispute settlement; (5) the acceptance and consideration by panels and the Appellate Body of *amicus curiae* briefs; and (6) the obligation on Members to act in good faith in WTO dispute settlement proceedings, and the obligation on panels and the Appellate Body to ensure due process in these proceedings. With regard to LDC Members, it is also important to note that Article 24.1, first sentence, of the DSU states:

At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country Members.

1.5.1 Consultations

The WTO dispute settlement process always begins with consultations (or, at least, an attempt to have consultations) between the parties to the dispute. The consultations enable the disputing parties to understand better the factual situation and the legal claims in respect of the dispute. Parties have broad discretion regarding the manner in which consultations are to be conducted. Members other than the parties to the dispute may be allowed to join the consultations when they have a substantial trade interest in the matter at issue in the dispute. Note that Article 4.10 of the DSU states:

During consultations Members should give special attention to the particular problems and interests of developing country Members.

With regard to LDC Members, Article 24.1, second sentence, of the DSU states:

Members shall exercise due restraint in raising matters under these procedures involving a least-developed country Member.

As noted above, Members have exercised such restraint as, to date, there has been no complaint brought against a LDC Member.

The consultation process essentially is meant to resolve a dispute by *diplomatic means* and has frequently been successful in resolving disputes. Approximately, 1 out of five disputes are resolved through consultations. However, if consultations do not resolve the dispute within sixty days after the request for consultations, the complainant may request the DSB to establish a panel. While the complainant may so do, in many disputes parties will try to reach an amicable solution to the dispute through consultations for a period much longer than 60 days. Note that with regard to disputes involving developing-country Members as respondents, Article 12.10 of the DSU explicitly states:

In the context of consultations involving a measure taken by a developing country Member, the parties may agree to extend the [60 day period]. If, after the relevant period has elapsed, the consulting parties cannot agree that the consultations have concluded, the Chairman of the DSB shall decide, after consultation with the parties, whether to extend the relevant period and, if so, for how long. ...

Specifically with regard to LDC Members, Article 24.2 of the DSU states:

In dispute settlement cases involving a least-developed country Member, where a satisfactory solution has not been found in the course of consultations the Director-General or the Chairman of the DSB shall, upon request by a least-developed country Member offer their good offices, conciliation and mediation

with a view to assisting the parties to settle the dispute, before a request for a panel is made.

In the only dispute involving a LDC Member, namely *India – Anti-Dumping Measures on Batteries*, Bangladesh, the complainant, did not request either the WTO Director-General or the DSB Chair to offer their good offices, conciliation or mediation.

1.5.2 Panel proceedings

The basic rules governing panel proceedings are set out in Article 12 of the DSU. Article 12.1 of the DSU directs a panel to follow the *Working Procedures* contained in Appendix 3 to the DSU, but at the same time authorises a panel to do otherwise. A panel will – whenever possible within one week of its composition – fix the timetable for its work and decide on detailed *ad hoc* working procedures. Each party to a dispute normally submits two written submissions to the panel: a ‘first written submission’ and a ‘rebuttal submission’. During the proceedings, the panel will meet with the parties twice, first after the filing of the ‘first written submissions’ and then after the filing of the ‘rebuttal submissions’. Note that Article 12.10 of the DSU states:

... in examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation. ...

Unless specific deadlines for the submission of evidence are set out in the *ad hoc* working procedures of the panel (which is often the case now), parties can submit new evidence as late as the second meeting with the panel. The panel must of course always be careful to ensure due process. As mentioned above, panels have the authority to seek information and technical advice from any source including experts in order to help them to understand and evaluate the evidence submitted and the arguments made by the parties. The parties are under an obligation to provide the panel with the information or the documents that the panel requests at any time during the proceedings. This requirement may impose a considerable burden on parties, especially parties with lesser in-house expertise and fewer resources to gather information and documents. The rights of third parties to participate in the panel proceedings are quite limited but have been, in some cases, extended. Note that panels have extended the rights of third parties in particular in disputes involving developing-country third parties with a major interest in the outcome of the dispute, such as *EC – Bananas III (1997)*, *EC – Tariff Preferences (2004)* and *EC – Export Subsidies on Sugar (2005)*.

Under the GATT dispute settlement system and in the first years of the WTO DSS, parties to disputes were not allowed to be represented in dispute settlement proceedings by private lawyers and could only rely on government lawyers to argue their case. However, in *EC – Bananas III (1997)*, Saint Lucia, a third party in this case with vital economic interests at stake, challenged this ban on private lawyers. While the United States objected to the presence of a

private lawyer acting on behalf of Saint Lucia, the Appellate Body ruled that a party or third party is free to decide to include private lawyers in its delegation to present its arguments in WTO dispute settlement proceedings. The Appellate Body noted in its ruling:

that representation by counsel of a government's own choice may well be a matter of particular significance – especially for developing-country Members – to enable them to participate fully in dispute settlement proceedings.¹⁶

This ruling by the Appellate Body gave countries without the necessary legal expertise in WTO dispute settlement to employ private lawyers to represent them in dispute settlement proceedings.

Panels submit their draft reports to the parties for comment in a so-called 'interim review'. After this interim review, the panel finalises the report, issues it to the parties and eventually – when the report is available in the three official languages – makes the report public by circulating it to all WTO Members. Panel proceedings in theory should not exceed nine months, but in practice panel proceedings take, on average, fifteen months. Within sixty days of its circulation, a panel report is either adopted by the DSB by negative consensus or appealed to the Appellate Body.

1.5.3 Appellate Body proceedings

In contrast to panels, the Appellate Body has detailed standard working procedures set out in the *Working Procedures for Appellate Review*. Appellate Body proceedings are initiated by a notice of appeal. A party to the dispute other than the original appellant may also appeal alleged legal errors in the panel report by filing a notice of other appeal. The appellant's and other appellant's submissions are filed at the same time as the notice of appeal or the notice of other appeal. The appellee's submission(s) and the third participants' submissions are due within, respectively eighteen and twenty-one days after the date of the notice of appeal. An oral hearing generally takes place between day 30 and day 45 after the date of the notice of appeal. Rule 16.2 of the *Working Procedures for Appellate Review* states:

In exceptional circumstances, where strict adherence to a time-period set out in these Rules would result in manifest unfairness, a party to the dispute, a participant, a third party or a third participant may request that division modify a time-period set out in these Rules for the filing of documents or the date set out in the working schedule for the oral hearing.

While such requests are not made frequently, they have been made, and granted, by both developed- and developing-country Members.

¹⁶ Appellate Body Report, *EC – Bananas III (1997)*, para. 12.

Compared to panel proceedings, third parties have broader rights to participate in Appellate Body proceedings. After the oral hearing and before finalising its report, the division responsible for deciding an appeal will always exchange views on the issues raised by the appeal with the Members of the Appellate Body not serving on the division. When the report is available in the three official languages, it is circulated to all WTO Members and made public. Article 17.5 of the DSU requires that Appellate Body proceedings not exceed ninety days, and, in most cases, the Appellate Body has been able to complete its review within that very short timeframe. Within thirty days of its circulation, the Appellate Body report, together with the panel report, as upheld, modified or reversed by the Appellate Body, is adopted by the DSB by reverse consensus.

1.5.4 Implementation and enforcement

Recommendations and rulings of panels and/or the Appellate Body, as adopted by the DSB, must be implemented immediately or, if that is impractical, within a 'reasonable period of time'. With regard to the implementation of recommendations and rulings, Article 21.2 of the DSU explicitly states:

Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.

Usually the parties are able to agree on the duration of that period, but if they cannot, the 'reasonable period of time' can – at the request of either party – be determined through binding arbitration (under Article 21.3(c) of the DSU). The 'reasonable period of time' agreed on by the parties ranged from 4 months and 14 days (in a case where the US had to implement) to 24 months (in a case where the Dominican Republic had to implement). The 'reasonable period of time' determined by a arbitrator ranged from 6 months (in a case where Canada had to implement) to 15 months and one week (in a case where the EU had to implement. Note that the Arbitrator in *Indonesia – Autos (1998)* ruled with reference to Article 21.2 of the DSU quoted above:

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

process constitutes a reasonable period of time for implementation of the recommendations and rulings of the DSB in this case.¹⁷

During the ‘reasonable period of time for implementation’, the DSB keeps the implementation of adopted recommendations and rulings under surveillance. Note that Articles 21.7 and 21.8 of the DSU state:

If the matter is one which has been raised by a developing country Member, the DSB shall consider what further action it might take which would be appropriate to the circumstances.

If the case is one brought by a developing country Member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned.

If by the end of the reasonable period there is disagreement as to the existence or the WTO-consistency of the implementing measures, this dispute is resolved in Article 21.5 compliance proceedings. If the offending party is found to have failed to implement the recommendations and rulings within the ‘reasonable period of time’ and agreement on compensation cannot be reached, the complainant may request authorisation from the DSB to retaliate against the offending party. A practice has developed under which the parties agree to resort first to an Article 21.5 ‘compliance’ proceeding before obtaining authorisation from the DSB to retaliate. Under the Article 21.5 ‘compliance’ proceeding, disagreement as to the existence or consistency with WTO law of implementing measures shall be decided through recourse to the DSU dispute settlement procedures, including, wherever possible, resort to the original panel. If the respondent did indeed fail to implement, the DSB can at the request of the complainant, authorise retaliation measures by reverse consensus. If the non-complying Member objects to the level of suspension proposed or claims that the principles and procedures for suspension have not been followed, the matter may be referred to arbitration (under Article 22.6 of the DSU) before the DSB takes a decision.

Part 2: Challenges and opportunities for LDCs and LICs

As noted in the introduction of this study, LDCs and LICs have to date made very limited use of the WTO DSS. In fact, no sub-Saharan African LDC or LIC has ever used the system, either as a complainant or as a respondent and their involvement as a third party has been modest. Part 2

¹⁷ Award of the Arbitrator, *Indonesia – Autos (Article 21.3(c)) (1998)*, para. 24. However, note that ‘criteria’ for the determination of ‘the reasonable period of time’ are not ‘qualitatively’ different for developed and for developing-country Members. See Award of the Arbitrator, *Chile – Alcoholic Beverages (Article 21.3(c)) (2000)*, para. 45.

of this study focuses on the challenges and opportunities for LDCs and LICs when using the WTO DSS. This part addressed in turn the following questions: (1) why have LDCs and LICs made such limited use of the WTO dispute settlement to date (i.e. the challenges)?; and (2) why should LDCs and LICs make more use of the system (i.e. the opportunities)?

2.1 Why have LDCs and LICs made such limited use of the WTO DSS?

The reasons for the very limited use of the WTO DSS by LDCs and LICs are multiple, complex and interrelated. They include: (1) the small size of the economy of LDCs and LICs, their small share in world trade and the limited diversification of their trade; (2) the complexity of WTO disputes and the lack of in-house expertise; (3) the high cost of outside expertise; (4) the inability to identify violations of WTO law; (5) the fear of reprisals by a disgruntled respondent; and (6) the inability to enforce compliance with recommendations and rulings.

2.1.1 Size of LIC/LDC economies, their share in world trade and the diversification of their trade

A first reason for the very limited use of the WTO DSS by LDCs and LICs is obvious but often overlooked or given short shrift, especially in legal analyses of this topic.¹⁸ LICs and LDCs are by definition small in economic size and have a small share of global trade. For example, Africa's share of global trade was only 3% in 2011. In addition, African economies continue to be overwhelmingly dependent on a small range of primary exports especially minerals and fuels.¹⁹ African countries, which comprise the biggest group of LDCs, therefore have limited participation in non-fuel merchandise trade, which comprises 60% of global trade and is the most dynamic sector of international trade. This inability to compete in international trade's most important value chains is consistent with the absence of many disputes arising from the WTO's DSS. Economic size and share in world trade (co-)determine the extent of the use of the WTO DSS. A 2005 study by Chad Bown, as confirmed by a 2008 study by Francois, Horn and Kaunitz, found a clear link between the share in world trade of a WTO Member and the number of dispute settlement proceedings initiated.²⁰ As noted by Horn, Mavroidis and Nordström in 2009, larger and more diversified exporting countries would be expected to bring more complaints than smaller and less diversified exporting countries.²¹ Taking into account the size of their economies, their share in world trade and the limited diversification of their trade, one

¹⁸ Jan Bohanes and Fernanda Garza, *Going Beyond Stereotypes: Participation of Developing Countries in WTO Dispute Settlement*, 4 (1) *Trade L. & Dev.* 45 (2012), 49 and 57.

¹⁹ See Valentine Rugwabiza (Deputy Director-General, WTO), "Africa Should Trade More With Africa to Secure Future Growth", Address at the University of Witwatersrand, Johannesburg South Africa, 12 April 2012 at http://www.wto.org/english/news_e/news12_e/ddg_12april12_e.htm

²⁰ Chad Bown, "Participation in WTO Dispute Settlement: Complainants, Interested Parties and Free Riders", 19 *World Bank Econ. Rev.* 287, 310 (2005); and Joseph Francois, Henrik Horn and Niklas Kaunitz, *Trading Profiles and Developing Country Participation in the WTO Dispute Settlement System*, ICTDS Programme on Dispute Settlement, ICTDS Paper No 6, 2008.

²¹ Henrik Horn, Petros C. Mavroidis, and Hakan Nordström, *Is the Use of the WTO Dispute Settlement System Biased*, Centre for Economic Policy Research Paper 2009.

cannot and should not expect to see *frequent* use of the WTO DSS by LICs and LDCs. These countries do not have the commercial interests that would justify *frequent* use of the WTO DSS. As noted by Bohanes and Garza in 2012:

[I]t is well known that WTO members with particularly small trade volumes – for instance, African LDCs – trade little because they face challenges with significant supply side constraints. This of course does not mean that these members are not affected by trade barriers in their large developed export markets. However, even if trade barriers exist, these countries may choose to focus their scarce resources on improving these supply side constraints, rather than to fight, for instance, quarantine measures and technical barriers to trade in their export market.²²

However, while LICs and LDCs cannot be expected to be *frequent* users of the WTO DSS, their use made of the DSS to date remains well below what would and could be reasonably expected.²³ Therefore, the small size of their economy, their share in world trade and the limited diversification of their trade, do not fully explain the current very limited use of the WTO DSS by LICs and LDCs. There are also other reasons why LICs and LDCs seem to be deterred from using the WTO DSS.

2.1.2 Complexity of WTO disputes and lack of in-house expertise

WTO law is a wide-ranging, complex and very technical body of substantive and procedural rules. WTO dispute settlement is conducted through complicated and sophisticated legal arguments. Engagement in WTO dispute settlement thus requires expert knowledge of the rights and obligations of Members under the WTO agreements. Submissions of parties in WTO disputes typically contain highly technical legal arguments and use legalistic language. They are therefore written by and for specialists rather than generalists. Even for specialists, it is a daunting task to keep up with the legal nuances of and developments in the ever-growing body of WTO case law. Engagement in WTO dispute settlement also requires expert knowledge of the procedural rules and practice of WTO dispute settlement as well as experience with courtroom litigation. The knowledge and skills needed for effective engagement in WTO dispute settlement is quite different from the knowledge and skills needed for effective engagement in WTO negotiations.²⁴

²² Bohanes & Garza (2012), 67, referring to Edwini Kessie and Kofi Addo, *African Countries and the WTO Negotiations on the Dispute Settlement Understanding*, ICTSD Paper (2008), 4.

²³ Note, however, that Francois, Horn and Kaunitz observed that some LICs have initiated *more* disputes than their GDP, share in world trade and income levels would lead to expect. See Francois, Horn and Kaunitz (2008). Note also that, in the light of the small size of their domestic markets, one cannot and should expect LICs and LDCs to be *frequent* respondents in WTO disputes.

²⁴ On the legal expertise needed for effective engagement in WTO dispute settlement and the difficulties for developing countries to have this expertise, see e.g. Gregory Shaffer, *Towards a Development-Supportive Dispute Settlement System in the WTO*, ICTSD Sustainable Development and Trade Issues Resource Paper No 5, March

Moreover, in addition to their legal complexity, many WTO disputes give rise to a broad range of economic and scientific issues and require parties to gather a very significant amount of data and documentary evidence with regard to these issues to back-up their legal case. Engagement in WTO disputes thus requires the involvement of experts able to gather, interpret and/or present complicated scientific or econometric data or documentary evidence. As an example, in the *EC – Approval and Marketing of Biotech Products (2006)*, a dispute concerning GMOs involving Argentina as one of the complainants, the European Union listed the expertise required in over thirty scientific specializations including genomic stability, allergology, DNA amplification, soil microbiology and malherberology.

Note that being the respondent in WTO disputes has forced some developing-country Members to invest in building-up the human and institutional resources to handle WTO dispute. These resources were subsequently used to use the WTO DSS as a complainant. This has been the case, for example, for Brazil and China, which both were frequent respondents in the early years of their WTO membership. However, as very few disputes have been brought against LICs and none against LDCs, these countries have not been ‘forced’ in this way to build-up their human and institutional resources to handle WTO dispute.

In sum, to be able to argue effectively WTO cases, which typically involve sophisticated legal arguments and complex factual ‘details’, rather than the simple application of general legal principles and readily available and easy-to-understand facts, a WTO member must have in-house specialized legal, economic and scientific expertise. By definition, LDCs and LICs have extremely meager resources to establish a WTO-dedicated bureaucracy with trade experts and specialists. Commonly, LDCs and LICs have a very low number of trade officials. Of these trade officials, few have much expertise in international trade law, let alone WTO dispute settlement. They have no, or too few, in-house lawyers to analyse WTO law, to monitor WTO case law, and to advise their governments on how best to safeguard their rights and force their entitlements under this law. About 20 LDCs and LICs do not even have a permanent representation in Geneva and therefore no Geneva-based diplomats to facilitate the filing of submissions and attendance of meetings and hearings. Generally speaking, LDCs and LICs lack the required expertise to use effectively the WTO DSS.

2.1.3 High cost of specialized outside advice

It should be noted that not only LDCs and LICs lack the legal and other expertise necessary to use effectively the WTO DSS. Many other WTO Members, both developed- and developing-country Members, find themselves in a similar, be it not as dramatic, situation. These countries

2003; Hunter Nottage, “Trade and Development”, in Daniel Bethlehem et al. (Eds.), *Oxford Handbook on international Trade Law* (2009), 481, 490; Frederick Abbott, *Are Developing Countries Deterred from Using the WTO Dispute Settlement System? Participation of Developing Countries in the DSM in the Years 1995-2005*, ECIPE Working Paper No. 01/2007.

commonly have a good, and not seldom excellent, group of in-house trade lawyers and specialists to analyse WTO law, to monitor WTO case law, and to advise their governments on how best to safeguard their rights and force their entitlements under this law. However, when it comes to engaging in WTO dispute settlement, they may feel that they lack the highly specialized expertise required and that they need to hire such expertise. As discussed above, in *EC – Bananas III (1997)* the Appellate Body allowed parties and third parties to do exactly that. In *EC – Bananas III (1997)* parties and third parties were allowed to employ private lawyers to represent them in dispute settlement proceedings. It should be noted that ever since this Appellate Body ruling, most WTO Members often employ specialized law firms to represent them in the disputes in which they are involved. Only the European Union and the United States usually argue cases exclusively with in-house government lawyers. However, the services of the specialized private lawyers employed to help out with the dispute settlement work do not come cheap. Lawyer fees reportedly range from US \$200-600/hour. It is said that in one early dispute, *Japan – Film (1997)*, which involved the United States and Japan, the private lawyers involved charged \$10 million for their services. Developing countries have been quoted as much as \$200,000 for representation during the panel proceedings.²⁵ Bohanes and Garza wrote in 2012:

A factually challenging WTO dispute – perhaps with procedural complications such as preliminary objections and procedures to protect business confidential information, as well as an appeal – can quickly result on legal fees of over 1,000,000 USD.²⁶

While these amounts should be assessed in relation to the trade interests at stake (which are of course many times bigger than the fees charged by the lawyers), the mere magnitude of these amounts may well place the services of specialized private lawyers out of the reach of many countries (if their governments are to pay the fees themselves). In addition, in some disputes, many Members will not have the required in-house expertise on the scientific issues that arise in these cases. To employ experts to gather, interpret and present the scientific data and documentary evidence supporting the legal arguments made may also be quite expensive. It is obvious that for LDCs and LICs specialist legal and other advice from private law firms or scientists will usually be much more expensive than they can afford. It is known – while not usually not publicized – that the legal costs of a complainant are often borne by the domestic industry interested in challenging a trade barrier, rather than by the government of the Member initiating the proceedings. However, in LICs and LDCs the domestic industry obviously does not have the financial resources available to the domestic industry of developed countries. Moreover, a LIC or LDC government, like the government of any country, may not always consider such ‘private’ financing of the legal costs appropriate, when its interests (which

²⁵ Gregory Shaffer, *How to Make the WTO Dispute Settlement Work for Developing Countries: Some Proactive Developing Country Strategies*, ICTSD Resource Paper No. 5, 9 (2003)

²⁶ Bohanes and Garza (2012), 71.

are likely to be of a more systemic and longer-term nature) do not coincide with interests of the domestic industry (which are likely to be narrowly focused on the trade barrier at issue).²⁷

In 2002, the African Group at the WTO pointed out that WTO dispute settlement is ‘complicated and overly expensive, which has institutional and human resource as well as financial implication.’²⁸

2.1.4 Inability to identify violations of WTO law

In addition to the small size of the economies of LDCs and LICs and their marginal share in world trade, the complexity of WTO law, the lack of in-house expertise, and the high cost of specialized outside advice, another oft-mentioned reason for the very limited use of the WTO DSS by LDCs and LICs is their governments’ inability to identify violations of WTO law that matter to their private sector domestic industries. This inability is of course related to their lack of in-house lawyers to analyse WTO law, to monitor WTO case law, and to advise on how best to safeguard their rights and force their entitlements under this law. However, this inability to is also related the lack of a partnership, and even the absence of a dialogue, between the domestic industries on the one hand and LDC and LIC government ministries and officials responsible for trade matters on the other hand. In developed countries and in many emerging economies, there is often a more or less institutionalized dialogue and a strong(er) partnerships between the government and the private sector domestic industries. The *dialogue* allows the government to be informed by the domestic industries of the measures of other Members, which have an adverse effect on their position either in export markets or in the domestic market. The *partnership* ensures the private sector domestic industries that they may count on the willingness of their government to defend their interests against WTO-inconsistent measures taken by other Members. In many LDCs and LICs there is too little of a dialogue, and not much of a partnership, between the government and the private sector domestic industries. The former insufficiently inform themselves about the trade interests of the latter; and the latter are unsuccessful in informing the former about these trade interests. In many LDCs and LICs, the government does not have close relations with the private sector. Often LDC and LIC governments do not appear to pay much attention to the needs and challenges of the private sector domestic industries, and in particular of smaller industries, that are very vulnerable to trade restrictive measures in export markets or competitive pressures in the domestic market that may be inconsistent with WTO rules. Unlike developed countries, LDCs and LICs do not have, for example, a procedural petition mechanism that allows private sector domestic industries to lobby their government to initiate complaints ‘on their behalf’ in the WTO dispute settlement system. Moreover, the lack of an institutionalized relationship between the governments of LDCs and LICs on the one hand, and their private sector domestic industries on the other hand also means these governments cannot be ‘subsidized’ by the

²⁷ *Ibid.*, 72.

²⁸ *Negotiations on the Dispute Settlement Understanding: Proposal by the African Group*, TN/DS/W/15, dated 25 September 2002, para, 3.

private sector domestic industries to detect violations and bring disputes to the WTO DSS. Note in this regard that Brazil's successful challenge of US cotton subsidies in *US – Upland Cotton (2008)* was made possible by the DSS through a well-coordinated public-private initiative.

2.1.5 Fear of reprisals

While Article 3.10 of the DSU explicitly states that the use of the WTO dispute settlement system 'should not be ... considered as contentious', the political reality is that the WTO Member against whom a complaint is brought will very seldom consider the initiation of WTO dispute settlement proceedings as a 'friendly' act. Some form of reprisal cannot be excluded and may even be expected. LDCs and LICs may therefore fear bringing disputes to the WTO DSS because it might result in reprisals in the form of the denial of preferential access to developed country markets. Given that many LDC and LIC exports are critical to supporting national budgets, LDC and LIC governments are wary of disrupting such preferential access. They calculate that even temporary blockage of the preferential access for their products would result in a shift to cheaper substitutes from more experienced exporters like Brazil, India, China, Russia and South Africa.

LDCs and LICs also rely on developed countries for non-trade support through a variety of aid programs that help to meet critical budgetary needs. They fear that bringing trade cases against developed countries that can retaliate outside the WTO system would be costly to them.²⁹ This fear of retaliation has been referred to as the 'glass house' syndrome and it defeats the purpose of the WTO's rule-based system since LDCs and LICs refrain from bringing legitimate cases for fear of retaliation from more economically powerful trading partners.³⁰

2.1.6 Inability to enforce compliance

The sixth and last possible reason discussed in this study for the very limited use of the WTO DSS by LDCs and LICs is their limited ability to enforce compliance with recommendations and ruling favourable to them. As discussed above, when the offending party fails to comply with the recommendations and rulings of panels or the Appellate Body within a reasonable period of time, the original complaining party may request authorization to retaliate against the offending party. However, as noted above, it is questioned whether retaliation is in fact a realistic option for a small developing-country Member to chose in order to force a developed-country Member to bring its WTO-inconsistent measure into compliance with its obligations. As noted above, the 'experience' of Ecuador in *EC – Bananas III (1997)* and of Antigua and Barbuda in *US – Gambling (2005)* indicate that retaliation (including cross-retaliation) is in fact not a realistic option for small developing countries and therefore obviously also not for LDCs and

²⁹ Chad Bown and Bernard Hoekman, "WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector", 8 *Journal of International Economic Law* 863 (2005).

³⁰ Bernard Hoekman and Petros Mavroidis, "WTO Dispute Settlement, Transparency and Surveillance", in Bernard Hoekman and Will Martin (eds.), *Developing Countries and the WTO: A Pro-Active Agenda*, 133 (2001)

LICs. Since LDCs and LICs have a very small share of global trade, their ability to threaten retaliation against larger trading partners who violate their rights is very limited. Moreover, retaliation is likely to ‘hurt’ the economic interests of the complaining LDCs and LICs (by depriving themselves of cheaper importers) more than it ‘encourages’ the offending larger economies to comply. In the context of *US – Gambling (2005)*, Antigua and Barbuda, which won this case against the United States but which has a population of less than 90,000 and accounts for less than 0.02 % of all exports of the US, noted that:

ceasing all trade whatsoever with the United States...would have virtually no impact on the economy of the United States, which could easily shift such a relatively small volume of trade elsewhere.³¹

Similarly, in *EC – Bananas III (1997)*, the Article 22.6 arbitrators in that dispute noted that:

given the fact that Ecuador, as a small developing country, only accounts for a negligible proportion of the EC’s exports of these products, the suspension of concessions is unlikely to have any significant effect on demand for these EC exports.³²

The WTO’s 2007 World Trade Report acknowledged the inability of small countries to pressure large economies to comply with DSB rulings through retaliatory measures.³³ While the mere existence of a mechanism to enforce compliance favourably contrasts the WTO DSS with other international state-to-state dispute settlement systems, the absence of a more effective mechanism is a deficiency. If the WTO DSS would have a more robust enforcement mechanism that could also benefit small developing countries, this would undoubtedly encourage LDCs and LICs to make more use of the WTO DSS. In 2002 already, the African Group at the WTO argued that to the extent the remedies of the DSS require suspension of concessions or retaliatory sanctions, LDCs and LICs have, in view of their small market shares, ‘no effective way to enforce’ WTO DSS rulings.³⁴

2.2 Why should LDCs and LICs make more use of the system?

Having established that LDCs and LICs make very limited use of the WTO DSS and having discussed the possible reasons for the very limited use, the next questions which logically arise are whether LDCs and LIC should make more use of the WTO DSS and, if so, why?

³¹ Decision by the Arbitrator, *US – Gambling (Article 22.6 – US) (2007)*, para 3.

³² Decision by the Arbitrators, *EC – Bananas III (Ecuador) (Article 22.6 – EC) (2000)*, para 95.

³³ WTO, *World Trade Report 2007*, 284.

³⁴ TN/DS/W/17, para 12

LDCs and LICs would be well advised to make (or at least seek to make) more use of the WTO DSS because the current very limited use of the WTO DSS denies them, or at least reduces, the benefits of WTO membership, and this in two ways, which are discussed in turn below.

2.2.1 Enforcement of rights

First of all, the very limited use of the WTO DSS by LDCs and LICs indicates that these countries fail to use the WTO DSS to enforce their rights under the WTO agreement and challenge specific trade measures of other Members undermining these rights. The primary benefit of using the WTO DSS and the binding recommendations and rulings that result from this system is that complaining countries benefit from the withdrawal of trade measures that curtail their comparative advantage. As noted above, a major reason for designing the WTO DSS was to reduce the importance of unilateral market power to resolve trade disputes. By making predictability and security at the centre of the WTO DSS, the DSU established a compulsory and legally binding system of settlement of disputes. It is a system that can be accessed to by any WTO member country whether rich or poor. As the American Law Institute's Project on WTO case law has found, the complaints filed for WTO adjudication represent only a small fraction of the total number of measures or policies of WTO members that may be in violation of various WTO rules.³⁵ Thus, a large potential exists for LDCs and LICs to use the WTO's DSS to name and shame countries in violation of their obligations. Finally, it should be noted that power-based explanations that rely on the credibility of the threat of retaliation have been found to be an inadequate explanation for the circumstances under which poor states are likely to file a DSS case against a rich country.³⁶ Notably, where a developing-country Member has a sizeable and financially important export market, evidence shows these Members are willing to bring a case against a developed WTO member.³⁷

The potential gains of more use of the WTO DSS by LDCs and LICs is underlined by the high degree of compliance with WTO DSS recommendations and rulings, already discussed above.³⁸ One study found the compliance rate to be at 83%.³⁹ Another study found compliance rates at about 90%.⁴⁰ Also in disputes in which developing country Members were the complainants, the compliance rate with the recommendations and rulings was very high.

Further, the repeated use of the WTO DSS will enable LDCs and LICs to increase the reputation costs associated with non-compliance of WTO rules. This is because an important role of the

³⁵ See http://www.ali.org/index.cfm?ffuseaction=projectswto_2009

³⁶ Andrew Guzman and Beth Simmons, "Power Plays and Capacity Constraints: The Selection of Defendants in WTO Disputes", 34 *Journal of Legal Studies* 557-598 (2005)

³⁷ Christina Davis, *Why Adjudicate? Enforcing Trade Rules in the WTO* (Princeton University Press, 2012), 20

³⁸ See section 2.1.6 above.

³⁹ William Davey, "The WTO Dispute Settlement System: The First Ten Years", 8 *Journal of International Economic Law*, 46-48 (2005).

⁴⁰ B. Wilson, "Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings", 10 *Journal of International Economic Law* 397 (2007).

WTO DSS is protect members from the harm of violation of WTO rules while spreading the benefits of cooperation on the basis of the rules among all WTO members. In fact, it was precisely because of the dangers of unilateral retaliation by one country that the WTO DSS was established. In establishing the WTO DSS, the goal was to strengthen adjudication of disputes as an alternative strategy to unilateral retaliation. Thus, LDCs and LICs should take advantage of the potential of the WTO DSS and hold violators of the WTO rules accountable. It is an important naming and shaming opportunity for violators of trade rules whose value cannot be underestimated.

2.2.2 Participation in the process of clarification of WTO law

Second, the very limited use of the WTO DSS by LDCs and LICs in WTO dispute settlement means that ‘their voice is not heard’ in the process of clarification of WTO law. In principle, adopted panel and Appellate Body reports are only binding on the parties to a particular dispute. In that respect, the lack of active participation of LDCs and LICs in WTO dispute settlement should not be a cause for concern. However, reports of WTO panels and the Appellate Body are the most important source of clarifications and interpretations of WTO law. As the Appellate Body stated *US – Stainless Steel (Mexico) (2008)*:

It is well settled that Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties. This, however, does not mean that subsequent panels are free to disregard the legal interpretations and the *ratio decidendi* contained in previous Appellate Body reports that have been adopted by the DSB.⁴¹

The Appellate Body furthermore stated that:

Dispute settlement practice demonstrates that WTO Members attach significance to reasoning provided in previous panel and Appellate Body reports. Adopted panel and Appellate Body reports are often cited by parties in support of legal arguments in dispute settlement proceedings, and are relied upon by panels and the Appellate Body in subsequent disputes. ... Thus, the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the *acquis* of the WTO dispute settlement system.⁴²

In other words, whereas the *application* of a provision may be regarded as confined to the context of the case in which it takes place, the relevance of *clarification* contained in adopted Appellate Body reports is not limited to the application of a particular provision in a specific

⁴¹ See Appellate Body Report, *US – Stainless Steel (Mexico) (2008)*, para. 158.

⁴² *Ibid*, para. 160. The Appellate Body also observed that ‘when enacting or modifying laws and national regulations pertaining to international trade matters, WTO Members take into account the legal interpretation of the covered agreements developed in adopted panel and Appellate Body reports.’ See *ibid*.

case.⁴³

By not participating more actively in WTO dispute settlement, LICs and LDCs do not engage in this process of clarification of WTO law, and this can only be to their detriment. On the contrary, frequent users of the WTO DSS, such as the US, the EU but also a number of emerging economies, are able to ‘shape’, or at least influence the ‘shaping’, of the rules’ in their favour. Countries that do not use the WTO DSS deprive themselves of the opportunity to influence the clarification of the rules in ways that might favour them. The rules, as clarified by panels and the Appellate Body, will be applied to them regardless of the fact that they had no involvement in the clarification process.

Part 3: Regional Alternatives to WTO Dispute Settlement?

Having discussed the possible reasons for the very limited use of the WTO DSS by LDCs and LICs and why it would be in their interest to make more use of the WTO DSS, the remaining question is what can be done to facilitate their use of the WTO DSS? However, before turning to that question in Part 4, we will examine the availability of regional alternatives to WTO dispute settlement. This part deals with: (1) the legal structure of dispute settlement processes in African regional economic communities and the implications of the proliferation of RTA’s among LDCs and LICs for relying on the WTO DSS; and (2) the overlapping jurisdiction of regional trade courts with the WTO DSS and outline responses to this overlap.

It is important to note that while African Regional Trade communities have established their own dispute settlement systems, research shows that the WTO DSS continues to be the preferred venue by parties to bilateral and regional trade agreements with dispute settlement bodies.⁴⁴

3.1 Dispute settlement in African regional economic communities

There are four functioning sub-regional trade courts in Africa. These are the Common Market for Eastern and Southern Africa Court of Justice (COMESA Court of Justice); the East African Court of Justice (EACJ); the now suspended Southern African Development Community Tribunal (SADC Tribunal) and the Economic Community of West Africa Court of Justice (ECOWAS Court of Justice). These courts were established as mechanisms for promoting trade liberalization in each of the regions. However, these courts have primarily decided cases involving human rights and good governance so far.

⁴³ See *ibid.*, para. 161,

⁴⁴ WTO Secretariat, World Trade Report 2011, The TWO and Preference Trade Agreements: From Co-Existence to Coherence, 15 (2011)

Although each of these Courts is established under a separate Treaty, there are overlaps in the jurisdiction of these courts. This is because some countries belong to more than one regional economic community. Of the fifty-four countries in Africa, only six belong to only one regional economic community.⁴⁵ The other forty-eight belong to at least two or more regional economic communities.⁴⁶ Swaziland belongs to three regional economic communities - COMESA, SADC and the Southern Africa Customs Union, (SACU).⁴⁷ Of all five countries in the EAC, four are also members of COMESA, while Tanzania is a member of SADC.⁴⁸ Of the fifteen countries in SADC, eight are also members of COMESA.⁴⁹ This fact of overlapping memberships means multiple courts could be seized of the same case. This is of course in addition to the potential of bringing the case before the WTO DSS.

Before addressing the challenge of multiple memberships, we will first examine the four major African sub-regional courts and the kinds of cases that they have decided. Thereafter, we will examine the challenge of multiple memberships and what this means in relation to WTO dispute settlement.

3.1.1 The COMESA Court of Justice

The Treaty Establishing the Common Market for Eastern and Southern Africa mandates the COMESA Court of Justice to ‘ensure the adherence to law in the interpretation and application of this Treaty.’⁵⁰ The court has its seat in Khartoum, Sudan and its decisions are not subject to appeal. There are seven judges on the court who serve for a five-year term. The first set of judges to the COMESA Court of Justice were appointed on June 30, 1998.

Decisions of the Court on the interpretation of the COMESA Treaty take precedence over the decisions of the Member States’ national courts.⁵¹ Member States’ national courts may request a preliminary ruling from the Court where a question is raised before such national court concerning the application or interpretation of the Treaty or the validity of an action by COMESA.⁵² Where any such question is raised in a Member State’s national court and the laws of that Member State do not provide for a judicial remedy for such violation of the Treaty, the national court shall refer the entire matter to the COMESA Court of Justice.⁵³

⁴⁵ Assessing Regional Integration in Africa, (Economic Commission for Africa, 2004), p. 40.

⁴⁶ See Figures 1-4, *infra*.

⁴⁷ See Figure 1, *infra*.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Ibid.* at Art. 19.

⁵¹ Treaty Establishing COMESA, *supra* note 1, at Art. 29(2).

⁵² *Ibid.* at Art. 30(1).

⁵³ *Ibid.* at Art. 30(2).

Suits to the COMESA Court of Justice can be brought by natural and legal persons, as long as they involve actions or omissions of the COMESA Council of Ministers or a Member State, which violate the Treaty.⁵⁴ The Court also has jurisdiction to entertain arbitral proceedings where COMESA, or any of its institutions, is a party to an agreement, and such agreement allows the Court to serve as the arbitral forum. Member States' national courts may also request a preliminary ruling from the COMESA Court of Justice where a question is raised before such national court concerning the application or interpretation of the Treaty or the validity of an action by COMESA.⁵⁵ Where any such question is raised in a Member State's national court and the laws of that Member State do not provide for a judicial remedy for such violation of the Treaty, the national court shall refer the entire matter to the COMESA Court of Justice.⁵⁶

To date, the COMESA Court of Justice has primarily decided labour disputes between COMESA employees and COMESA itself. Some of these cases have involved the Eastern and Southern African Development Bank, otherwise known as the COMESA Bank. In 2002 the COMESA Court of Justice dismissed *Republic of Kenya and Commissioner of Lands v. Coastal Aquaculture* on the grounds that Coastal Aquaculture had not exhausted domestic remedies. This case involved a challenge of the legality of the acquisition of Coastal Aquaculture's land by the Kenyan government. Two cases involving companies that sued their governments in the COMESA Court were removed from the Court's calendar for failure by the companies to further pursue the cases as required by the rules of the Court.

3.1.2 The East African Court of Justice

The East African Court of Justice, ('EACJ'), is established under the Treaty Establishing the East African Community.⁵⁷ The EACJ has jurisdiction over the interpretation and application of the EAC Treaty under Article 27(1). Article 27(2) provides that the Council of Ministers shall confer human rights jurisdiction at future date. That has not yet happened. Decisions of the EACJ are 'final, binding and conclusive and not open to appeal'.⁵⁸

The EAC Treaty provides that the judges on the EACJ are to be appointed by the Summit on recommendation by the Partner States.⁵⁹ Before the 2006 amendments, the EAC Treaty provided that the EACJ would consist of no more than six judges with no more than two from each of the original three Partner States.⁶⁰ The EAC Treaty as amended split the EAC into a First Instance Division and an Appellate Division and provides that the court shall be composed of a

⁵⁴ Treaty Establishing COMESA, *supra* note 1, at Art. 26.

⁵⁵ Treaty Establishing COMESA, *supra* note 1, at Art. 30(1).

⁵⁶ *Ibid.* at Art. 30(2).

⁵⁷ Treaty Establishing the East African Community (Adopted Nov. 30, 1999, Came into Force July 7, 2000, Amended Dec. 14, 2006 and Aug. 20, 2007) (establishing a regional economic community between Kenya, Uganda, Rwanda, Burundi, and Tanzania).

⁵⁸ *Ibid.* at Art. 35(1).

⁵⁹ EAC Treaty, *supra* note 37, at Art. 24(1).

⁶⁰ *Ibid.* at Art. 24 (as adopted Nov. 30, 1999).

maximum of fifteen judges with a maximum of ten for the First Instance Division and five for the Appellate Division.⁶¹ No more than two judges from each of the now five Partner States can be appointed to the First Instance Division and no more than one from each Partner State to the Appellate Division.⁶² The seat of the EACJ is to be determined by the Summit.⁶³

The EAC Treaty states that the decisions of the EACJ on the interpretation and application of the EAC Treaty have precedence over the decisions of the national courts.⁶⁴ Where jurisdiction is conferred upon the EACJ the national courts have no jurisdiction.⁶⁵ A natural or legal person within East Africa has standing to bring a case before the EACJ. In addition, no exhaustion of domestic remedies is required prior to filing suit in the EACJ. These liberal access rules have resulted in several cases alleging violations of the preambular provisions relating to human rights, the rule of law and democracy.

In the case of *James Katabazi and 21 Others v. Secretary General of the East African Community and Another*, the EACJ was petitioned to determine the lawfulness of the detention of Ugandan prisoners.⁶⁶ Sixteen people had been brought before the Ugandan High Court and charged with treason.⁶⁷ The Ugandan Court had granted bail to fourteen of them and the court was immediately surrounded by security personnel who re-arrested the men, interfered with the preparation of the bail documents, and took the men back to jail.⁶⁸ They were taken before a military General Court Martial and charged with unlawful possession of firearms and terrorism stemming from the same facts as the previous charges.⁶⁹ The issues of interference with court process and conducting simultaneous civil and military prosecutions was brought before the Constitutional Court of Uganda which ruled that the interference was unconstitutional and that bail had to be granted the men.⁷⁰ They were not released and the issue was brought before the EACJ.⁷¹

The respondents, the Secretary General of the East African Community and the Attorney General of Uganda, challenged the EACJ's jurisdiction to deal with matters of human rights considering that no such jurisdiction had been granted by the EAC Treaty or by the Council under Article 27(2).⁷² The Court held it had jurisdiction. In so doing it held that while it was not explicitly authorized to decide human rights cases, "it will not abdicate from exercising its

⁶¹ Ibid. at Art. 24(2) (Adopted Nov. 30, 1999, Amended Dec. 14, 2006 and Aug. 20, 2007).

⁶² Ibid. at Art. 24(1).

⁶³ Ibid. at Art. 47.

⁶⁴ EAC Treaty, *supra* note 37, at Art. 33(2).

⁶⁵ Ibid. at Art. 33(1).

⁶⁶ *James Katabazi and 21 Others v. Secretary General of the East African Community and Another*, East African Court of Justice Judgment Ref. No. 1 of 2007 (Nov. 1, 2007).

⁶⁷ Ibid. at 1.

⁶⁸ Ibid. at 2.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ *James Katabazi and 21 Others v. Secretary General of the East African Community and Another*, *supra* n. 109 at 2.

⁷² Ibid. at 12

jurisdiction of interpretation under Article 27(1) merely because the reference includes allegation of human rights violation.⁷³ In other words, as long as a dispute gives the EACJ jurisdiction under Article 27, the fact that the dispute involves human rights is merely incidental. Further, it held that:

[T]he intervention by the armed security agents of Uganda to prevent the execution of a lawful Court order violated the principle of the rule of law and consequently contravened the Treaty. Abiding by the court decision is the corner stone of the independence of the judiciary which is one of the principles of the observation of the rule of law.⁷⁴

The EACJ based its decision in *Katabazi* on the objectives and purposes clauses of the Treaty which are regarded as preambles that do not create binding obligations. Objectives and purposes clauses are therefore not thought of as creating independent or substantive grounds for granting relief. Rather, they are meant to give the treaty context. In 2000, the Iran-United States Claims Tribunal put it this way:

[W]hen one is dealing with the object and purpose of a treaty, which is the most important part of the treaty's context, the object and purpose does not constitute an element independent of that context. The object and purpose is not to be considered in isolation from the terms of the treaty; it is intrinsic to its text. It follows that, under Article 31 of the Vienna Convention⁷⁵, a treaty's object and purpose is to be used only to clarify the text, not to provide independent sources of meaning that contradict the clear text.⁷⁶

⁷³ Ibid. at 16.

⁷⁴ Ibid.

⁷⁵ Vienna Convention on the Law of Treaties, (Signed May 23, 1969, Entered into Force Jan. 27, 1980), at Art. 31.

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

⁷⁶ United States v. Iran, No. 130-A28-FT, ¶ 58 (Iran-U.S. Cl. Trib. Rep. 2000).

Notwithstanding this, the EACJ determined that Article 5(1), which spells out one of the objectives of the Community, requires Partner States to abide by the decisions of their courts. The *Katabazi* decision illustrates the interpretive boldness of the EACJ not only in seizing jurisdiction over cases that raise sovereignty questions for the member states as well as in creatively using preambular provisions of the Treaty Establishing the EACJ to determine cases brought before it when such cases involve human rights which are not an enumerated base for the exercise of jurisdiction by the ground.

Since the *Katabazi* case, several other cases have been decided under the EACJ's jurisdiction not to abdicate in deciding human rights cases.

To date, cases involving commercial actors suing their governments under the terms of the EAC Treaty have been rare in the EACJ. One such exceptional case involved protection of cross-border investment.⁷⁷ The only other case involved waiver of customs ware house rent and loss of consignment.⁷⁸ None of the two cases was decided on the merits. They were dismissed on procedural grounds including that both cases were not brought against an organ of the East African Community or a Partner State.

3.1.3 The ECOWAS Community Court of Justice

The ECOWAS Treaty establishes the ECOWAS Court of Justice hereinafter 'ECCJ').⁷⁹ The jurisdiction of the ECCJ includes: the interpretation and application of the Treaty, Conventions and Protocols of the Community; the interpretation and application of the regulations, directives, decisions and other subsidiary legal instruments adopted by ECOWAS as well as deciding the legality of regulations, directives, decisions and other subsidiary legal instruments adopted by ECOWAS.

The ECCJ consists of seven judges, appointed by the Authority of Heads of States and Government from a pool of nominees, two from each state.⁸⁰ Members of the CCJ are appointed for a five-year term and may be reappointed only once. The Protocol allows national courts to present certified questions on issues of interpretation and application of the Treaty and other ECOWAS texts.⁸¹

Individuals and corporate bodies may also bring a proceeding before the ECCJ 'for the determination of an act or inaction of a Community official that violates the rights of the

⁷⁷ *Alcon International Limited v The Standard Chartered Bank of Uganda & 2 Others*, Appeal No. 2 of 2011 EACJ

⁷⁸ *Modern Holdings (EA) Limited v Kenya Ports Authority*, No.1 of 2008 EACCJ

⁷⁹ Treaty Establishing the Economic Community of West African States, ECOWAS Authority of Heads of State and Government, (Adopted and Enacted July 24, 1993) (replacing the 1975 Treaty of Lagos as the Treaty Establishing ECOWAS), at Arts. 7(1)(e), 15(1).

⁸⁰ Community Court Protocol A/P.1/7/91, *supra* note 135, at Art. 2.

⁸¹ Community Court Protocol A/P.1/7/91, *supra* note 135, at Art. 10(f).

individuals or corporate bodies.⁸² Individuals are also explicitly granted the right to bring cases of violations of human rights before the ECCJ.⁸³

Prior to the 2005 amendment of the Protocol by the Supplemental Protocol⁸⁴, individuals were not allowed to bring suit in the CCJ.⁸⁵ This was a heavy restriction on the power of the CCJ to enforce the Treaty upon ECOWAS Member States and ECOWAS stood apart from other RTA judiciaries which allow such cases.⁸⁶ The 2003 case of *Olajide Afolabi v. Federal Republic of Nigeria*⁸⁷ and the 2004 case of *Frank Ukor v. Rachard Lalaye*⁸⁸, emphasize this fact.⁸⁹

In 2003 Nigeria closed its common border with Benin, which hurt many of the businesses along the border.⁹⁰ A Nigerian citizen applied to the ECCJ to have his suit heard on the ground that the border closure had caused loss to his business in violation of the Treaty.⁹¹ Nigeria objected to the ECCJ's jurisdiction to hear the case under the Treaty and the Protocol.⁹² The ECCJ agreed and dismissed the case. In 2004 Benin seized a national's truck and goods.⁹³ The citizen applied to the ECCJ to quash the order that his truck and goods be seized as violative of the Treaty.⁹⁴ Benin objected to jurisdiction and, again, the ECCJ dismissed the case.⁹⁵ These cases are, in large part, the reason why the Supplemental Protocol was established in 2005.⁹⁶

Since the 2005 amendments to the Protocol many citizens of Member States have brought cases before the CCJ, and many have won. In 2008, a citizen of Niger brought suit in the ECCJ against Niger for failing to protect her human rights, as she had been a slave for almost her entire life.⁹⁷ The citizen won the case and was awarded about \$17,000.⁹⁸

A more controversial decision of the ECCJ came in 2009 in the case of *Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria and Universal Basic Education Commission*.⁹⁹ In this case, SERAP, a human rights NGO, brought suit in the CCJ as a legal

⁸² Community Court Protocol A/P.1/7/91, *supra* note 135, at Art. 10(c).

⁸³ *Ibid.* at Art. 10(d).

⁸⁴ Supplementary Protocol A/SP.1/01/05, *supra* note 134.

⁸⁵ Enabulele, *supra* note 133, at 116-19.

⁸⁶ *Ibid.*

⁸⁷ *Olajide Afolabi v. Federal Republic of Nigeria*, ECW/CCJ/APP/01/03, (2003).

⁸⁸ *Frank Ukor v. Rachard Lalaye*, ECW/CCJ/APP/01/04, (2004).

⁸⁹ Enabulele, *supra* note 133, at 116.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Ibid.* at 117.

⁹⁴ *Ibid.*

⁹⁵ Enabulele, *supra* note 133 at 117

⁹⁶ *Ibid.* at 116-19.

⁹⁷ P. Walker, 'Niger Guilty in Landmark Slavery Case', *The Guardian* (Oct. 27, 2008), available at www.guardian.co.uk/world/2008/oct/27/niger-slave-court; see also *Hadijatou Mani Koraou v. Republic of Niger*, Judgment No. ECW/CCJ/APP/08/08, unofficial translation of Judgment No. ECW/CCJ/JUD/06/08 (Oct. 27, 2008).

⁹⁸ *Ibid.*

⁹⁹ Judgment No. ECW/CCJ/APP/0808, *supra* note 167.

person against Nigeria for human rights violations on the ground that Nigeria had not adequately implemented Nigeria's Basic Education Act and Child's Rights Act of 2004, and had thus violated both the African Charter and the ECOWAS Treaty.¹⁰⁰ Nigeria alleged that the ECCJ did not have jurisdiction, notwithstanding the express provision of the Protocol.¹⁰¹ The ECCJ noted that Article 9(4) of the Protocol states '[t]he [CCJ] has jurisdiction to determine cases of violation of human rights that occur in any Member State'; that Article 4(g) of the ECOWAS Treaty affirms that the Member States must adhere to the 'recognition promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights'; and that Article 17 of the African Charter states that '[e]very individual shall have the right to education'.¹⁰² Thus, the ECCJ determined that it had jurisdiction, but there is yet to be a decision on the substantive issues of the case, namely whether Nigeria had actually violated its citizens' right to an education.¹⁰³

To date, the *Afolabi* case noted above has been the only case filed in the ECCJ involving a claim from a trader. When the ECCJ's rules were changed in 2005, private party access to the Court was only given for human rights cases. Private access to the Court for trade, economic and commercial disputes for private parties was however not permitted.¹⁰⁴

3.1.4 The SADC Tribunal

The Treaty of the Southern African Development Community (hereafter Treaty) establishes the Tribunal to ensure adherence to and the proper interpretation of the provisions of the SADC Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it.¹⁰⁵ Further emphasis is given to this objective in Article 32: 'Any dispute arising from the interpretation or application of this Treaty, the interpretation, application or validity of Protocols or other subsidiary instruments made under this Treaty, which cannot be settled amicably, shall be referred to the Tribunal.'¹⁰⁶ The Treaty mandates '[t]he decisions of the Tribunal shall be final and binding.'¹⁰⁷ Furthermore, subsection 2 of Article 16 of the Treaty states '[t]he composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed in a Protocol, which shall, notwithstanding the provisions of Article 22 of this Treaty, form an integral part of this Treaty, adopted by the Summit.'¹⁰⁸ Article

¹⁰⁰ ESCR-Net, *Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria and Universal Basic Education Commission*, Judgment No. ECW/CCJ/APP/0808, (International Network for Economic, Social and Cultural Rights, 2009), available at www.escr-net.org/caselaw/caselaw_show.htm?doc_id=1143047.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Laurence Helfer, Karen Alter and Jacqueline McAllister, "A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice", forthcoming *American Journal of International Law* (2013)

¹⁰⁵ Treaty Establishing the Southern African Development Community, (Adopted and Came into Force on Aug. 17, 1992, Amended on Aug. 14, 2001), at Arts. 1(g) and 16(1).

¹⁰⁶ Ibid. at Art. 32.

¹⁰⁷ Ibid. at Art. 16(5).

¹⁰⁸ Ibid. at Art. 16(2).

22 is the article that addresses the requirements of ratification process for protocols to the treaty.¹⁰⁹

The Protocol on Tribunal and the Rules of Procedure Thereof was passed by the Summit in August 2000 in accordance with Article 16 of the Treaty.¹¹⁰ While the Tribunal has begun operating, the Protocol on Tribunal has not yet been ratified by two-thirds of Member States as required by Article 22.¹¹¹ There is much dispute over whether this protocol in particular can be given effect without such ratification. This together with the Tribunal's decision in the Campbell case resulted in its indefinite suspension in 2012. The Protocol on Tribunal mandated the Council to determine where the seat of the Tribunal would be located.¹¹² The Council eventually chose Windhoek, Namibia.¹¹³

The Treaty for the Establishment of SADC states 'Members of the Tribunal shall be appointed for a specified period.'¹¹⁴ The Protocol mandates 'The Tribunal shall consist of not less than ten (10) Members, appointed from nationals of States who possess the qualifications required for appointment to the highest judicial offices in their respective States or who are jurists of recognised competence.'¹¹⁵ The Summit, on recommendation of the Council, is to appoint the ten members¹¹⁶, five of which it is to designate as 'regular Members', those who 'shall sit regularly on the Tribunal'.¹¹⁷ The other five 'constitute a pool from which the President [of the Tribunal] may invite a Member to sit on the Tribunal whenever a regular Member is temporarily absent or is otherwise unable to carry out his or her functions.'¹¹⁸ The Protocol states that the Tribunal is constituted by three members, but it may decide to constitute all five for any case.¹¹⁹ The Tribunal only sits when there is a case submitted to it¹²⁰ and the President of the Tribunal gets to decide who shall sit for any case.¹²¹ The Council may increase the number of members on a proposal from the Tribunal.¹²² While, the Members of the Tribunal serve a five-year term and may only be re-appointed for an additional five-year term.¹²³ The Tribunal only

¹⁰⁹ Ibid. at Art. 22.

¹¹⁰ Protocol on Tribunal and the Rules of Procedure Thereof, South African Development Community, (Adopted Aug. 7, 2000).

¹¹¹ Press Release, 'Status and Meaning of Ratification of SADC Treaty and Tribunal Protocol', Zimbabwe Human Rights NGO Forum (Sept. 6, 2009), *available at* www.zimbabwedemocracynow.com/2009/09/06/status-and-meaning-of-ratification-of-sadc-treaty-and-tribunal-protocol/.

¹¹² SADC Protocol on Tribunal, *supra* note 183, at Art. 13.

¹¹³ SADC Web Site, 'SADC Tribunal', *available at* www.sadc.int/tribunal/.

¹¹⁴ SADC Treaty, *supra* note 178, at Art. 16(3).

¹¹⁵ SADC Protocol on Tribunal, *supra* note 183, at Art. 3(1).

¹¹⁶ Ibid. at Art. 4(4).

¹¹⁷ Ibid. at Art. 3(2).

¹¹⁸ Ibid.

¹¹⁹ Ibid. at Art. 3(3).

¹²⁰ Ibid. at Art. 6(2).

¹²¹ SADC Protocol on Tribunal, *supra* note 183, at Art. 3(4).

¹²² Ibid. at Art. 3(5).

¹²³ Ibid. at Art. 6(1).

sits when there is a case, the Council may decide to make it a full-time position and, if it does, Members would no longer be allowed to hold any other office or employment.¹²⁴

With regard to the relationship between the tribunal and Member States, the Treaty for the Establishment of SADC provides that ‘the members of the Tribunal . . . shall be committed to the international character of SADC, and shall not seek or receive instructions from any Member States, or from any authority external to SADC.’¹²⁵ The Tribunal ‘may rule on a question of interpretation, application or validity of the provisions in issue if the question is referred to it by a court or tribunal of a State.’¹²⁶

The Tribunal also has original jurisdiction over all disputes and all applications referred to it in accordance with the Treaty and this Protocol which relate to:

- (a) the interpretation and application of the Treaty;
- (b) the interpretation, application or validity of the Protocols, all subsidiary instruments adopted within the framework of the Community, and acts of the institutions of the Community; [and]
- (c) all matters specifically provided for in any other agreements that States may conclude among themselves or within the community and which confer jurisdiction on the Tribunal.¹²⁷

The Tribunal is directed to develop its own case law, ‘having regard to applicable treaties, general principles and rules of public international law and any rules and principles of the law of States.’¹²⁸ The Protocol provides ‘Where a dispute is referred to the Tribunal by any party the consent of other parties to the dispute [is] not . . . required.’¹²⁹ The Tribunal does not have original jurisdiction, but it may give preliminary rulings in certain cases.¹³⁰

A natural or legal person may only bring suit against a Member State ‘unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction.’¹³¹ Finally, the Tribunal has ‘exclusive jurisdiction over all disputes between the Community and its staff relating to their conditions of employment.’¹³² The Tribunal’s legitimacy has been brought into sharp focus as a result of its decision on Zimbabwe’s land reform program. Following that decision, many officials within Zimbabwe’s government argued that the Tribunal does not currently exist and as noted above, the Tribunal’s operations were suspended in 2012.

¹²⁴ Ibid. at Arts. 6(2) and (3).

¹²⁵ SADC Treaty, *supra* note 178, at Art. 17(2).

¹²⁶ SADC Protocol on Tribunal, *supra* note 183, at Art. 16.

¹²⁷ Ibid. at Art. 14.

¹²⁸ Ibid. at Art. 21.

¹²⁹ Ibid. at Art. 15(3).

¹³⁰ Ibid. at Art. 16. For an explanation of these instances, see the ‘Partner States’ National Courts’ subsection of this section.

¹³¹ Ibid. at Art. 15(2).

¹³² Ibid. at Art. 19.

The case that started the controversy over the SADC Tribunal's legitimacy is *Mike Campbell (Pvt) Ltd. and 78 Others v. The Republic of Zimbabwe*.¹³³ The applicants, natural and legal persons, in that case were land-owners challenging Zimbabwe's land reform program which essentially permitted taking the applicants' land from them and redistributing it.¹³⁴ The Tribunal determined that it had jurisdiction to hear and determine the case. It dismissed Zimbabwe's objections to the admissibility of the case because of non-exhaustion of domestic remedies and held:

The rationale for exhaustion of local remedies is to enable local courts to first deal with the matter because they are well placed to deal with the legal issues involving national law before them. It also ensures that the international tribunal does not deal with cases which could easily have been disposed of by national courts.¹³⁵

Therefore, the Tribunal reasoned:

[W]here the municipal law does not offer any remedy or the remedy that is offered is ineffective, the individual is not required to exhaust local remedies. Further, where . . . the procedure of achieving the remedies would have been unduly prolonged, the individual is not expected to exhaust local remedies.¹³⁶

The Tribunal thus determined that if an applicant's local remedies suffered from *de facto* exhaustion, the Tribunal would have jurisdiction. In fact, the Supreme Court of Zimbabwe had already rendered a decision in the applicants' case.¹³⁷

The Tribunal further held that it had jurisdiction to determine human rights cases because Article 21(b) of the SADC Treaty mandates the Tribunal to develop its own jurisprudence and to do so having regard for general principles and rules of public international law.¹³⁸ Article 4(c) requires Member States to act in accordance with 'human rights, democracy and the rule of law.'¹³⁹ Therefore, as long as one of these interconnected principles had been violated by Zimbabwe the Tribunal held it had jurisdiction to hear the dispute under Article 15(2) of the Treaty. The Tribunal noted that Amendment 17 of the Constitution of Zimbabwe denied the respondents access to the courts and the right to a fair hearing and so determined that their

¹³³ *Mike Campbell (Pvt) Ltd. and 78 Others v. The Republic of Zimbabwe*, SADC (T) Case No. 2/2007 [2008] SADCT 2 (28 Nov. 2008).

¹³⁴ *Ibid.* at 4-7.

¹³⁵ *Ibid.* at 20.

¹³⁶ *Ibid.* at 21 (internal quotations omitted).

¹³⁷ *Mike Campbell (Pty) Ltd. v. Minister of National Security Responsible for Land, Land Reform and Resettlement* (124/06) [2008] ZWSC 1 (22 Jan. 2008).

¹³⁸ *Ibid.* at 24.

¹³⁹ *Ibid.* at 25.

human rights, democracy, and the rule of law had been violated and that the Tribunal had jurisdiction.¹⁴⁰

After granting jurisdiction the Tribunal went on to discuss the substantive questions raised in the case. In its ruling, it held that the applicants had been discriminated against on the ground of race, the respondent owed the applicants fair compensation for the lands that had been taken from them, and both the respondent and Amendment 17 itself were in breach of Articles 4(c)¹⁴¹ and 6(2)¹⁴² of the Treaty.¹⁴³

Zimbabwe did not comply with the Tribunal's ruling.¹⁴⁴ Following Zimbabwe's objections about the expansionist law-making authority exercised by the Tribunal in violation of Zimbabwe's sovereignty, in 2011 the highest decision making body in SADC declined to re-appoint the Judges to the Tribunal. In 2012, they suspended the Tribunal pending a review of its jurisdiction.

The Campbell case that resulted in the SADC Tribunal's suspension was brought by investors challenging the expropriation of their land. The SADC Tribunal did not, like the other sub-regional African trade courts, handle more disputes of a commercial or trade nature.

3.2 Jurisdictional Overlaps and Multiple Membership Challenges

Africa's four sub-regional trade courts are relatively young courts. These courts have primarily decided a burgeoning number of cases particularly in the area of human rights and much less so trade cases. The SADC Tribunal's decision in the Campbell case resulted in its suspension in 2012. In addition, the EACJ's early decisions on election of members to the East African Legislative Assembly (EALA) resulted in amendments that introduced a two-month limitation for cases coming before the EACJ.

For purposes of deciding cases, the jurisdictional overlaps that result from the multiple memberships of African countries in more than one regional economic community as noted above, has not had an adverse impact on these functioning of these courts. Clearly, there are administrative burdens imposed on LDCs and LICs that have multiple memberships in the four major sub-regional trade communities. As noted above, for example, Swaziland belongs to

¹⁴⁰ Ibid. at 26-41.

¹⁴¹ 'SADC and its Member States shall act in accordance with the following principles: human rights, democracy and the rule of law.' SADC Treaty, *supra* note 178, at Art. 4(c).

¹⁴² 'SADC and Member States shall not discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture, ill health, disability, or such other ground as may be determined by the Summit.' SADC Treaty, *supra* note 178, at Art. 6(2).

¹⁴³ *Mike Campbell (Pvt) Ltd. and 78 Others v. The Republic of Zimbabwe*, *supra* note 219, at 57-59.

¹⁴⁴ N. Nkomo, 'South African High Court Approves Legal Action Against Harare in Land Case', Voice of America News (Jan. 13, 2010), available at www1.voanews.com/zimbabwe/news/human-rights/Zimbabwe-South-African-Group-Granted-Right-to-Sue-Zimbabwe-13Jan10-81347412.html.

three regional trade communities. There are benefits to be derived from one regional trade community that may not be available in another trade community. Thus Swaziland gets preferential trade benefits from its SACU membership, that are not available from its SADC membership.¹⁴⁵

What is problematic is that for the most part regional trade courts have primarily decided human rights cases.¹⁴⁶ There have been extremely few, if any cases, brought to enforce the trade mandates of these regional economic communities. One could surmise that the human rights practitioners and movements are far more organized in terms of mobilizing these courts than trade associations and entrepreneurs. What is needed now is a continuing to expand the number legal practitioners who can advise their clients on how these African economic community regimes offer them opportunities to use the remedies these RTA judiciaries are empowered to give. Such remedies, of course, include the trade remedy regimes of antidumping and countervailing duty law that have been borrowed from the WTO. They, of course, also include the possibility of challenging the broad range of non-tariff barriers that exist in trade between African countries. The potential for using these African RTA judiciaries is, therefore, quite broad and this potential awaits future use.

The last question to be addressed is the relationship between the WTO DSS and Africa's sub-regional trade courts. As noted above, Africa's sub-regional courts have hardly been used to decide cases involving trade integration. Hence, no conflicts or parallel proceedings have¹⁴⁷ arisen that would raise questions about the pre-eminence of one system over the other. However, the existence of sub-regional trade courts raises important questions. This is because many LDCs and LICs in Africa and elsewhere are members of regional economic communities in their own regions as well as members of the World Trade Organization. The potential for conflict between overlapping jurisdictions in the regional trade courts and the WTO therefore arises. For example, can a trade remedy authorized by a regional trade court that is inconsistent with WTO rules be sustained?¹⁴⁸ This kind of legal question can best be answered by examining the flexibilities that regional economic communities enjoy under Article XXIV of the GATT 1994 and/or Article V of the GATS. Another kind of question that arises is which mechanism a country that is both a member of a regional trade community and the WTO should/could use to bring a complaint about non-compliance with a trade obligation. Would it be better to resort to the geographically proximate regional trade court, or to go to the more experienced DSS of the

¹⁴⁵ James Gathii, *African Regional Trade Agreements as Legal Regimes* (Cambridge University Press, 2011).

¹⁴⁶ See James Gathii, "Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy", forthcoming, *Duke Journal of Comparative and International Law*; Karen Alter et al, "A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice", forthcoming *American Journal of International Law*.

¹⁴⁷ For one view see, Joost Pauwelyn, "Going Global, Regional or Both? Dispute settlement in the Southern African Development Community (SADC) and Overlaps with the WTO and Other Jurisdictions", 13 *Minnesota Journal of Global Trade* 231-304 (2004).

¹⁴⁸ Gabrielle Marceau and Jillian White, "Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO", 1 *Journal of International Dispute Settlement*, 67-95 (2010)

WTO? There is another related question: Since the SADC Tribunal, as the other three regional trade courts, is designed to have exclusive jurisdiction over member states on questions that fall within each treaty regime, does that exclusivity preclude WTO dispute settlement? The answer to this question depends on whether the WTO DSS would consider exclusive jurisdiction clauses in non-WTO treaty when deciding on its own jurisdiction in a dispute.

Some commentators have argued that a dispute brought before the WTO DSS would hardly yield to another forum since the WTO's dispute settlement forum is always the convenient forum for trade cases arising out of WTO law.¹⁴⁹ According to this view, pursuant to Article 23 of the Dispute Settlement Understanding, the WTO's Dispute Settlement Body has exclusive and compulsory jurisdiction over any dispute relating to matters covered by any WTO agreement.¹⁵⁰ Notably, in *Mexico— Taxes on Soft Drinks (2006)*, Mexico argued that the WTO panel should refuse to resolve the dispute in light of its efforts to begin proceedings under NAFTA Chapter 20. The Appellate Body held that the panel could not decline to exercise jurisdiction and that the WTO had no basis to determine whether or not the United States had acted consistently with its NAFTA obligations.¹⁵¹

At the moment, the relationship between WTO and regional trade dispute settlement can be stated as follows – the WTO dispute settlement process covers disputes covering any WTO treaty. As such, the WTO dispute settlement process cannot exercise jurisdiction to determine whether or not a WTO member country acted in/consistently with its regional trade obligations. Ultimately, as long as a dispute raises a WTO legal question, the WTO DSS can exercise jurisdiction over the case even if one of the parties intends to use a regional dispute settlement system over the same legal dispute. As noted above, as a matter of practice, WTO member states who are parties to regional trade agreements with dispute settlement systems seem to prefer the WTO's DSS to determine their disputes.¹⁵² The familiarity of WTO DSS, broader scope of WTO remedies, the predictability of WTO jurisprudence and existence of appellate review among other benefits appears to have made it the default option for resolving trade disputes that would otherwise be resolved under regional trade dispute mechanisms.¹⁵³ Further, regional trade judiciaries are new and untested and do not enjoy the legitimacy of the

¹⁴⁹ Gabrielle Marceau and Kyung Kwak, "Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements", 41 *Canadian Yearbook of International Law*, 83 (2003)

¹⁵⁰ Debra P. Steger, "The Jurisdiction of the World Trade Organization", 98 *AM. SOC'Y INT'L L. PROC.* 142, 143 (2004).

¹⁵¹ See Appellate Body Report, *Mexico – Taxes on Soft Drinks (2006)*, para. 53 and 56.

¹⁵² WTO, *World Trade Report 2011*, The WTO and Preferential Trade Agreements: From Co-Existence to Coherence, 15 (2011)

¹⁵³ A Porges, "Dispute Settlement", in J. Chauffour and J. Maur (eds.) *Preferential Trade Agreement Policies for Development*, 492 (2011)

WTO's DSS.¹⁵⁴ Further, the WTO's DSS offers reputational costs at a multilateral rather than bilateral or even regional level, making it a more preferred alternative.¹⁵⁵

At this point, it is appropriate to point out the provisions of Annex VI of Concerning the Settlement of Disputes Between the Member States of the Southern African Development Community, (SADC).¹⁵⁶ This Annex establishes an ad hoc dispute settlement process and body that closely mirrors the WTO DSS that was designed to resolve trade disputes. This body which parallels the SADC Tribunal discussed above has never been used in practice. Article 1bis of Annex IV precludes SADC member states from utilizing any other dispute settlement procedures once it has invoked the provisions of Annex IV.¹⁵⁷ Suffice it to say, the provisions of Annex VI raise more questions than they answer especially given that they have never been invoked.¹⁵⁸ Perhaps the current review of the suspended SADC Tribunal will address the existence of multiple possible forums for trade dispute settlement in Southern Africa.

Since no definitive legal pronouncement has been made about whether the WTO DSS supersedes regional trade dispute systems, it is important to note other proposals that have been discussed to resolve the overlapping jurisdictions of regional and multilateral dispute settlement systems. These other proposals have been summarized as follows. First, permit and or require WTO Panels to apply regional economic community law as a defence: WTO panels could be permitted, where appropriate, to recognize defences available under an RTA. This could result in the same law being applied by panels of the WTO or a regional economic community. Second, *forum conveniens*: Article 23 of the Dispute Settlement Understanding could be amended to permit members to determine the most convenient forum for resolving a given dispute. Third, exhaustion of remedies: Members could agree to require parties to either exhaust their RTA remedies before bringing a WTO dispute or to exhaust their WTO remedies before bringing an RTA dispute. Fourth, required suspension of other forum process: Members could negotiate rules to permit or require the suspension of proceedings in one forum while the other forum hears the matter. Fifth, Article 13 of the DSU: Article 13 of the DSU, which permits panels to request information from parties or any other source, could be invoked to seek information, or evidence, or even rulings from an RTA tribunal. Sixth, *res judicata*: Article

¹⁵⁴ P. Van den Bossche and M. Lewis, "What to Do When Disagreement Strikes? The Complexity of Dispute Settlement Under Trade Agreements", in S. Frankel and M. Lewis, (eds.) Trade Agreements at the Crossroads, (forthcoming Routledge 2013)

¹⁵⁵ W. Davey, "Dispute Settlement in the WTO and RTAs: A Comment", in L. Bartels and R. Ortino, (eds.) Regional Trade Agreements and the WTO Legal System, 343 (2006)

¹⁵⁶ Available at <http://www.tralac.org/files/2011/11/SADC-Trade-protocol-Amendment-to-Annex-VI.pdf>

¹⁵⁷ See Clement Ng'ong'ola, "Replication of Dispute Settlement Processes in SADC", 1 SADC Law Journal 35 (2011); See also Joost Pauwlyn, "Going Global, Regional or Both? Dispute settlement in the Southern African Development Community (SADC) and Overlaps with the WTO and Other Jurisdictions", 13 MINNESOTA JOURNAL OF GLOBAL TRADE 231-304 (2004)

¹⁵⁸ See Jan Bohanes, "A Few Reflections on Annex VI to the SADC Trade Protocol", Tralac Working Paper No. 3/2005 (June 2005) available at http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/WP32005_Bohanes_Jan.pdf

23 could be amended to permit a WTO panel to decline jurisdiction if a regional trade court has already adjudicated the same matter.

Part 4: Strategies for the Effective Use of the WTO DSS

In this part, we outline some strategies that LDCs and LICs can adopt to be able to effectively use WTO dispute settlement. These strategies can be divided in three categories: (1) learning and borrowing from successful developing country experiences (i.e. experiences-based strategies); (2) making better use of existing resources or mobilizing new resources to enable LDCs and LICs to use the WTO DSS (i.e. resources-based strategies); and (3) increasing reliance on mediation and conciliation under Article 5 of the DSU, fully utilizing the existing DSU rules providing for special and differential treatment for developing countries and LDCs, and improving the DSU to allow LDCs and LICs to make more effective use of the WTO DSS (i.e. rules-based strategies).

4.1 Experiences-based strategies

Brazil has successfully used the WTO's dispute settlement process using what has been referred to as 'three pillars.' These are, an office in Geneva, a special WTO legal division in Brazil, and well-organized relations with the private sector, think tanks academics and interest groups. The Brazilian government has effectively used joint ventures with academia, think tanks, consultancies and civil society groups. Brazilian trade associations coordinated their work and then communicated their needs and priorities to the Brazilian government. These public private partnerships have in turn helped the Brazilian government to develop positions on its international trade negotiations and cases.¹⁵⁹ Collective action through trade associations is critical to effective participation in the WTO's dispute settlement process. Strong public-private sector collaboration not only provides information, but resources to support dispute settlement proceedings. LDC and LIC governments should create mechanisms of effectively engaging the private sector in all trade matters from negotiations, to dispute settlement as well as in periodic WTO Trade Policy Reviews. This would expose the private sector and a cadre of government officials to trade policy and legal matters that could translate to effectively monitoring violations or potential violations of WTO rules.

Another factor critical to the success of countries like South Africa is strong inter-ministerial coordination. In South Africa, the Department of Trade and Industry coordinates all trade matters within the South African government including in the Permanent Mission in Geneva. The International Trade Administration Commission takes responsibility for trade disputes. Thailand is another country that maintains a dedicated international trade law unit. Argentina

¹⁵⁹ Gregory Shaffer, Michelle Ratton Sanchez and Barbara Rosenberg, "The Trials of Winning at the WTO: What Lies Behind Brazil's Success", 41 Cornell International Law Journal 446 (2008)

has formed a dispute settlement division in its Ministry of Foreign Affairs and International Trade. This division has been representing Argentina in important dispute settlement cases at the WTO. Institutionalization has helped to create consensus among various government ministries to defend Argentina in the WTO DSS. This has helped to create expertise that, in turn, has led Argentina to begin launching its own disputes against other WTO members.

A number of developing countries have filed cases before the WTO's dispute settlement body and prevailed over developed countries. The examples include Costa Rica's case against the United States involving underwear; Thailand and Pakistan's case against the United States involving shrimp; India's case against the United States involving wool shirts; Venezuela and Brazil's case against the United States involving gasoline; Peru's case against the European Communities involving sardines; and two Brazilian cases – one against the United States involving cotton and another against the European Communities involving poultry.

Although LDCs and LICs have not had similar successful experiences with the WTO DSS, they could learn from the experience of developing countries that have used the system and had some success. For example, the case brought by Peru and Chile against the European Communities involving scallops, *EC – Scallops (Peru and Chile) (1996)*, illustrated in the very first years of the WTO DSS already how a developing country can use the WTO DSS effectively and successfully. Peru and Chile challenged a French regulation on the labelling of scallops. The regulation prohibited the marketing under the label '*noix de coquille Saint-Jacques*.' Since Canada's scallops were also affected by the labelling regulation, Peru and Chile banded together with Canada against the European Communities in their case at the WTO DSS. Canada offered advice and guidance to Peru and Chile. Working with Canada on the case, Peru and Chile negotiated – while the case was before the panel – an agreement with the European Communities to allow them to continue exporting their scallops under the *noix de coquille Saint-Jacques* label as long as they indicated the country of origin. The European Communities decided to compromise rather than risk the prospect of a negative panel determination.

One of the main fears LDCs and LICs face in using the WTO's dispute settlement system is the fear of losing preferential access to developed country markets. Costa Rica's experience in *US – Underwear (1997)* demonstrates that fears of initiating dispute settlement proceedings will jeopardize foreign relations and result in adverse trade consequences. Before this case could be brought, there was disagreement between the Costa Rican Ministry of Foreign Affairs and the Ministry of Trade about whether or not the government should bring a complaint to the WTO concerning the United States' restrictions on textile imports from Costa Rica.¹⁶⁰ As would most Foreign Ministries in developing countries, the Ministry of Foreign Affairs was hesitant to file a complaint for fear of harming Costa-Rican-US foreign relations.¹⁶¹ However, the Trade Ministry

¹⁶⁰ J. Breckenridge, "Costa Rica's Challenge to US Restrictions on the Import of Underwear", in P. Gallagher, P. Low and A. Stoler (eds.), *Managing the Challenges of WTO Participation: 45 Case Studies* (Cambridge: Cambridge University Press, 2005), pp. 182-183.

¹⁶¹ Id. 182. Among the lawyers in this group were Anabel Gonzales, currently Costa Rica's Minister of Trade, and Irene Arguedas, Director of Foreign Investment in Costa Rica.

argued that Costa Rica's participation in the WTO dispute settlement system was essential to the country's economic future.¹⁶² The Trade Ministry prevailed and Costa Rica filed a WTO complaint against the United States measures on cotton underwear. Led by a team of local lawyers, rather than from an international law firm, Costa Rica won the case when the United States' restraints were found to be inconsistent with the U.S.'s WTO obligations. The United States complied with the ruling almost immediately.¹⁶³ Hence, rather than damage its relations with the United States, 'Costa Rica gained an increased level of respect from the United States and more generally among WTO members'.¹⁶⁴

Learning through experience is one of the best ways to creatively address and in some cases overcome capacity constraints. Using the WTO dispute settlement system as third parties helps LDCs and LICs gain first hand knowledge about how the system works as well as establishing a closer collaboration with private sector actors. In short, as some authors have noted, knowledge, collaboration, and experience reduce start-up costs for subsequent litigation.¹⁶⁵

4.2 Resources-based strategies

4.1.1 The Advisory Centre on WTO Law

The Advisory Centre on WTO Law (ACWL) is a Geneva-based legal service organization that provides subsidized legal assistance to developing countries. It was established in 2001 to provide developing countries, which are members of the ACWL or LDCs with legal capacity necessary to enable them to take full advantage of their WTO membership. The Centre helps developing countries analyse their legal rights and obligations under WTO law and whether or not to bring dispute settlement claims. In addition to providing legal advice (in the form of written or oral opinions), the ACWL provides comprehensive assistance in all stages of WTO dispute settlement, i.e. consultations, panel and Appellate Body proceedings and implementation and enforcement. The ACWL can prepare written submissions and/or represent a developing country in panel meetings and Appellate Body hearings. To date, the ACWL has been involved in 38 WTO dispute settlement proceedings. The ACWL also provides for capacity building support in the form of training on WTO law and a secondment programme

¹⁶² Id.

¹⁶³ See WTO, *Dispute Settlement: Dispute DS24*, available at: <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds24_e.htm>, accessed on 21 December 2012.

¹⁶⁴ J. Breckenridge, "Costa Rica's Challenge to US Restrictions on the Import of Underwear", in P. Gallagher, P. Low and A. Stoler (eds.), *Managing the Challenges of WTO Participation: 45 Case Studies*, 186, (Cambridge: Cambridge University Press, 2005). Argentina's experience further suggests that foreign policy considerations may be overstated, see Diana Tussie and Valentina Delich, "Dispute Settlement Between Developing Countries: Argentina and Chilean Price Bands", in Peter Gallagher, Patrick Low and Andrew Stoler, *Managing the Challenges of WTO Participation: 45 Case Studies*, 36-37 (2005)

¹⁶⁵ C.L. Davis and S.B. Bermeo, "Who Files? Developing Country Participation in GATT/WTO Adjudication", 71 *The Journal of Politics*, 1036 (2009)

for trade officials of developing countries. While all developing countries are eligible for membership of the ACWL, to date 30 of them have become ACWL members (which requires the payment of a one-off membership fee). All LDCs are eligible for the assistance of the ACWL without becoming a ACWL member.

The ACWL's legal advice and capacity building support is free for all its developing country members. For assistance in dispute settlement proceedings, LDCs pay a mere symbolic fee. The maximum fees for LDCs an entire dispute, including consultations, panel proceedings and Appellate Body proceedings, amounts to less than CHF 35,000.¹⁶⁶ Developing countries other than LDCs pay more for this assistance, but LICs would pay a maximum of about CHF 140,000. The fees charged by the ACWL to LICs are reportedly only 15 to 20 per cent of what the major commercial law firms specialized in WTO law charge. However, even these low fees are occasionally referred to as an obstacle to the use of the WTO DSS by LICs. According to Bohanes and Garza, there is however no evidence that these fees do indeed constitute a genuine constraint on the use of the WTO DSS.¹⁶⁷ Bown and McCulloch found in 2011 that the value of lost exports due to the trade barrier at issue in cases litigated by the ACWL in the period from 2001 to 2008 was on average \$ 1.9 m. per year. The fees charged by the ACWL are a mere fraction of the value of lost exports.¹⁶⁸ It should be noted that the operational costs and other financial needs of the ACWL are primarily covered by donations of ACWL developed country members, and not by the fees it charges for its legal assistance. The fees are charged to discourage frivolous disputes.

The ACWL also has a Technical Expertise Fund, which operates externally from the regular budget of the ACWL's budget. The Fund's budget is supported by Denmark, Norway and the Netherlands. Developing countries can access support from the Fund at any point in the process of a dispute including the early investigative stage prior to the filing of a dispute.

According to a 2009 study by Bown and McCulloch, the ACWL did not 'introduce' new countries to the WTO DSS. However, according to this study, the ACWL: (a) did increase the use of the system by developing countries which had used it before; (b) allowed developing countries to litigate a case to the end, rather than accepting an early settlement; (c) allowed developing countries to act as sole complainants, rather than as a co-complainant (often of a developed country); and (d) allowed developing countries to initiate disputes over smaller values of lost trade.¹⁶⁹

4.1.2 Building domestic legal capacity

¹⁶⁶ Bohanes & Garza (2012), 74.

¹⁶⁷ *Ibid.*, 73.

¹⁶⁸ Bown & McCulloch (2011), 39.

¹⁶⁹ Bown & McCulloch (2009), 4.

As discussed above, with the exception of the EU and the US, most WTO Members feel that they lack the highly specialized expertise required to effectively engage in WTO dispute settlement proceedings and that they need to hire such expertise. As noted by Kessie and Addo in 2008, for smaller countries that participate only occasionally or rarely in WTO dispute settlement, it is not efficient to maintain highly specialized experts on their staff when they cannot expect to use them often.¹⁷⁰ Shaffer concluded in 2003 already that training internal counsel requires significant allocation of resources that makes little sense for a country that will use the WTO DSS only occasionally.¹⁷¹ Moreover, as noted by Bohanes and Garza in 2012:

[T]he availability of developing country government staff often being very limited, assigning an official full time to a particular dispute, away from his or her other responsibilities, could affect the functioning of the entire administrative section.¹⁷²

However, while most countries, and in particular LICs and LDCs, should not aspire to have in-house WTO legal experts or dedicated WTO litigation teams, with the necessary expertise to argue cases before panels and the Appellate Body, all countries, including LICs and LDCs, should have the expertise to identify WTO-inconsistent measures, and to act as a liaison between the outside legal experts and the national political decision-makers.

A variety of mechanisms exist for developing the legal capacity to be able to monitor and detect violations, to initiate consultations and eventually to decide when to launch dispute settlement proceedings. As noted above, building inter-ministerial coordinating offices as well as forming effective public-private partnerships has proved an effective means of building legal capacity.

Other options include joining disputes as third parties as well as taking advantage of technical capacity building programs offered by the World Trade Organization and institutions in developing countries such as the Trade Policy Training Institute in Africa (trapca), which is based in Arusha, Tanzania. There are other opportunities for advanced legal training in trade law including Masters Degree programs in African universities such as the University of Pretoria and University of the Western Cape. Opportunities for advanced study in trade law with support for LDC and LIC participants exist in institutions such as the World Trade Institute in Bern as well as in many Law Schools in Europe and North America. While these are expensive options, there are often designated scholarships to support developing country participants. Further, many institutions including the Dispute Settlement Body and the Secretariat of the WTO offer internships that LDC and LIC participants can take advantage of to build their legal capacity. The Advisory Center on WTO Law has a Secondment Program for Trade Lawyers. Launched in 2005, this program trains lawyers from LDCs and developing country members for a nine-month period on WTO legal issues and dispute settlement proceedings. The Center also offers seminars on cases decided by the WTO's dispute settlement body. It offers specialized training on WTO upon request to LDCs and developing countries.

¹⁷⁰ Kessie & Addo (2008), 4.

¹⁷¹ Shaffer (2003).

¹⁷² Bohanes and Garza (2012), 71.

A particular problem relating to the training of government officials in WTO matters is the brain-drain of such officials to much better paid jobs in the private sector or international organizations after these officials have finished their training.

4.1.3 Support by civil society and *pro bono* support

LDCs and LICs can also benefit from support from civil society groups like the South Center and Oxfam. Civil society groups have accumulated expertise and experience in dealing with WTO legal matters as well as in dispute settlement. For example, Oxfam played an important role with a coalition of other civil society groups in helping Brazil in the *US-Cotton* case. These civil society groups provided expertise to evaluate the impact of US subsidy programs on West African cotton farmers. Using this evidence, Brazil prevailed in demonstrating that the U.S. subsidy program was inconsistent with the WTO's anti-subsidy rules. Civil society groups also filed an amicus brief in the European Union's case in support of Brazil in a case involving retreaded tires. These NGOs helped publicize the case in their support for Brazil. Similarly, Peru's successful case against the United States involving Sardines included assistance from a British consumer group. This example shows the potential for LDCs and LICs entering into alliances with foreign trade associations and consumer groups. Notably, in the *US-Cotton* case, Benin and Chad were represented on a *pro bono* (free) basis by a leading global law firm (White & Case). The opportunities for such *pro bono* representation can result in successful litigation on behalf of LDCs and LICs as it did in the *US-Cotton* case.

4.1.4 The WTO Secretariat's role

Article 27(2) of the Dispute Settlement Understanding provides that the Secretariat of the WTO may provide legal advice and assistance to developing countries during the dispute settlement process. A developing country must make a request for such legal expertise to be provided from the WTO's Institute for Training and Technical Cooperation. In providing such assistance, the Secretariat is required to maintain its impartiality. Thus, unlike the ACWL, the Secretariat is prevented from assuming an advocacy role on behalf of a developing country. The limitation here is that technical assistance is provided after a dispute has been submitted. While the Secretariat assists Members in respect of dispute settlement at their request, there may also be a need to provide additional legal advice and assistance in respect of dispute settlement to developing country Members. To this end, the Secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests. This expert shall assist the developing country Member in a manner ensuring the continued impartiality of the Secretariat.

4.1.5 Coalitional Strategies

LDCs and LICs often consider adopting common negotiating positions in the WTO. The African Group at the WTO often adopts common positions in negotiations. The East African Community has adopted a common negotiating mandate in trade negotiations. Such a coalitional strategy could be adopted in WTO dispute settlement. Building coalitions would help in terms of raising funding to pursue a case at the WTO without having one country disproportionately assume the financial burden. Coalitional strategies may involve coalitions of developing countries, as was the case in *US – Shrimp (1998)*, in which the complainants were India, Pakistan, Thailand and Malaysia. Such strategies may also involve coalitions of developing and developed countries, as was the case in *EC - Bananas III (1997)*, in which the complainants were Ecuador, Guatemala, Honduras, Mexico and the United States. Another example of such coalition between developed and developing countries was *EC – Approval and Marketing of Biotech Products (2006)*, in which the complainants were Argentina, Canada and the United States.

4.3 Rules-based strategies

4.3.1 Increasing reliance on conciliation and mediation or discussions in WTO Committees

In some cases LDCs and LICs may be able to settle their trade disputes through the good offices, conciliation and mediation procedures provided for in Article 5 of the DSU. While dispute resolution through these procedures may be less costly and faster in some cases, it is to be expected that the voluntary nature of these procedures and their non-binding outcome will not be an attractive alternative in most disputes.

Another possibility available for LDCs and LICs, which want to avoid, costly and time-consuming litigation, is to raise trade concerns in the political bodies of the WTO, such as the TBT Committee and the SPS Committee with regard to technical barriers to trade and SPS measures respectively. Such a strategy of raising concerns in WTO Committees has been relatively successful in recent years and avoids expensive dispute settlement proceedings, which many LDCs and LICs can hardly afford.

4.3.2 Fully utilizing existing DSU rules providing for special and differential treatment

Another strategy that LDCs and LICs can use to get the most out of WTO dispute settlement is to fully utilize the range of flexibilities in WTO rules for developing countries and LDCs. These

flexibilities must be actively sought since they are not automatically applicable or even mandatory.¹⁷³ They include:

- (a) In disputes involving a developing country, a panellist from a developing country is allowed to sit (Article 8.10 of the Dispute Settlement Understanding);
- (b) Developing countries entitled to use alternative dispute settlement procedures, that is procedures other than regular panels (Article 3.12 of the Dispute Settlement Understanding)
- (c) Article 27.3 of the Dispute Settlement Understanding provides that the Secretariat shall conduct special training sessions on WTO dispute settlement procedures for interested developing country Members.
- (d) Article 3.12 of the Dispute Settlement Understanding provides that if a developing country Member brings the complaint, it has the option of invoking the provisions of the GATT Decision of 5 April 1966 as a partial alternative to the DSU. This entitles the developing country complainant to the good offices of the Director-General and a shortened panel procedure. In addition, it entitles a developing country to have a developing country panellist.
- (e) Article 12.10 of the Dispute Settlement Understanding allows developing countries to extend the time limits for consultations and requires that the panel accord the developing country sufficient time to prepare and present its argumentation.
- (f) Article 12.11 of the Dispute Settlement Understanding requires the panel to explicitly indicate how it took into consideration any and all relevant WTO provisions on differential and more-favourable treatment for developing countries from covered agreements that were raised in the course of the dispute settlement procedures.
- (g) When a dispute has moved beyond the panel stage, Article 21.2 of the Dispute Settlement Understanding provides that particular attention should be paid to matters affecting the interests of developing countries in the implementation of any rulings or recommendations.
- (h) Under Articles 21.7 and 21.8, the Dispute Settlement Body is required to consider whether further action should be taken in cases involving developing countries, and shall take into account not only the trade issues involved, but also the potential impact on the developing country's economy.
- (i) Article 24.1 of the Dispute Settlement Understanding provides that particular consideration shall be given to the special situation of least-developed countries, and further requires that other WTO Members exercise "due restraint" in raising matters against a least-developed country.¹⁷⁴

¹⁷³ For an overview of how some of these flexibilities have been used so far, see Sonia E. Rolland, "Considering Development in the Implementation of Panel and Appellate Body Reports", 1 Trade, Law and Development, 150-199 (2012)

¹⁷⁴ Notably, F. Roessler, "Special and Differential Treatment of Developing Countries under the WTO Dispute Settlement System", in F. Ortino and E-U. Petersmann (eds.), *The WTO Dispute Settlement System 1995-2003* (The Hague: Kluwer Law International, 2004), p. 90, argues that these procedural safeguards do not overcome the capacity difficulties LDCs and LICs face. Gerhard Erasmus similarly argues that 'these provisions are not of direct

4.3.3 DSU reform negotiations and improvements to the benefit of LICs and LDCs

At the Marrakesh Ministerial Conference of April 1994, at which the *WTO Agreement*, including the DSU, was signed, it was also agreed that WTO Members would review the DSS within four years of the entry into force of the *WTO Agreement*. This review did not lead to any agreement on changes to the existing DSS. However, it was agreed in 2001 to continue discussions on the reform of the WTO DSS in the context the Doha Round negotiations. Under paragraph 30 of the Doha Ministerial Declaration of 2001, negotiations on improvements and clarifications of the DSU were supposed to be completed by May 2003. The negotiations on DSU reform are still on-going.

Here we briefly examine some of the proposals that have been made for reforming the WTO DSS to make it more beneficial to LICs and LDCs:

- (a) Making it easier for countries to be joined in consultations. This would require changing the DSS rule that requires a 'substantial trade interest' for a country to be joined in consultations. In addition, the rules provide for a ten-day window from the date of the circulation of a request for a panel for a country to be included in consultations as well as to demonstrate a 'substantial trade interest.'
- (b) Further, there is a proposal to define what constitutes a substantial interest in Article 10(2) of the DSU in a manner that acknowledges that it means an trade impact on major macro-economic indicators such as employment, national income and foreign exchange reserves as well as protecting the long-term development interests of developing countries;
- (c) Combining the language of Articles 4.10 and 12.11 of the DSU to require demonstration of how the special interests of developing counties have been taken into account during consultations;
- (d) Enhancing third party rights under Article 10(3) of the DSU to improve access to meetings and documentation except those containing confidential documentation;
- (e) Enhancing the rights of third parties who have a substantial interest to be heard and to make written submissions in Appellate Proceedings by amending Article 10(2)
- (f) To have a panellist from a developing or least developed country in any dispute involving developing or least developed countries;
- (g) Amending Article 13 of the DSU to make it clear that the DSS should exercise restraint in its decision-making and should not exceed its authority by adopting powers best

value with respect to the question as to how to engage in the system in the first place or how to reap the perceived benefits.' See G. Erasmus, "The Non-Participation by African Countries in the Dispute Settlement System of the WTO: Reasons and Consequences", in T. Hartzenberg (ed.), *WTO Dispute Settlement an African Perspective* (London: Cameron May, 2008), p. 185.

- exercised by WTO members through negotiations in the Ministerial Council and the Trade Negotiating Committee;
- (h) Amending Articles 14.3 and 17.11 to make it possible for each panellist and AB Member to issue their own separate written opinion thereby ending anonymous decisions;
 - (i) Amending Article 21.2 with regard to taking into account the special situation of developing countries in implementing recommendations and rulings of the DSB. Notably, in *Indonesia-Autos*,¹⁷⁵ an arbitrator took into account Indonesia status as a developing country and noted its submission that its economy was in ‘near collapse’, in giving Indonesia six additional months to come into compliance;
 - (j) Amending Article 21.8 of the DSU to introduce monetary compensation in cases brought by a developing country against a developed country;
Amending Article 27.2 to authorize the Secretariat ensure geographical balance in the roster of legal experts from which developing and least developed countries could consult and to have such experts fully discharge the functions of counsel to such a country when it is party to a dispute;
 - (k) Amending Article 28 of the DSU to establish a fund financed by the WTO’s regular budget to facilitate the effective utilization of the WTO DSS by developing and least developed countries

Cote d’Ivoire proposed on behalf of the African Group the establishment of a ‘WTO Fund on Dispute Settlement’. This Fund would be to pay for the litigation costs of developing countries.¹⁷⁶ Developed country Members are unlikely to agree with this proposal for a ‘WTO Fund on Dispute Settlement’. Under the current proposal, all developing countries, including upper-middle income countries such as Argentina and Brazil, would benefit from this Fund. Moreover, it is likely that any additional money available for financial support to facilitate the use of the WTO DSS is better and more efficiently channelled to developing countries through the ACWL, an independent institution with 12 years of experience in providing legal assistance to developing countries.

Cuba, Egypt, India, Malaysia and Pakistan tabled a joint proposal to require in a dispute between a developed and a developing country to make the former pay the litigation costs of the former if the panel or the Appellate Body ruled in favour of the developing country.¹⁷⁷ However, why should an upper-middle income country not be required to pay to litigation of a LIC if the panel or the Appellate Body ruled in favour of the latter?

¹⁷⁵ Indonesia – Certain Measures Affecting the Automobile Industry, Award of the Arbitrator, WT/DS54/15, para. 24 at page 10

¹⁷⁶ TN/DS/W/92, dated 5 March 2008.

¹⁷⁷ TN/DS/W/47, dated 11 February 2003.

Part 5: Simulation Exercise

European Union – Ban on Roses (DS 657)

FlowerPower, a flower producer from Lombardia, a least developed country in Eastern Africa, has exported flowers to the European Union since the late seventies. As a party to the Economic Partnership Agreement between the European Union and Eastern Africa, Lombardia benefits from duty-free and quota-free access for flowers to the EU market. The freshly cut flowers are flown in every night to Schiphol to be sold in the early morning at the Aalsmeer flower auction near Amsterdam, and then distributed over the rest of Europe. Until last year, the quantities of flowers imported from Lombardia were quite modest and concerned primarily varieties not grown in Europe. Since last year, however, FlowerPower (and other flower producers from Lombardia and neighbouring countries), have also started to export roses, and they have done so with considerable commercial success. However, at the end of last year the Dutch customs authorities have prohibited the importation of roses from Lombardia (as well as the roses of Benkya and Sooland, two other East African countries). The Dutch Customs refuse the importation of flowers from Lombardia on the basis of EU Regulation 5436/15, concerning the protection of public health against ROSE RXX 5-IN-1. ROSE RXX 5-IN-1 is a new, cheap, very effective but highly toxic pesticide to protect rose plants from aphids, thrips, rose midges, caterpillars and beetles, which all love roses and are widespread in Eastern Africa. In July of last year a study of the University of Wageningen, financed by the European Association of Flower Producers, showed that even small quantities of ROSE RXX 5-IN-1 present on the thorns of roses could cause severe allergic reactions to persons who get harmed by the thorns.

As the expansion of FlowerPower's production of roses has required significant investments, the EU's import ban on roses has put the future of FlowerPower at risk causing Abasi Oginga, FlowerPower's General Manager a lot of concern and anxiety. FlowerPower, directly or indirectly, employs more than 10,000 people in one of the poorest regions of Lombardia. As a corporate taxpayer, FlowerPower obviously also 'contributes' to the Government's budget. At a family reunion, Abasi Oginga hears from his nephew, who just returned from Europe (where he did an LL.M.), that this ban is most likely inconsistent with the law of the World Trade Organization. He advised his uncle to challenge the legality of this import ban. Abasi Oginga is happy to hear that there may be something that can be done to save his company but his nephew had not taken a course on WTO law and had to admit that he had no idea where and how FlowerPower could challenge the EU import ban. If possible, Abasi Oginga would prefer FlowerPower itself to challenge the EU import ban in a Dutch court or at the WTO in Geneva. This might be expensive because lawyers do not come cheap, but FlowerPower had successfully challenged a breach of contract by a Dutch supermarket chain a few years ago. Having been in the flower export business since the late seventies, Abasi Oginga has good contacts at Ministry of Trade of Lombardia, and this Ministry had been quite supportive in the past. The latter could not be said of the Ministry of Agriculture, and especially the current Minister of Agriculture, who is

known to be opposed to the exportation of flowers (as he considers that Lombardia should focus on the production of food for domestic consumption rather than the production of flowers for export). Neither the Ministry of Trade nor the Ministry of Agriculture has any scientific expertise with regard to the health risks related to ROSE RXX 5-IN-1. Only the Ministry of Public Health of Lombardia has some expertise in this field. More expertise is present at the Ministry of Public Health of neighbouring Sooland, also a flower exporting country. While proudly independent, Lombardia has in recent years followed a 'pro-European' foreign policy, so as not to put at risk the many development assistance programmes in Lombardia by the European Union and its Member States.

Assume that FlowerPower is a company producing flowers in your country. You are Abasi Oginga. What would you do? What can you do? What do you think will happen? What in your opinion should happen?

After much internal debate, the Government of Lombardia decided to challenge the EU import ban on roses treated with ROSE RXX 5-IN-1, at the WTO in Geneva. As already much valuable time was lost in coming to the decision to challenge the EU measure, the Ministry of Trade wishes to table a request for the establishment of a panel as soon as possible. It also wishes to 'involve' both Benkya and Sooland, two other East African countries that are affected by the EU import ban. Note, however, that Benkya exports roses primarily to the United States and that the quantities exported to the European Union have been marginal to date. FlowerPower has informed the Government of Lombardia that it has sought legal advice from Sadley Easton LLP, a New York-based law firm specialized in international trade law, and that it wishes this firm to be involved in the preparation and presentation of the position of Lombardia in this case. On the basis of its preliminary assessment of the case, Sadley Easton is of the opinion that the EU import ban at issue is inconsistent with Articles I, III and XI of the GATT 1994, Articles II, XVI and XVII of the GATS, Articles 2.2, 5.1, 5.6 and 5.7 of the *SPS Agreement* and Articles 2.1, 2.2 and 2.4 of the *TBT Agreement*. Rumour has it that the fees of Sadley Easton are paid by Cargo Express, a large German airline company specialized in the transport of fruits and flowers from Africa to Europe, and Bexo, Europe's largest supermarket chain. The Government of Lombardia desperately needs, and therefore welcomes, the specialized legal advice given by Sadley Easton. However, it (also) wishes to engage its own private legal counsel, since its interests and those of FlowerPower (and Cargo Express and Bexo) may not always coincide. The services of a specialized law firm are, however, prohibitively expensive for a least-developed-country as Lombardia. In addition, after considering the costs of WTO litigation, Lombardia considers that it should do all that is possible to resolve the dispute with the European Union in this first phase of WTO dispute settlement. However, Lombardia is – at least at this time - unwilling to drop or water-down its claims of WTO inconsistency. Further the European Union, angered by the accusations of illegal conduct made by Lombardia, is unwilling to come to any form of compromise.

Where can the Government of Lombardia find private legal counsel it is able to afford? What role, if any, can Sadley Easton LLP, play in the WTO dispute settlement proceedings? Can the Government of Lombardia initiate WTO dispute settlement proceedings by requesting the

establishment of a panel? If not, why not? What should be Lombia's first step in these proceedings? Please draft the relevant document? Should the preparation for these first steps in the proceedings be left to the Ministry of Trade or should there be broader involvement? If so, how should this involvement of other ministries, government departments and other stakeholders be organized? Please draft the document that will start the WTO dispute settlement proceedings in this dispute. Remember that the Government of Lombia is of the opinion that it would benefit if Benkya and Sooland also got involved in this dispute. What do you think is most likely to happen after the document referred to above is sent out and received by the addressee? Does the Permanent Representation of Lombia to the United Nations and other International Organizations in Geneva have a role to play at this first stage of the dispute settlement process?

After five months of fruitless attempts to reach an amicable solution to the dispute on the WTO legality of the EU import ban on roses, the Government of Lombia decides it has no option but to take the next step in the WTO dispute settlement process. As much time was lost in the previous phase of the process, the Government of Lombia gives its Ambassador in Geneva, the instruction to speed up the process. The European Union, on the contrary, is not in a hurry at all. More, it attempts to block any further progress in the dispute settlement process. After the WTO Dispute Settlement Body established at its meeting of 25 May 2018, the panel in *European Union – Ban on Roses*, there is disagreement between the European Union and Lombia. However, at the same time, she is told to insist that this dispute will be heard and decided by three nationals from developing-country Members of the WTO, one of which should be is a national of Lombia and a scientist specialized in roses working for FlowerPower. For that reason and that reason only, the persons proposed by the WTO Secretariat, are not acceptable. For the European Union, the demands of Lombia with regard to the panellists are equally unacceptable.

Please draft the document that the Government of Lombia must submit to initiate the next step in the dispute settlement process. Who will or can be involved in the drafting of this document? To what extent can the European Union frustrate the WTO dispute settlement process at this stage? How do Benkya and Sooland become third parties in the panel proceedings? Can the European Union or Lombia prevent or ensure this from happening? Who decides the composition of the panel? What are the required qualifications for panellists? To what extent can the demands of Lombia with regard to the composition of the panel be met?

On 3 July 2015, the panel holds its first meeting with the parties to discuss the panel's working procedures and the detailed working schedule. At this meeting, Lombia demands that it should be given extra time to prepare its written submissions; it also suggests – in order to shorten the overall duration of the panel proceedings -that there will be only one substantive meeting of the panel with the parties. When the panel is established, both Benkya and Sooland have notified the DSB their substantial interest in this dispute. Now Lombia requests that both Benkya and Sooland be allowed to participate in all meetings of the panel with the parties and be entitled to receive all submissions of the parties to the panel. Lombia also wants to be able

to submit new evidence and data at any time during the panel proceedings as it fears that it may problems collecting all relevant evidence and data in time. Moreover, Lombia wants the working procedures of the panel to stipulate that it will have the right to be represented in the panel proceedings by private legal counsel; and that the panel will *not* accept and consider any *amicus curiae* briefs that may be submitted to the panel. Finally, Lombia requests that the panel establishes an expert review group composed of scientists, and it demands that no scientist be appointed to this expert review group without its explicit approval.

Which of these demands or requests of Lombia can the panel agree to? Which demands or requests must the panel reject?

In its first written submission to the panel, Lombia does not include any arguments in support of its claim that the EU import ban on roses is inconsistent with Articles 2.1, 2.2 and 2.4 of *TBT Agreement* but it reserves the right to make arguments on this claim during the first substantive meeting of the panel with the parties or in its second written submission. While it does not refer to its claims of inconsistency with the *TBT Agreement*, Lombia makes two claim of inconsistency in its first written submission it has not made before. First, Lombia argues that the EU import ban is also in consistent with Article 4.2 of the *Agreement of Agriculture*. Second, Lombia also argues that a measure closely related to the EU import ban, namely the procedure to assess whether roses have been treated with methyl bromide, is inconsistent with relevant provisions under the *TBT Agreement* and the *SPS Agreement*. With regard to the EU import ban on roses, Lombia argues that it suffices for it to show that this ban is inconsistent with Articles I, III or XI of the GATT 1994 and Article II, XVI or XVII of the GATS and that the burden of proof would then shift to the European Union, which would have to show that the measure is justified under Article XX of the GATT 1994 and Article XIV of the GATS, or is consistent with Articles 2.2, 5.1 and 5.6 of the *SPS Agreement*, Articles 2.1, 2.2 and 2.4 of the *TBT Agreement*, and/or Article 4.2 of the *Agreement on Agriculture*. If the European Union is unsuccessful in doing so, the panel – according to Lombia – would have to conclude that the EU import ban on roses is – as claimed by Lombia - inconsistent with the relevant provisions of the GATT 1994, the GATS, the *SPS Agreement*, the *TBT Agreement* and the *Agreement on Agriculture*.

Which of Lombia's claims of WTO inconsistency will/can the panel examine? On which party, Lombia or the European Union, does the burden of proof rest?

Having filed its first written submission and received the first written submission of the European Union, Lombia now starts preparing for the first meeting of the panel with the parties. Some elements of the panel's working procedures are not clear to Lombia and Lombia's ambassador has been instructed to contact the chair of the panel, a fellow ambassador and old friend, for a private lunch in the restaurant *Perle du Lac*, along the Lake of Geneva, in the hope of getting clarification of the panel's working procedure. Lombia's ambassador also wants to raise with the chair of the panel a very delicate matter. Lombia is possession of information that would indicate that the spouse of one of the other panellists, a journalist, has had access to Lombia's first written submission. Moreover, it has been reported that this spouse has a

considerable financial interest in Cargo Express, a large German airline company, which, as noted above, is specialized in the transport of fruits and flowers from Africa to Europe. This financial interest had not been disclosed at the time of the composition of the panel.

Will the chair of the panel accept the invitation of his colleague and old friend, the ambassador of Lombardia, to have lunch at the Perle du Lac? What can and should be done about the situation involving the spouse of one of the other panelists? More generally, how should Lombardia prepare for the first meeting of the panel with the parties? Who should be involved in that preparation? Who should take the lead?

After the first substantive meeting of the panel with the parties, the latter submit their rebuttal submissions and the panel holds a second substantive meeting with the parties. Thereafter, the panel starts its deliberations and on 19 January 2019 issues its interim report to the parties. The panel rejects Lombardia's claims of inconsistency with the relevant arguments under the *SPS Agreement* and the *GATS*, considers the *TBT Agreement* to be non-applicable, exercises judicial economy with regard the claims of inconsistency with the *GATT 1994*, and rules that all other claims of inconsistency are outside the terms of reference of the panel. The Government of Lombardia is very disappointed with the panel's conclusions. The Minister of Trade wishes to make a public statement to that effect. According to Lombardia, the panel not only made serious mistakes in its interpretation of the legal provisions at issue, it also made numerous typographical and grammatical mistakes as well as factual errors in its report.

What should Lombardia do (and what should it not do) at this point of the panel proceedings?

One month later the panel first issues its final report to the parties, and another six weeks later, the panel report is circulated to all WTO Members and made available on the WTO website. The European Union puts the report in *EU – Ban on Roses* on the agenda of the DSB meeting of 23 April 2019 for adoption.

*What can Lombardia do to prevent the adoption of the panel report? Please draft the relevant document. If Lombardia decides to appeal the panel report, what can it appeal? Is it clear that it can appeal the panel's interpretation of the relevant provisions of the WTO agreements but can it appeal the application of the provisions to the facts of this case? Can it appeal the panel's ruling that the *TBT Agreement* does not apply and can it ask the Appellate Body to 'complete the legal analysis' on its claims of consistency with the *TBT Agreement*? Can Lombardia appeal the exercise of judicial economy by the panel? Can it appeal the panel's factual findings? When will Lombardia have to file its appellant's submission?*

On 24 April 2019, the Secretariat of the Appellate Body informs the parties and third parties of the composition of the Division of the Appellate Body that will hear and decide the appeal, as well as of the working schedule for the appeal. To Lombardia's dismay, the 'European' Appellate

Body Member sits on, and even chairs, the Division in this appeal. In fact, Lomibia considers that this appeal raises such important issues that it should be dealt with by the Appellate Body *in plenum* and not merely by a division of three Appellate Body Members. Also, Lomibia considers that as a least-developed country it will need considerably more time to prepare for the oral hearing than the current working schedule provides for. In case of an 'other appeal' by the European Union it will also need more time to prepare its appellee's submission than is currently allowed for. Benkya, Sooland, another WTO Member, Farland, as well Cargo Express have made it known that they want to be heard by the Appellate Body. The European Union has requested the Appellate Body to allow for webcasting of the Appellate Body oral hearing.

What can Lomibia do to remove the 'European' Appellate Body Member from the Division? Can the Appellate Body in plenum deal with this appeal? What can it do to ensure more time for proper preparation of the oral hearing and possibly its appellee's submission? How best to prepare for the oral hearing of the Appellate Body division in this appeal? Can Benkya, Sooland, Farland and Cargo Express in any way participate in the Appellate Body proceedings? What about the EU's request to webcast the oral hearing?

In its report, circulated on 23 July 2019, the Appellate Body reverses or modifies several of the panel's findings and conclusions, and finds that the EU import ban on roses is WTO-inconsistent. Lomibia puts the Appellate Body report, and the panel report, as modified by the Appellate Body, on the agenda of the specially convened DSB meeting of 5 August 2019.

What will happen at the DSB meeting of 5 August 2019?

In early September 2019 the European Union informs the DSB that it will implement the rulings and recommendations of the Appellate Body, as adopted by the DSB but that it will require two years to do so. Lomibia cannot agree that two years constitute a 'reasonable period of time for implementation' within the meaning of Article 21.1 of the DSU. It argues, also in the light of Article 21.2 of the DSU that six months is a more appropriate 'reasonable period of time for implementation'.

How will the 'reasonable period of time for implementation' in this dispute be established? Is it likely to be closer to the two years asked by the European Union or the six months considered to be sufficient by Lomibia? Why?

Days before the expiration of the 'reasonable period of time for implementation' granted to the European Union, the latter informs Lomibia that it has implemented the recommendations and rulings in this dispute. Lomibia disagrees since the European Union continues to apply a import ban on roses, although in a slightly modified manner. Pursuant to Article 22 of the DSU, Lomibia intends to request the DSB for authorization to suspend concessions and other obligations in relation to the European Union. While it realizes that this may be no more than a symbolic act since such suspension is unlikely to hurt the European Union in any way, it nevertheless wishes

to go ahead with such request. Lomibia wants to ask in particular authorization to suspend its obligations under the *TRIPS Agreement* for to an amount of Euro 1 bn per year. Not surprisingly, the European Union rejects Lomibia's contention that it has not complied with the recommendations and rulings in this case. It also objects to the level of suspension of concessions and other obligations requested.

Can Lomibia request the DSB to authorize the suspension of concessions and other obligations? Who decides on the level of suspension of concessions and other obligations? Is the suspension likely to induce the European Union to comply with the recommendations and rulings in this case? What can Lomibia do to ensure compliance?

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