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TOPIC: **Towards Stakeholder Participation in the initiation of
WTO Disputes: A case study for Namibia and SACU.**

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DECLARATION

I declare that, **Towards Stakeholder Participation in the initiation of WTO Disputes: A case study for Namibia and SACU**, is my own work, that it has not been submitted before for any degree or examination in any other University, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Vivienne Elke Katjuongua

Signed.....

May 2007



DEDICATION

To my beloved son Unomuinho-Bennet, our separation was not without cause and this is your fifth birthday gift, with love and tears in my eyes. Thank you Mommy for the sacrifices you have made for me to make it this far in life, without your support and continuous words of encouragement my train would not have reached its final destination. To my siblings, Kuepi and Mpho you have been my inspirations and I dedicate this paper to the four of you as one because you complete me. To Uunona, we all follow our destiny but together we achieve so much more.



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To acknowledge and name all the people who assisted me in this journey of nourishing this thesis which has been dubbed “the baby” may result in the unfortunate eventuality of leaving out some people. To all those who supported me in this journey, thank you very much. There are some people who deserve special mention within the confined of this brief acknowledgement.

First and foremost my thanks go to my supervisor, Adv MS Wandrag, thank you for your patience and continuous support on my journey. To the Almighty heavenly father, you have given me insight and perseverance unknown to me until the completion of my journey, and a friend in Jimcall. I want to thank my friend Jimcall, your friendship, continuous guidance, constructive comments and time has been a manifestation of the dreams we have set to conquer. Lastly, I thank the World Bank for the Scholarship grant that has enabled me to undertake and complete my LLM. Initiatives like these may seem so small but reach beyond boundaries that only the recipients and future beneficiaries of the knowledge and experience acquired by the recipient, can relate to.

KEY WORDS

Developing Countries; Dispute Settlement System (**DSS**); Dispute Settlement Understanding (**DSU**); Domestic Policies; European Union (**EU**); Initiation of Trade Disputes; Private Sector; Regional Agreement; Southern African Customs Union (**SACU**); Stakeholders; Sub Saharan Africa (**SSA**)Unfair Trade Practices, World Trade Organisation (WTO); National Trade Forum (NTF);Ministry of Trade and Industry (MTI).



ACRONYMS

WTO	World Trade Organisation
DSS	Dispute settlement System
SACU	Southern African Customs Union
SADC	Southern African Development Community
COMESA	Common Market for Eastern and Southern Africa
USA/US	United States of America
EU	European Union
TBR	Trade Barrier Regulation
DSU	Dispute Settlement Understanding
DSB	Dispute Settlement Body
GATT	General Agreement on Tariffs and Trade
MFN	Most Favoured Nation
EC	European Community
DSP	Dispute Settlement Process
SSA	Sub-Saharan Africa(n)
ACP	African Caribbean Pacific
EPA	Economic Partnership Agreement
AGOA	African Growth and Opportunity Act
MTI	Ministry of Trade and Industry
NTF	National Trade Forum
OPR	Operational Rules and Procedure
TDCA	Trade Development and Cooperation Agreement
UHT	Ultra High Temperature
TRALAC	Trade Law Centre for Southern Africa
SA	South Africa
FMD	Food and Mouth Disease
BSE	Bovine Spongiform Encephalopathy
SPS	Sanitary and Phytosanitary
BNLS	Botswana Namibia Lesotho Swaziland
USTR	United States Trade Representative
DG	Director General
UN	United Nations

TOPIC:	i
DECLARATION	ii
DEDICATION	iii
ACKNOWLEDGEMENT	iv
KEY WORDS	v
ACRONYMS	vi
CHAPTER ONE	1
INTRODUCTION	1
1.1. BACKGROUND	1
1.2. RESEARCH OBJECTIVES	3
1.3. PROBLEM STATEMENT	4
1.4. SIGNIFICANCE.....	4
1.5. RESEARCH HYPOTHESIS	6
1.6. SCOPE	6
1.7. RESEARCH METHODOLOGY AND CHAPTER OVERVIEW	7
CHAPTER TWO	8
WTO Dispute Settlement system	8
2.1. Background	8
2.2. Participation by Developing Countries in the WTO DSS	10
2.3. Hindrances negating participation by African developing countries in the WTO DSU.....	13
2.3.1. Lack of legal expertise in WTO law	13
2.3.2. Lack of financial resources, including for hiring of outside counsel... 14	
2.3.3. Fear of political and economic pressure from other WTO members that induces developing countries to abandon justified legal claims..... 15	
2.3.4. Developing countries' relatively smaller value, volume and variety of exports.....	16
2.3.5. Lack of a mechanism for the participation of stakeholders in the initiation of WTO DS process.....	16
2.4. CONCLUSSION	16
Chapter Three	18
STAKEHOLDER PARTICIPATION IN NAMIBIA AND SACU	18
3.1. The integration of WTO law in the Namibian Legal system.....	18
3.2. The current framework for stakeholder participation in Namibia	19
3.3. Stakeholder participation in SACU	25
3.4. CONCLUSSION.....	27
Chapter Four	28
Comparative Study on Stakeholder Participation	28
4.1. Evolution: How the participation of Stakeholders evolved	28
4.2. Case Study : US , EC and Australia.....	32
4.2.1. How U.S., EC and Australia adapted and enhanced their resources and abilities for participation under the WTO's legalized dispute settlement system:	32
4.2.2. Mechanisms regulating the process of dispute initiation.....	33
4.2.3. Submission of complaints	36
4.2.3.1. Who can submit?.....	36
4.2.3.2. The decision to initiate or not to initiate	38
4.2.3.3. Consultations.....	38
4.2.3.4. Consultations with Third countries.....	39
4.2.3.5. Examination procedure	40

4.2.3.6. Acts which trigger enforcement action by the relevant authorities	40
4.2.3.7. Confidential treatment of information	41
4.2.3.8. Action that may be taken by the relevant regulatory body	42
4.2.3.9. Procedure for termination of action taken	44
4.2.3.10. Monitoring of implementation of the determination made.....	44
4.3 CONCLUSION.....	46
Chapter Five	47
5.1. Recommendations and Conclusion.....	47
5.2. CONCLUSION.....	52
X. BIBLIOGRAPHY	53
A. Text	53
B. Articles	53
LEGISLATION	56
WEBSITES	56
Annexure Attached.....	57

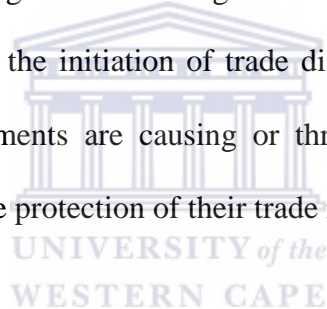


CHAPTER ONE

INTRODUCTION

1.1. BACKGROUND

The participation of African countries in the Dispute Settlement System (**DSS**) of the World Trade Organisation (**WTO**) is insignificant.¹ There are several reasons advanced for their inactiveness and one of the major stumbling blocks is the absence of stakeholder² participation in trade dispute initiation within the individual country or regional arrangement. The lacuna caused, at national and regional level, by an absence of legislation or regulations setting out the procedural framework for stakeholders to participate in the initiation of trade disputes, where the activities of foreign firms and/or governments are causing or threaten to cause harm to their industries, is an obstacle to the protection of their trade interests.



These procedural systems are absent amongst the stakeholders within the country, at national level and within regional trade arrangements like the Southern African Customs Union (**SACU**), Southern Africa Development Community (**SADC**) and the Common Market for Eastern and Southern Africa (**COMESA**), to name but a few. The lack of stakeholder participation in these fora may be one of many factors contributing to Africa's insignificant, if any, participation in the **WTO DSS** or Mechanism.

¹ Chad P. Brown, "WTO dispute settlement and the missing developing cases: Engaging the private sector", *Journal of International Economic Law*, Volume 8 2005, 861.

²i.e. all the firms, private or public and the industries within a country or regional arrangement that actively participate in its economy.

The process of initiating trade disputes through stakeholders is not novel. Such procedural mechanism exists in the United States of America (US) as stipulated by the Trade Act of 1974, in the European Union (EU) through the Trade Barriers Regulation of 1995 and an informal system in Australia. It is not surprising to see that the US and EU have been major participants as complainants in the WTO Dispute Settlement Mechanism (DSM), when one ascribes their participation to the existence of procedural frameworks, ensuring active stakeholder participation in trade dispute initiation in these countries.³

The need for the development of a system to address the gap between the stakeholders and the state in the area of initiation of trade disputes is also being advanced by developing nations such as Brazil and Japan⁴. Recognising that some developing countries have participated in the initiation of disputes in the absence of such mechanism, the paper calls on other developing members and the least developed member states of the WTO to develop useful systems invoking stakeholder participation in the Dispute Settlement System at national level which should transcend into the Regional *forae*.

Thus, this research seeks to find a suitable model/mechanism which meets the particular needs of developing countries. The practical aim of this research is to enhance active participation of various stakeholders in developing countries who may be adversely affected or who face potential damage by unfair trade practices of other players in the brutal and complex battleground of world trade. How can these countries use/or modify the rules of the game to apply in their domestic industries to

³ Jackson H.J “The World Trading System, law and Policy of International Economic Relations”, Second Edition, 1997 (MIT Press) Massachusetts p.107.


⁴ <http://www.keidanren.or.jp/english/policy/2004/016.html> accessed on 2 October 2006

maximize their benefits, or minimize costs of particular trade policies or actions of the other foreign players? In particular, how can Sub-Saharan African (SSA) countries actively use the prevailing DDS system to maximize the welfare of their stakeholders?

1.2. RESEARCH OBJECTIVES

The general objective of this research is to examine the importance and need for the establishment of a domestic system engaging the participation of stakeholders in the initiation of trade disputes at national and regional level in SSA which will enhance greater participation of SSA countries in the **WTO DSS**.

The specific objectives of this Research are:

- 
- (a) To investigate the lack of participation by SSA countries in the WTO Dispute Settlement System.
 - (b) To examine the importance of stakeholder participation in the initiation of trade disputes within a national and regional setting.
 - (c) To critically analyze the trade dispute initiation mechanism in the United States of America, the European Union and Australia.
 - (d) To make recommendations on the establishment of a workable dispute initiation system within Namibia and the Southern African Customs Union (**SACU**).

1.3. PROBLEM STATEMENT

There is no legal framework allowing for active stakeholder participation in SSA countries (developing and least developed) and in the majority of developed countries at national and Regional Trade Agreements levels in the initiation of trade disputes. This research therefore seeks to suggest a suitable legal framework which can be utilized by stakeholders in African countries as part of the process of trade dispute initiation when their interests are threatened or adversely affected.

1.4. SIGNIFICANCE

There is a call for the creation of a system to help private and public companies adversely affected by acts, policies, and practices of foreign companies and/or governments, which violate or deny rights or benefits under the **WTO** Agreements and other trade agreements or are unjustifiable, unreasonable or discriminatory and burden or restrict commerce. Under such a system, injured companies would be able to petition their governments to initiate investigations that if successful, would lead to the settlement of disputes and remedy or lessening of the resulting injury. The absence of domestic procedures in a country is a cause for concern over the stability of a country's companies' overseas strategies and implies a loss of bargaining power vis-à-vis foreign governments. Creating such procedures in a country will increase the transparency and fairness of the country's administrative processes and is also essential for increasing opportunities for public participation in these processes. Moreover, in terms of foreign-affiliated companies engaged in business activities in another country, procedures aimed at insuring a level playing field would likely promote inbound direct investment, a longstanding top government policy of the majority of developing countries. Furthermore such an action, based predominantly

on **WTO** rules, would have corrective effects on the practices of foreign nations that are injurious to free trade, and in turn contribute to the stability of the world trading system.⁵

The importance of this mechanism was aptly stated by Brown (2005). He points out that in creating such a system the private sector typically undertakes the pre-litigation economic and legal research necessary to convince its government officials of the legal merits and economic benefits to pursuing a case. Then it engages its domestic government through access (or a threat of access) under the relevant domestic statutory provisions, such as the *Section 301* policy in the United States and the *Article 133* Process and the Trade Barrier Regulation (**TBR**) in the **EU**, whereby domestic industries can petition the competent government authorities to raise potential market access concerns. Conditional on the government's willingness to pursue the case at the **WTO**, the private sector's attorneys and consultants are then likely to assist in the preparation of the formal briefs and economic evidence to be used in the litigation in Geneva. The private sector may also help induce foreign compliance with **DSU** rulings, either through identifying the most effective foreign political targets when retaliation is authorized by the Dispute Settlement Understanding (**DSU**), or through the engagement of a public relations campaign abroad to increase the political willingness needed to induce removal of foreign market access restrictions.⁶

⁵Chad P. Brown (2005) 871.

⁶*Id.*

1.5. RESEARCH HYPOTHESIS

The investigative assumption, which the proposed research will examine, is that the establishment of a workable policy framework for the participation of private and public stakeholders within the domestic trade arena for the initiation of trade disputes by member states at the **WTO** (in their capacity as complainants, respondents or interested third parties) will increase the participation of developing countries in the WTO DSS. Namibia, as a developing country and member of **SACU**, will be used as case study to demonstrate the applicability and need for a policy framework for use in a domestic and regional setting.

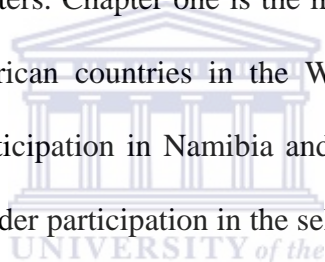
1.6. SCOPE

The subject area is very extensive. To ensure that the objectives of this research are achieved, a limited but refined scope is proposed. The concept of stakeholder participation in the initiation of trade disputes will mostly deal with a comparative analysis between the United States Trade Act of 1974, the European Union Trade Barriers Regulation, and the informal system in Australia. The proposals in this research will be limited to the extent they are applicable to Namibia and **SACU**. Mention will be made of policies that may exist in some developing countries the world over. Otherwise the importance of Trade dispute initiation will be evaluated from the **WTO** Dispute Settlement Understanding (**DSU**) in which a shift from the traditional regime management to a Stakeholder model of participation in dispute settlement has been observed in recent years.

1.7. RESEARCH METHODOLOGY AND CHAPTER OVERVIEW

The available literature on trade dispute initiation at national level is scarce, but the available literature on the **WTO DSS** is exhaustive and contains literature on the subject matter. Most of the existing literature focuses on the US and Europe. A critical engagement of the various debates and Regulations/Act is proposed. The various approaches will be juxtaposed to examine their relevance and applicability in the context of Namibia and **SACU**. Questionnaires will be used to solicit information on the mechanisms available to stakeholders in Namibia and SACU as the literature on these mechanisms is not readily accessible.

This paper contains five chapters. Chapter one is the introduction, Chapter two deals with the participation of African countries in the **WTO DSS**, and Chapter three discusses the stakeholder participation in Namibia and SACU. Chapter four gives a comparative study of stakeholder participation in the selected developed countries and limited information available on developing country participants, whilst Chapter five provides recommendations and conclusions.



CHAPTER TWO

WTO Dispute Settlement system

2.1. Background

Disputes in society are resolved in different ways. There are essentially two methods of peaceful resolution of international disputes. An international dispute can be resolved: through diplomatic negotiations between the disputing States (with varying degrees of third party intervention and assistance);⁷ or through adjudication by an independent entity (arbitration and judicial settlement).⁸ This paper undertakes a discussion of dispute settlement through adjudication under the WTO DSU and advocates that the participation of developing countries in this system is important and can only be enhanced through the creation of an effective mechanism that allows for the participation of stakeholders in the initiation of the trade dispute.

In this paper, the participation of stakeholders in the initiation of WTO disputes should be understood to include their active participation when a WTO member initiates the complaint, or responds, or joins as a third party or files *amicus curia* briefs in a matter before the WTO DSB.⁹

⁷ Article 2.3 of the United Nations Charter requires all members to: “settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.” See Van den Bossche P. (2005) 175.

⁸ Article 33.1 of Chapter VI, entitled ‘Pacific settlement of disputes’, of the UN Charter states, “The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice”. See Van den Bossche P. (2005) Id.

⁹Two reasons are advanced in support of the idea that participation in WTO Dispute Settlement matters for shaping WTO law and International Economic Relation. Firstly, participation in the WTO dispute settlement system is essential for shaping WTO law’s interpretation and application over time. WTO law cannot be amended or interpreted through the WTO political process as it requires consensus by the members to modify. This is one of the facts that further enhance the impact of WTO jurisprudence. Changes in WTO rules only take place through infrequent negotiating rounds, involving complex tradeoffs between over one hundred and fifty (<http://www.wto.org> accessed February 20, 2007). The membership total is as calculated up to January 11, 2007) countries with widely varying interests, values, levels of development and priorities. In addition, because of the complex bargaining process within the WTO, rules are often purposefully drafted in a vague manner as part of a political compromise. WTO members thereby delegate significant *de facto* power to the WTO dispute settlement system to interpret and effectively make WTO law. Secondly, WTO law, although it does

The WTO dispute settlement is inter-governmental in nature and its prime object is the prompt settlement of disputes between WTO Members concerning their respective rights and obligations under the WTO law.¹⁰ The dispute settlement system forms the core of the WTO by acting as the central mechanism to enforce international trade law. It embodies a high level of legalization in comparison with other international institutions, and it confronts the most difficult political problems related to national demands for protection and international rules to manage a globalized economy. Furthermore, the effectiveness of the institution and distributional gains are said to be influenced by the participants in the enforcement mechanisms.¹¹

The WTO DSS is a technical legal process consisting of four stages: filing a complaint, consultation, panel, and in some cases, appeal to the Appellate Body. The parties through mutual agreement amongst themselves can end this process at any stage before the panel renders its finding(s).

Access to, or the use of the WTO DSS is limited to Members of the WTO.¹² The Stakeholders (businesses, industries and private entities) directly affected by the WTO covered agreements have no standing to bring a claim before the WTO DSB, and can only have their voices heard through representation by their respective member state governments.

not formally adopt a common law approach, has taken a common law orientation, with the Appellate Body and WTO panels citing and relying on past WTO jurisprudence in their legal reasoning.

Individual WTO cases involve more than the judicial resolution of an individual dispute and the panel and Appellate Body decision produces systemic effects for future cases (Shaffer G.C. (2003) 9-10).

¹⁰ Article 3.3 of the Dispute Settlement Understanding reads; “The prompt settlement of such disputes is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members”. Article 3.2 of the DSU further provides, “The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law”.

¹¹ Christina L. Davis and Sarah Blodgett Bermeo, (2006), 2.

¹² US-Shrimp, The appellate Body in the US–Shrimp ruled that:

“It may be well to stress that access to the dispute settlement process of the WTO is limited to Members of the WTO. This access is not available, under the WTO Agreement and the covered agreements as they currently exist, to individuals or international organizations, whether governmental or non-governmental. Only Members may become parties to a dispute of which a panel may be seized, and only Members “having a substantial interest in a matter before the panel” may become third parties in the proceedings before that panel. Thus, under the DSU, only Members who are parties to a dispute, or who have notified their interest in becoming third parties in such a dispute to the DSU, have a legal right to make submissions to, and have a legal right to have those submissions considered by the Panel.”

2.2. Participation by Developing Countries in the WTO DSS

The WTO DSS has been in existence for twelve years now. It has arguably been the most prolific of all international dispute settlement systems.¹³ Between 1 January 1995 and 21 November 2006, a total of 360 disputes had been brought to the WTO system for resolution.¹⁴ This number exceeds the disputes brought before its predecessor, the GATT DSS. During this period many developing countries, and most comprehensively those in SSA remain bystanders. Developing countries in total make up two-thirds of the WTO membership, but they only initiate one third of the disputes¹⁵.

Even though developing countries have been lagging behind in participation under the DSU, those developing nations who have participated have gained noticeable experience. Participating as the complainant has been motivated by the consideration that a potential dispute may come along with such large trade consequences that high information costs will not prevent filing a WTO complaint because such costs will be low relative to the costs imposed by the trade barrier.¹⁶

Other countries may initiate their first case by joining a complaint that another state has already initiated. For example, China joined the WTO in 2001, and the following year initiated its first WTO dispute by joining eight other countries including the EU, Japan, and several developing nations against US-Steel Safeguards imports (WT/DS252).¹⁷

¹³ Peter Van den Bossche, 173.

¹⁴ <http://www.eto.org>, accessed March 29, 2007. Out of this total only in 75 did the parties agree to solutions or notify a withdrawal of the dispute. WTO Dispute Settlement Statistics (as of 21 November 2006), Legal Affairs Division, WTO Secretariat.

¹⁵ Some African countries such as Nigeria (WT/DS581), Senegal, Cameroon, Zimbabwe and Côte d'Ivoire (all four latter countries were third party participants in WT/DS58) have been involved as third parties. Morocco was the first country to file Amicus curiae brief in the EU Trade discrimination of Sardines case (WT/DS231).

¹⁶ This rationale for participation was the driving force behind Ecuador's decision in February, 1996, to request consultations and file a complaint against the EU for losses from the EU banana regime. Ecuador is said to have rushed its accession to the WTO so that it could file its complaint in this matter (WT/DS27). As the largest exporter of Bananas, Ecuador's losses from the EU banana regime estimated at \$500,000 a day outweighed its potential legal costs from lodging the complaint. Christina L. Davis and Sarah Blodgett Bermeo (2006), 12-13. <http://www.wto.org> accessed January 15, 2007.

¹⁷ Ibid.

Experience as a defendant increases a country's information about how the WTO process works. This experience can be utilized later for initiating a case. Indonesia, for example, had complaints filed against it by the EU (WT/DS54), US (WT/DS59) and Japan (WT/DS55 and WT/DS64) in a dispute about automobiles in 1996, and two years later initiated its first case against Argentina (WT/DS123) about safeguard measures on footwear. Compared to this, the South African experience as a defendant cannot be equated to that of Indonesia. South Africa was cited as a defendant in two cases namely WT/DS1688, concerning Anti-Dumping duties on certain Pharmaceutical products from India, and WT/DS288, concerning definite Anti-Dumping measures on Blanketing from Turkey. In both cases the step taken so far has been a requests for consultation, and no request for the establishment of a panel or settlement notification has been made.¹⁸ Thus the experience gained may or may not result in subsequent participation in WTO DSS or the level of progress made in the Dispute Settlement Process may influence the possibility of subsequent participation.

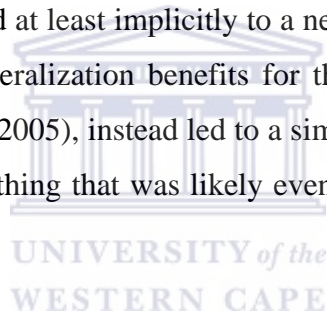
Third party participation offers an easier window into the process. Countries can join as a third party under Article 4.11 of the Dispute Settlement Understanding (DSU), as long as they demonstrate a "substantial trade interest" in the dispute, and they may join panel proceedings as a third party under Article 10.2 of the DSU if they demonstrate a "substantial interest" from either concerns with trade or systemic issues. As third parties they are able to present their own written and oral testimony to the panel, are able to see the submissions of the main parties and sit in on the full meeting of the panel.¹⁹ The case of United States-Safeguard on Circular Welded Pipe from Korea (WT/DS202) is a good example of a case where the participation of other WTO members as third parties may have brought about a different outcome or an outcome that would be beneficial to all affected WTO members. The matter related to a complaint by Korea against safeguards the USA applied against welded pipes from Korea on a quasi-MFN which measure affected multiple WTO member countries.

¹⁸ <http://www.wto.org> accessed May 12, 2007.

¹⁹ Because the cost of participation in the WTO dispute settlement system is high, developing countries fail to defend their systemic interests within the judicial system in cases where they are not parties. Among the developing countries, only India, Brazil and Mexico had participated as third parties in more than eight WTO cases, whereas Japan had done so forty-two times, the EC forty-one times, and the United States thirty two times, as of August 2002 (more recent statistics could not be found for the purpose of this paper). The majority of developing country WTO members have never participated. Where a developing country initiated a WTO case, a particular industry with high per capita stakes in international trade is typically behind the dispute and finances it.

Other exporting countries affected by the US measure, like the European Union and Japan, exercised their right to intervene as interested third parties in the dispute. But other adversely affected exporting countries, such as South Africa, Turkey and Venezuela did not formally participate in the dispute.²⁰ In this case despite almost exhausting the WTO formal dispute resolution process, the dispute was not resolved by the US lifting the safeguards. Instead, a settlement was negotiated and this yielded a discriminatory increase in market access benefits to the Republic of Korea. A completely successful economic resolution to this dispute would involve the US eliminating all trade barriers, liberalizing imports of pipe from the Korean complainant, and extending that liberalization to exports of pipe from other source countries on an MFN basis.

The above case scenario, more specifically the way in which the dispute was settled raises a policy concern of whether the lack of active participation by the other exporting interests contributed at least implicitly to a negotiated settlement, that failed to generate positive trade liberalization benefits for the other exporters (spillovers) and as stated by C.P. Brown (2005), instead led to a simple restructuring of the WTO-inconsistent policy into something that was likely even more discriminatory than the initial safeguard.²¹



²⁰ Some commentators allege that the decision not to participate may be seen as a move to “free ride and enjoy the market access benefits generated by the formal litigant’s efforts to liberalize the safeguard-protected market on an MFN basis”, but the writer adds that there may be other reasons for decision not to participate. C.P. Brown, (2005/1) 3.

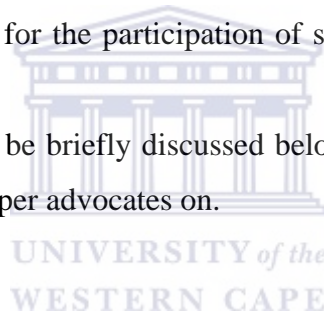
²¹ C.P. Brown, (2005/1) 3-4. Active participants develop a standard operating procedure, regular budget allocation, and organizational capacity for initiation of WTO disputes. Brazil, for example, has established a WTO dispute settlement division in its trade ministry, and encourages active private sector involvement in cases, and has created programs for training young attorneys in international trade law. It is argued that, although it will take time before other countries reach this level in their organization of internal resources, participation in dispute cases contributes to the process. According to Breckenridge²¹, Costa Rica’s victory in a dispute with the US over cotton underwear exports (DS24) concludes that “the country gained significant experience and expanded its capacity with regard to international trade and legal issues, while the legal team within the Ministry of Trade further enhanced its reputation for credibility within the Costa Rican Government.

2.3. Hindrances negating participation by African developing countries in the WTO DSU

There are five major challenges that developing countries face if they are to make use of the WTO DSS against resource-rich countries and their wealthy constituents:

- lack of legal expertise in WTO law;
- lack of financial resources, including for the hiring of outside counsel (high costs of access to the system); and
- fear of political and economic pressure from the United States and EC that induces them to abandon justified legal claims,²²
- Developing countries' relatively smaller value, volume and variety of exports.²³
- Lack of a mechanism for the participation of stakeholders in the initiation of WTO DS process

The first four challenges will be briefly discussed below, while the fifth challenge is the core subject matter this paper advocates on.



2.3.1. Lack of legal expertise in WTO law

Greater legalization of international trade dispute settlement does not come without costs and the demands for human resources have sky rocketed if a WTO member wishes to invoke its international trading rights.²⁴ The first problem that these countries face is in identifying and building a case as this requires domestic expertise both at an administrative level as well as in the affected domestic private enterprises on WTO covered agreements. The expertise concerns the assessment of the potential success in a dispute settlement proceeding (DSP). This requires in depth knowledge of the substance of the agreement and a functioning link between domestic industry and trade representatives in administration.²⁵ Central to these requirements, is the

²² Davis, C.L, and Bermeo, S.B. (2006) 3-4.

²³ Shaffer G.C., (2003) 16.

²⁴ Shaffer Id. 7.

²⁵ Once a potential case is brought to the attention of a government, it must decide whether to file a complaint. Knowledge of the existing law and the elements of its potential claim are necessary to assist

need for trust in the WTO dispute settlement system. In essence it is the lack of knowledge about the DSS that hinders participation of Developing countries in the system.²⁶ The increased focus on legal dispute settlement has led to an increase in the need for legal capacity in the member state administrations.²⁷

2.3.2. Lack of financial resources, including for hiring of outside counsel

A bias in participation activity may stem from the current system of self-representation requiring that countries have sufficient resources to both monitor and recognize relevant WTO violations and to fund legal proceedings in cases in which their rights have been violated.²⁸

The cost of bringing an individual WTO case is extremely high and this further reduces developing countries' incentive to participate.²⁹ According to Brown P., the expected costs of formal participation in a dispute can be said to have two distinct components: the expected litigation costs and the expected political economy costs of confronting another nation in a formal dispute.³⁰

As a consequence, the demand on lawyer time, and thus the cost of specialized legal expertise, has skyrocketed. Litigation at the international level involves a distant forum in which legal expertise is U.S. and Euro-centric, highly specialized, and quite expensive. For example, lawyers for Kodak and Fuji in the Japan-Photographic Film

the government in calculating the likelihood of victory. There are also those issues that are only discovered/realized after the initiation of the dispute which may have tilted the scale in favour of not participating or initiating in a dispute. Information gathering is complicated and this hampers the judgment whether the expected outcome will justify the cost of initiating a case. Active participation of the government and stakeholders is necessary throughout the entire process from the selection of the case, initiation of the process and working with the legal advisor to complete the case.

²⁶ Christina L. Davis and Sarah Blodgett Bermeo, (2006), 3.

²⁷ Martin Bjorklund, (2003), 7.

²⁸ C.P. Brown, (2005/2).

²⁹ Shaffer, (2003), 16.

³⁰ C.P. Brown, (2005/2).

case charged their clients fees in excess of \$10 million dollar. Such fees are unthinkable for most developing countries.³¹.

2.3.3. Fear of political and economic pressure from other WTO members that induces developing countries to abandon justified legal claims

A recurring critique of the current DSU is that the WTO system is not fair because the final stage of implementation may depend on the relative economic power of the parties to the dispute.³² The associated problems faced by developing African in this respect are two fold, on the one hand they face other developing countries comparatively more developed and capable of exerting pressure,³³ and on the flip side they face developed nations upon whom dependence for aid and other trade related support is essential for economic development of the SSA countries.³⁴



³¹The alternative for a developing country to train internal lawyers with WTO expertise is typically worse than hiring outside counsel, since it entails significant long-term allocation of resources which is not cost-effective if a country is not an active player in the litigation system. The accuracy of this argument can be questioned as an investment in the training of a lawyer or expert in any field is regarded in all countries, as human capacity building. But, the reality of today is that, where developing country's internal lawyers develop expertise and exhibit talent, they can be snatched up by private law firms that pay salaries against which developing countries cannot compete. Thus start-up costs are high and potential economies of scale low. The spillover effects for developing countries, in contrast to developed country benefits, are almost purely negative, since, once a developing country trade official leaves to work for the private sector in the United States or Europe, that individual almost never returns to government service. The private market for lawyers thus further reduces developing countries incentive to dedicate resource to develop internal WTO expertise. Shaffer G.C., Id.17-18

³² Id. 1.

³³The first problem arises from the fact that in the WTO all countries may declare that they are developing countries in order to benefit from some of the kinds of differential treatment afforded to developing countries. Some of the developing countries, like Brazil and India, are very powerful and pose possible threats to weaker developing countries. Börklund (2003) 3.

³⁴The second political pressure has the effect that, in the event that disputes do arise, the likelihood of their being brought before the DSU is hindered by the fact that although the WTO is touted as a system of equals, most African countries probably feel intimidated to challenge some of their developed trading partners. Most of Africa's outside trade is tied to non-reciprocal trade arrangements such as the Africa Caribbean Pacific-European Union (ACP-EU) (this may be replaced by the Economic Partnership Agreements (EPAs) being negotiated, but the result is the same) and African Growth and Opportunity Act (AGOA). These "favours" to African participants make the countries less likely to want to bring a challenge to the hand that feed them. Most African countries remain heavily dependent on donor funding and this further compromises their power in the WTO *fora*.

2.3.4. Developing countries' relatively smaller value, volume and variety of exports

The majority of developing countries are less active international traders, in other words, do not have a substantial economic stake in the litigation (no/minimal loss of market access) and, are thus less likely to be repeat players in WTO litigation. Because they are less likely to be repeat players, they have less incentive to deploy the necessary resources to develop sophisticated internal WTO legal expertise in order to participate in the first place. The developing countries also do not benefit from the economies of scale because of their infrequent use of the system.

2.3.5. Lack of a mechanism for the participation of stakeholders in the initiation of WTO DS process

The absence of a mechanism permitting interaction between private stakeholder to inform the government of measures taken that cause or may cause injury to industries in countries is a major obstacle for the participation of African countries in the DSS. A gap exists and the interests of the stakeholders as well as the government are not fully represented as WTO members. As will be illustrated in this paper, the mechanism will contribute to the lessening of the impact challenges such as III(a) and (b), (and maybe (c)), have on the participation in the WTO DS by member countries irrespective of their development status.

2.4. CONCLUSION

The Chapter sets out that a WTO member can participate in the DSU in various roles and like many judicial processes a dispute at the WTO has various stages. It has been shown that participation in the WTO DSU is dominated by its developed members as opposed to its developing members who make up the majority of its total membership. The benefits of participating in the DSU have been set out and it may be accepted that they outweigh the disadvantages. Five challenges are identified as obstacles in the way for participation in the DSU by developing WTO members and the impact of these obstacles are recognised. However the lack of stakeholder participation in the initiation of trade disputes is recognised as one of the main challenge. This paper will address it as it may contribute to the lessening of the impact

some of the other obstacles to participation may have on a developing countries decision to participate in the DSU. The next chapter sets out the mechanisms in place in Namibia and SACU for the participation of stakeholders in the initiation of trade disputes.



Chapter Three

STAKEHOLDER PARTICIPATION IN NAMIBIA AND SACU

3.1. The integration of WTO law in the Namibian Legal system

Namibia as an independent country has a constitution and domestic legislation (in the form of Acts of Parliament) and regulations which make up the *corpus* of its domestic laws. In order to put Namibia in perspective one needs to briefly discuss the place of international law (specifically the WTO covered agreements) in Namibian municipal law.

Article 144³⁵ of the Namibian Constitution provides that:-

“Unless otherwise provided by the constitution or Act of parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the Law of Namibia”. The effect of this Article is that treaties and international agreements to which Namibia becomes a party by ratification or accession will become part of municipal law.³⁶

One can say that because of the effect of Article 144 of the Namibian constitution, the WTO agreements ratified by Namibia when it became a member of the WTO on 1 January 1995, namely the Marrakech Agreement³⁷, are self executing and these international laws do not need to be incorporated, for example through the passing of an Act of Parliament, in order to have internal effect.³⁸

³⁵ The Constitution of the Republic of Namibia, Act 1 of 1990.

³⁶ Gerhard Erasmus, (1989-90) 101.

³⁷ World Trade Agreement 1994 (establishing the WTO and including GATT Uruguay 1994, otherwise referred to as the Marrakech Agreement), concluded 15 April 1994 and entered into force on 1 January 1995.

³⁸ Ian Brownlie, (2003) 48.

3.2. The current framework for stakeholder participation in Namibia

The official webpage of the Ministry of Trade and Industry (MTI) states that “[R]ecognising the important role of the private sector in national development, the Ministry continues to co-operate with and provide assistance to private enterprise in Namibia. This is done by the formation of appropriate policies and strategies aimed at creating an environment conducive to the promotion of Namibia's products in external markets, the development of and assistance to small- and medium-scale industries, attracting and facilitating foreign investments in the country and providing attractive incentive packages to investors.”³⁹

In realizing the aspiration quoted, the need for co-operation mechanism between the public and private sector in the trade arena received attention in July 2005. The MTI submitted a proposal to the Cabinet of Namibia requesting approval for the establishment of a formal consultative and cooperation mechanism (to be formally known as the National Trade Forum (NTF)) between MTI and what is referred to as “the economic stakeholders, especially the private business sector.” The rationale behind the establishment of the mechanism is said to be “necessary for a joint effort towards the realization of national aspiration and objectives and the positioning of Namibia competitively in international trade and investment arenas.” The mechanism was approved by Cabinet⁴⁰ and the NTF was launched on October 31, 2005. The NTF was registered as an organization not for gain on 6 June 2006.⁴¹ According to the available information the forum is not yet operational and is in the process of setting up its Secretariat.⁴²

In addition to the establishment of the NTF, the Government entered into a Memorandum of Understanding with lobby groups representing the respective

³⁹ <http://www.mti.gov.na> , visited 23 April 2007.

⁴⁰ Cabinet Decision No. 17, August, 2, 2007. The operational rules and procedures are contained in the proposed terms of reference of the National Trade Forum (NFT) and the NFT Operational Rules and Procedures.

⁴¹ The Forum is registered under registration number 21/2006/232 in terms of Section 21 of the Companies Act of 1973, as amended.

⁴² The information has been provided by a reliable source from the Ministry of Trade and Industry through a response to a questionnaire. The participant has requested not to be named for the purposes of this paper.

industries. The lobby groups are the Namibian Chamber of Commerce and Industry, Namibia Manufacturers Association and Indigenous Business Council. According to the Operational Rules and Procedures (ORP), the government undertook to consult with the lobby groups and any request for financial or technical support is to be requested through the NTF.

The rationale behind the establishment of the NTF as set out above, is for the realization of national aspiration and objectives and the positioning of Namibia competitively in international trade and investment. International trade can be any trade between nations and the provision does not specifically refer to the international trade under the WTO, and this forum may actually be established to serve the interest of all international trade activities Namibia engages in. The NTF's responsibilities may include Free Trade Agreements (FTAs), the EPAs being negotiated with Europe, Bilateral Trade Agreements (BITs) and the trade between Namibia and Europe as a consequence of the Trade Development and Cooperation Agreement (TDCA) entered into between South Africa and the latter, to name a few. The fact that the forum's ORP are silent on the initiation or participation by Namibia in international dispute, let alone the WTO DSU, is an indication that the country has not put in place the measures necessary to address its participation with the assistance of its stakeholders in the WTO DSU.

A reading of the ORP indicates that they deal with the day to day functioning of NTF, detail on the various meetings that have to take place is set out but what the essence and aim of these numerous meetings will be is not clear, maybe the subject matters for discussion are selected according to the particular matter considered as important at the time preceding it or as decided at the last meeting held. The perception is that the Forum is not functioning very well.⁴³

According to the MTI, four sub-committees were established to compliment and strengthen the functionality of the NTF, namely; trade in service, agricultural trade, non agricultural market access and fisheries and aquaculture. Like the Operational Rules and Procedures, these sub-committees function through continuous meetings that are held on a monthly basis.

⁴³ The participants in the interviews conducted have requested that they remain anonymous.

A reading of Provision 2.3 of the OPR is mind boggling as in addition to the requirement of participation by member in the various meetings of the NTF, it further states that such participation implies and demands a high degree of confidentiality and participants may be required to sign restrictive confidentiality agreements with the NTF. One hopes that the confidentiality requirement will only be raised in matters where it is directed towards protecting trade secrets of an industry or where it may be in the public interest, or some other justifiable reason to do so. One hopes that this provision and provision 7.2, discussed below, will not be used to veto the initiation of potential trade dispute(s) by the government, motivated by a blatant exercise of its power to the detriment of an affected industry.

In addition to the NTF, there is an Agricultural Trade Forum with similar terms of reference which is said to be more effective than the NTF, however there is no formal mechanism to bring WTO violations to the attention of the government. The manufacturing sector has a Manufacturing Association and the Meat Board of Namibia, both of which are proactive in the protection of the interests of the stakeholders within these industries.

The two industries in Namibia that have been exposed to measures taken by other WTO members which have caused adverse effects to the detriment of the domestic industries and where the government could but did not initiate WTO dispute in terms of the DSU are the Dairy and Beef industry. A brief discussion of the events that took place and upon which this paper relies in claiming that WTO dispute initiation ought to have been engaged in will follow.

The Dairy industry has been under constant pressure from dairy imports from South Africa since 2005 and this resulted in the closure of one of its dairy producers, Rietfontein factory in February, 2005. During this period milk prices in South Africa⁴⁴ had dropped unexpectedly and the Namibian industry faced an influx of cheap dairy products from its southern neighbours. Once again on August 21, 2006,

⁴⁴ The dairy volumes in Namibia are said to represent about 1% of the South African dairy market and this makes the industry highly vulnerable to market diversion from South Africa. The problem is further aggravated by the absence of a mechanism in place to address the influx of subsidized dairy imports into Namibia. <http://www.dairyafrika.com> accessed March 28, 2007.

the Namibia Agricultural Union issued an urgent press release calling for government intervention to protect the dairy industry, which was facing a possible closure, as well as the infant UHT milk industry, the protection of which is expected to come to an end in 2007.⁴⁵ Independent consultants⁴⁶ were approached and their investigations revealed that unfair trade practices severely damaging to the industry were taking place. These practices are said to have resulted in job losses, price cuts to produce and factory closures.⁴⁷

Beef is one of the most important products in Namibia and the industry has also been exposed to various trade distorting measures.⁴⁸ The EU provides direct support per year to its farmers in addition; there is indirect support of tariffs that make imports artificially expensive, as well as national level assistance to farmers.⁴⁹

⁴⁵ <http://www.dairyafrika.com/news> accessed March 28, 2007.

⁴⁶ Namibia, like all most other developing countries, has a shortage/total lack of persons with the necessary academic qualifications to opine on trade related issues. This was once again confirmed in the dairy matter as the government obtained legal opinion on the matter from Trade Law Centre for Southern Africa (TRALAC).

⁴⁷ The industry's concerns were addressed and there are indications that the extension of the Infant Industry Protection until 2012 will be gazetted soon, enforcing a 40-percent levy on all imported UHT milk. The industry applied for an extension to SACU through the Ministry of Trade to bring some relief to the dairy industry, which is going through turbulent times due to more competitively priced milk from neighbouring South Africa. A price increase of 50-cents per litre took effect from 1 April 2007 removing fears of a possible collapse of the industry and dependence on imports which could lead to increases in retail prices due to the lack of competition resulting from such industry collapse. <http://www.dairyafrika.com/news.asp?ID=29>, New Era, March 28, 2007, Could SA's Milk Shortage Hit Namibia? accessed May 11, 2007.

⁴⁸ Namibia exports beef to Europe and the preferences it receives from Europe include specific duties and applied tariff quotas. One consequence of this is that imports from Namibia are only of higher quality beef, and this tends to result in export quality being higher than average domestic quality. Consequently only producers with higher quality beef benefit from this. The chances of poorer producers participating in the lucrative trade are reduced, because they lack the ability to finance quality production (unless the government makes appropriate provision). The disparity is further widened when specific duty combined with a tariff quota encourages exports to be of only the highest quality.

⁴⁹ Stevens C., Food Trade and Food Policy in Sub-Saharan Africa: Old Myths and New Challenges, Development Policy Review, 21/2003, 669-681, at 674. Stevens comments that Africa's greatest gains from exporting to Europe have been in the products that appear at first glance to be the most heavily protected and to receive the least generous preferences. Beef is a traditional export to the European Union markets that is heavily influenced by Agricultural protectionism. Europe applies the concept of trade policy rent, which briefly stated exists when a market is distorted but certain supplies receive preferential access. The purpose of the distortion is to enable domestic European producers to sell goods that consumers would otherwise prefer to buy from foreign producers (whether the because they are cheaper or preferred quality or whatever). One way is to subsidize the domestic producers (this is politically unpopular because it is visible and results in either high taxes or lower government expenditure or other things), and another method is to rig the domestic market so that consumers have to pay the highest prices at which domestic producers can compete (one way of achieving this result is through imposing protectionist trade barriers by squeezing imports, restrict supply and maintain prices at higher levels than would otherwise apply). The purpose is to confer rents on the producers in the distorting country.

South Africa faced mad cow disease (FMD/BSE scare) outbreak and in December 2000 all imports from Namibia and other neighbouring countries into Southern Africa were banned. During the same period the EU raised its subsidies on beef Exports to South Africa. The ban on meat imports and the added subsidized EU imports made it extremely hard for Namibian meat to compete. The poor communal farmers were the hardest hit as exports to the EU from these areas were banned and the South Africa market was of crucial importance to these exporters.⁵⁰

The Food Safety, Sanitary and Phytosanitary (SPS) requirements for the export of meat from Namibia⁵¹ to the EU have been a major obstacle for market access.⁵² Only Meatco is certified to export meat to the EU to the exclusion of the communal farmers and only boneless meat can be exported. These measures have had a significant impact on the industry and it has suffered major financial losses and had to put expensive machinery in place to meet the SPS standards as a consequence.⁵³ These potential WTO disputes were settled to the detriment of the Namibian Industries, who had to accept the market conditions (or maybe the costs of litigating at the WTO may have outweighed the gains from trade).

In Namibia there are currently no mechanisms (except for the NTF, which as discussed above may not be able to address the need for stakeholder participation in the initiation of WTO trade disputes) in place to ensure that the WTO covered

⁵⁰ The Meat Board estimated a loss in excess of US\$13 million as a result of the EU subsidy. Namibia lodged a formal request for the EU to rescind its decision. <http://www.fews.net> accessed May 10, 2007. Safe to say that the subsidies in the European Union still exist, the outcome of the formal request could not be accessed during the research conducted. .

⁵¹ Beef exported from Namibia comes from cattle that are reared in a natural environment, without growth hormones and regular use of antibiotics. <http://www.economist.com.na> , accessed May, 9, 2007.

⁵² The underlying intent in the formulation of the SPS Agreement was to facilitate unhindered international trade in animals, plants and their products without endangering human, animal or plant life (Article 2, and the chapeau to the agreement). An important concept embedded within the Agreement is to ensure that governments do not use sanitary measures related to the import of animal products as unjustified trade barriers to protect their own domestic livestock industries from competitive imports (Article 5). To enable scientifically justifiable baseline for consistency in decision making, member countries are encouraged to base their decisions on international standards where they exist or if the sanitary standards set by the importing country is higher than an international standard, on such standards (Article 3). <http://www.wto.org> accessed May 1, 2007; see also, Bruckner G.K. Tralac Working Paper No. 6/2005, October 2005, 1-60, 4.

⁵³ To date the EU still bans bone-in and for the Namibian producer (Meatco), putting measures in place to meet these non-tariff barriers is expensive and difficult to overcome.

agreements are implemented correctly or to measure compliance by importers and exporters unless the other trading partner raises the issue.

The private sector in Namibia is aware of the WTO covered agreements but view the process as tedious and expensive and these deter them from putting measures in place to give effect thereto.⁵⁴

What is worrying about the whole set up is the lack of co-ordination between these various fora as well as the non-stop, costly meetings which sometimes bear no fruits and more alarming is that the procedures do not deal with an eventuality of a trade dispute by or against Namibia at the WTO forum. Further to this, the NTF OPR at provision 7.2, provide that “[D]ecisions taken by the members shall not be binding on the Ministry of Trade & Industry or the Government of the Republic of Namibia but shall convey the recommendations of the Public Sector to the Government.” Reference to the Public Sector in this provision, must be accepted as a typographical error and this paper will assume that the correct word is Private Sector in order to show the dilemma that the private sector is faced with.⁵⁵

When measured against the political interests and pressure the government may in all respect be exposed to from the major trading WTO members, the provision is alarming as the mere conveyance of “recommendations” may not be convincing enough for government to take the matter further. The industry may be left out in the cold to face the trade distorting measures it is being exposed to. The NTF is financially dependent on the MTI and this may have an impact on the decision making.

Like the regulatory framework in place in the US an EU and the informal Australian provisions discussed in chapter four, below, the final decision to initiate or not initiate a trade dispute at the WTO DSB for Namibia is vested with its MTI. The dilemma faced by the industry in the event that they regard the case as one validating the

⁵⁴ Reply received from a member of the stakeholder group of Namibia as an answer to a question posed in the questionnaire used for data collection during the research for this paper. Also see www.economist.com.na accessed May 9, 2007.

⁵⁵ A copy of the Operational Rules and Procedures of the NTF is attached as an annexure to this paper. Permission to attach this document has not been obtained, however the copy was provided in reply to the questionnaire directed to the NTF.

initiation of a dispute, must be weighed up against the government's interest as the member and guardian of the implementation and enforcement of the WTO covered agreements. Although this method is not entirely without merit, in the sense that it affords government and the private sector a realistic means of response, it has been noted for its opacity and instability because it would seem to leave issues to the government's discretion.⁵⁶ Moreover, the ministry in charge varies depending upon the affected sector.

The possibility of ever getting involved in a Trade dispute at the WTO level is very low in Namibia. Namibia regards South Africa as their major trading partner viewing their relationship as one of mutual benefit. This may explain the modest approach taken when the South African Dairy products flooded the market which was arguably a form of dumping. This paper recognizes the strong commercial and Trade flow between these two countries but globalization and the WTO commitments call for greater market access and there will be many more Nations trading with Namibia. It must thus put measures in place to deal with its current trading partners as well as prospective future trading partners that may engage in conduct which is not WTO compliant. The approach⁵⁷ taken by Namibia in dealing with the trade distorting measures faced by its industries illustrated above, confirms the argument that small developing states may feel constrained from initiating a case against their larger trade partners because they do not anticipate that they will be able to gain concessions or because they fear losing aid or preferential trade.⁵⁸

3.3. Stakeholder participation in SACU

The main question is why and how should SACU play a role in facilitating increased stakeholder participation within the Union for the mutual benefit of its members?

⁵⁶Keidanren N. (2004) 2.

⁵⁷ An approach that seem to have gone unnoticed, but of significant importance is that of Musoti V. (2003). Where he suggests for the establishment of an advisory center, to be located at a university (in the case of Namibia such center can either be located at the university of Namibia or the Polytechnic of Namibia). Academics from the institute will work with the Ministry of Trade and Industry or the line Ministry of the affected industry. Primary research can be conducted by academics or graduates or both, and a memorandum of Understanding like the ones between NTF and the lobby groups, can be entered into between the Ministry of Trade and industry, jointly with NTF and the University or Polytechnic of Namibia (whichever one is more beneficial for the research work anticipated).

⁵⁸Supra Davis, C.L. and Bermeo, S.L. (2006) 7.

SACU can play a dynamic role in the process of facilitating increased participation of its member country stakeholders in the initiation of trade disputes firstly because it has fewer members than other regional arrangements such as SADC⁵⁹ or COMESA⁶⁰. Namibia is a member of SACU since attainment of her independence in 1991. The customs union represents the most important trading partners for Namibia and for that reason the writer argues that having a mechanism in Namibia which will be complimented by a higher ranking and regional mechanism at the SACU level will be a means to accomplishing stakeholder participation in the initiation of trade dispute at the WTO.⁶¹

The SACU agreement⁶² seeks to entrench a democratic approach to trade policy while minimizing revenue instability during a period of declining tariffs.⁶³

SACU can establish a branch where member state stakeholders can seek legal opinion in the event that their governments veto the initiation of a dispute. SACU may avail itself to providing the parties with an independent legal opinion which may or may not influence the decision of either party (stakeholders or government). Where a dispute is between member states the forum can be used to try and resolve the dispute or direct possible less trade distorting measures that member states can put in place to lessen the impact on the industry. Serving as an independent party at the disposal of member state governments and stakeholders will be beneficial and may contribute to lessening the costs involved in the process of obtaining legal advice or preparing the

⁵⁹Short for: Southern African Development Community.

⁶⁰ Short for: Common Market for Eastern and Southern Africa.

⁶¹ The most important function of SACU is the collection of customs and excise duties. This is done through the South African National Revenue fund and the revenue is shared among the members (Botswana, Namibia, Lesotho, South Africa and Swaziland) on the basis of a revenue-sharing formula. These revenues provide a significant source of revenue for the not so international trade exposed member countries, being the BNLS (All member countries except for South Africa) countries. The renegotiation of the SACU agreement in 2002 supports the need for the customs union to play an active role in the creation of a stakeholder participation mechanism.

⁶² The new agreement as it is said to be more comprehensive and includes the following objectives set out in Article 2:

- To promote the integration of Members into the global economy;
- To facilitate cross-border movement of goods between the Members;
- To establish effective, transparent and democratic institutions which will ensure equitable trade benefits to the Members;
- To facilitate the equitable sharing of revenue from customs, excise and additional duties;
- To promote fair competition, substantially increase investment and facilitate economic development; and

To facilitate the development of common policies and strategies.

⁶³ Kirk, R. and Stern, M. (2003) 1. Also quoted in Grant Catherine (2006) 2.

complaint, respondent, or third party participation of a member country at the WTO DSB. In the event that it is required to render advice in a dispute between its member states, such advice can be rendered on a first come first service basis and may serve as an arena for the settlement of the dispute to avoid the more expensive WTO DSS.

Where the measures forming the subject matter of the complaint have been taken by a common trading partner of all member states, the SACU mechanism can be used in the process from the initiation stage, preparation and filing of briefs. The SACU mechanism can also assist the member state stakeholders by providing expertise on WTO law where it has such expertise, and in this way lessen the possibility of members engaging in possible WTO violations and enable them to identify possible trade distorting measures taken by trading partners.⁶⁴

3.4. CONCLUSION

The chapter illustrates that developing countries like Namibia have taken initiatives to put mechanisms in place that will facilitate the participation of stakeholders in the process of giving effect to the country's WTO commitments. However the mechanism does not address the element of initiating trade disputes at the WTO, let alone the participation of stakeholders in such a process. SACU as a regional arrangement is a suitable forum to facilitate the process of stakeholder participation in the WTO DS process but it has no mechanism in place but has future plans for such mechanism. It is thus safe to conclude that in SSA there is a need for a stakeholder participation model which may result in participation by the SSA countries in the DSU. The next chapter undertakes a comparative analysis of formal and informal stakeholder participation models in place in the US, EU and Australia and some developing countries who have participated in the WTO DS process.

⁶⁴There are plans under the auspices of SACU for the establishment of a notification mechanism. These plans have been approved by the SACU council but the detail of the envisaged mechanism was not available at the time of compiling this paper. According to the questionnaire response, the current compliance evaluation is undertaken by the mission in Geneva at the WTO.

Chapter Four

Comparative Study on Stakeholder Participation

4.1. Evolution: How the participation of Stakeholders evolved

The paper calls for stakeholder participation and thus necessitates an elucidation of the evolution of stakeholder participation at the International *Fora*. Although the writers do not use the word stakeholders when they refer to the private sector actors in the economy of a country, the evolution of the role of these actors can be traced from the rigid divide between the roles of private and public players; followed by the Institutional Economist who refer to a mechanism of coordination between private and public; and governance through public private networks.⁶⁵

Traditionally, social scientists have treated government as distinct from civil society and created what is commonly referred to as the public-private dichotomy.⁶⁶ Social scientists such as Max Weber (1946)⁶⁷ refers to the relationship as one within which the state governs civil society and hence the state does not enter into a governance network with civil society. Robert Dahl (1976)⁶⁸ advocates on the concept of “polyarchy” where political leader’s control of the state is legitimated through a pluralist democratic political process and like Weber, he states that there is a difference between the role of the government (public) and the governed (private). Joseph Grieco’s (1990)⁶⁹ International relations theory also reflected this public-private dichotomy with an emphasis on the role of state power in shaping and deploying international regimes to advance state interests.⁷⁰

The private–public dichotomy is reflected in a similar way by Institutional economist. Their focus is on the mechanism used to coordinate and ultimately allocate resources

⁶⁵Gregory C. Shaffer, (2003) 10-18.

⁶⁶Id.

⁶⁷ Weber Max. (1946) translated by H.H. Gerth and C. Wright Mills, 239.

Weber Max. (1947) 154.

Quoted by Gregory C. Shaffer, (2003) 2003, 10.

⁶⁸Dahl Robert. (1976) 10.

Dahl, Robert, and Lindblom C., (1976) 171, 227-36, 272-86., 11.

⁶⁹ Grieco Joseph M. (1990).

⁷⁰ Gregory C. Shaffer, (2003) 2003, 11.

and thereby determine economic outcomes. They refer to these mechanisms as systems of “governance” as opposed to government. Oliver Williams⁷¹ for example concentrates on the operations of firms but his idea is said to apply to political economy in general. Under the concept of hierarchy, governments allocate resources by command as, through acts of legislatures, courts and bureaucracies. Governments issue regulations, impose fines, and collect taxes. Markets, in contrast allocate resources through the uncoordinated decisions of individuals, as reflected in the price system. Markets are said to hence reflect a private ordering of goods, services, and wealth, in contrast to a hierarchical public alone.⁷²

Shaffer (2003) refers to this as governance complementing public hierarchies and private markets; governance through public-private networks. These networks bring together public and private actors to address discrete policy issues and through this meeting blur the public-private distinction. Governments are delegating traditionally “public” functions to the private sector but in order to ensure that the desired outcome is achieved the government oversees the activities of the private actors. It can be perceived as the way in which western societies are increasingly being governed through “self organizing, inter-organizational networks” composed of public and private actors pursuing shared goals. Mixed networks of public and private actors coordinate in formulating and implementing public policy.⁷³ In order to achieve the desired outcome government oversees the activities of the private actors.

The idea that public functions are governed by shifting combinations of public and private actors is not entirely new. The blurring of the public and private domains has long been a subject of interest to legal realists and law and society scholars. The interdependency between the private and public spheres is said to be the latest development in this area. Public institutions have shifted responsibility for the provision of many services to the private and voluntary sectors through privatization

⁷¹ Williamson, Oliver E. 1975. *Markets and Hierarchies, analysis and Antitrust Implications: A Study in the Economics of International Organization*. New York: Free Press.

Williamson Oliver E. 1985. *the Economic Institutions of Capitalism: Firms, Markets, Relational Contracting*. New York: Free Press.

Williamson Oliver E. 1996. *The Mechanisms of Governance*. Oxford University Press.

⁷²Gregory C. Shaffer, (2003) 12. The stakeholder participation that this paper is calling for is more closely modeled after the last stage of development, namely governance through “public private networks.

⁷³ Id. 12-13.

and deregulation. The network established between government officials and private groups is brought about predominantly because of the resource interdependency between them. “A basic assumption of network relationships is that one party is dependent on resources controlled by another, and that there are gains to be had by the pooling of resources.”⁷⁴

Not all public and private actors enjoy equal opportunities to participate in these networks and the relative power and influence of actors within these networks is determined by the diffusion of resources and actors’ per capita stake in outcomes. Actors hold different resources ranging from constitutional, legal, organizational, financial, political, and informational, to name a few. As Shaffer (2003) illustrates, by using the WTO as an example, public actors hold constitutional and legal powers that endow them with authority. In the WTO only member states may bring claims before the WTO DSB. In this way private actors depend on public authorities to represent their interests. Private actors, however, also have organizational, financial, political, and informational resources that can benefit public authorities. In the context of WTO dispute settlement, private associations have the financial means to hire legal experts to help develop legal arguments; hold essential information about the market place needed to develop the factual basis of legal claims; and deploy political resources through lobbying, campaign financial support, and public information campaigns. In this way the public and private actors depend on each other’s resources to accomplish their respective goals.⁷⁵

In addition to resources, participation also depends on actors’ relative stakes in the outcomes, particularly on the per capita benefits from participating as compared with informational and organizational costs to do so. “The character of an institutional participation is determined by the interaction between benefits of that participation and the costs of that participation.... Interest groups with small numbers but high per capita stakes have significant advantages in political action over interest groups with large numbers and smaller per capita stakes.”⁷⁶

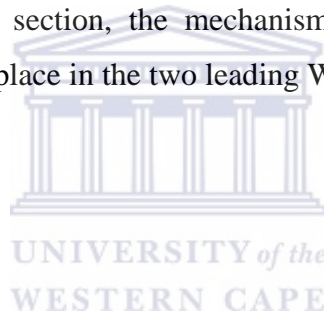
⁷⁴ Gregory C. Shaffer, (2003), 14.

⁷⁵ Id. 15-16.

⁷⁶ The groups with high per capita stakes are more likely to obtain and provide information to the policymaking process and those with low per capita stakes are less likely to engage in policy strategizing, especially where the per capita benefits of fully understanding the issues and organizing

At the international sphere, such as the WTO, governmental representatives remain the most important players in the public private-networks in international relations. With respect to cross-border networks, private actors still play the central role. As Firms and Trade Associations become repeat players in the legal challenge of trade barriers, they develop knowledge of how to strategically use the WTO process when needed.⁷⁷

As the statistics indicate, the US and Europe have been the most frequent repeat actors in the WTO DSS and in the following chapter, their private-public networking will be used to demonstrate the current set up that has allowed stakeholders to participate in WTO dispute initiation.⁷⁸ Australia, which has been a complainant seven times and a defendant in nine cases,⁷⁹ was the only country where an informal mechanism exists, which has been documented and is accessible for the purpose of this paper. In the following section, the mechanism will be used as the closest comparison to the systems in place in the two leading WTO DSU participants.



themselves are too low to justify the costs. Koesat, Neil. 1994. Imperfect alternatives: Choosing Institutions in law, Economics and Public policy: University of Chicago Press, 3, 6, 868. See also Shaffer 2003, 16.

⁷⁷ Id.

⁷⁸ <http://www.wto.org> accessed May 10, 2007.

⁷⁹ Id. Accessed May 27, 2007.

4.2. Case Study : US , EC and Australia

4.2.1. How U.S., EC and Australia adapted and enhanced their resources and abilities for participation under the WTO's legalized dispute settlement system:

In the developed countries the business interests in democracies have gained skills that help to support a litigation strategy. Firms are said to become accustomed to providing information to government and presenting their legal and national interests rather than private deal-making.⁸⁰ The line of argument is that democracies are more likely to initiate due to their experience with the judicial process domestically. The paper argues that this argument is more relevant to developed nations because even in the African democracies where litigation thrives, this element has not had an impact on increased participation in the WTO DSS. Be that as it may, the way in which the successful democracies organize themselves may be used as guidance for the approach developing countries such as Namibia may consider in strengthening the mechanism between stakeholders and governments for increased participation in the WTO DSS.

The U.S. and EC public authorities hold considerable resource advantage when participating in WTO litigation. For example, the Office of the United States Trade Representative (USTR) employs many lawyers and these lawyers are supplemented by those in other U.S. departments, including from the Department of Commerce, Department of Agriculture, Department of the Treasury, Office of Patents and Trademarks, and Environmental Protection agency, as needed in individual WTO disputes.⁸¹

By drawing a comparison between the dispute initiation systems in place in the three developed countries, two of which are active participants in the WTO DSS, one can provide some guidance on mechanisms that developing countries can put in place to

⁸⁰ Bergstein, A. and Berger, P.L. (1997) 9-10.

⁸¹ The Legal Services division of the European Commission employs lawyers that address WTO matters; this division is supplemented by hundreds of lawyers working in the commission's Trade Directorate General (DG) and other DGs, including DG Agriculture, DG Enterprise, DG Internal Market and DG Consumer Affairs. These lawyers are typically graduates from leading U.S. and European universities in WTO law. Thus in a WTO dispute the collective expertise and experience favor the U.S. and/or EC. Gregory Shaffer (2003) 21-22.

encourage active participation of stakeholders in the initiation of trade disputes. The important components of the systems in place in the US, EU and Australia which will be compared are, the mechanisms regulating the process of dispute initiation, submission of complaints, (under this heading who submits, admissibility and time frames to initiate or not, will be set forth); internal consultations; consultations with third parties; examination procedure (of the information pertaining to the alleged complaint); obstacles to trade, unreasonable, unjustifiable or discriminatory acts; confidentiality; action that may be taken; termination of action and monitoring of implementation. The US and EU systems are formal in nature while the Australian system is informal. Where the discussion is silent on the measures in place in one or more of the selected discussions it must be taken that no such information could be found during the composition of this paper for that specific jurisdiction.

4.2.2. Mechanisms regulating the process of dispute initiation

The means through which economic operators can have their trade problems addressed by the Community, is stipulated in the EU Council Regulation (EC) No 3286/94 of 22 December 1994 (referred to as EU Regulation). The mechanism is said to be a type of commercial defense mechanism aimed at strengthening the common commercial policy, particularly with regard to protection against illicit commercial practices.⁸² The Community procedures in the field of common commercial policy are laid down in the Regulation, particularly those established under the auspices of the WTO, which are aimed at responding to obstacles to trade having an effect on the market of the Community. The aim is the removal of the resulting injury. The Regulations, in Article 1, recognizes that international trade rules are primarily those established under the auspices of the WTO covered agreements and the annexes thereto but recognizes, in the preamble to the Regulations, that they can also include those rules laid down in any other agreement to which the Community is a party setting out rules applicable to trade between the Community and third countries. Article 1 provides that the procedures in the Regulation are to be applied to the

⁸² <http://eur-lex.europa.eu> accessed May 14, 2007.

initiation and subsequent conduct and termination of international dispute settlement procedures.⁸³

The Regulation establishes procedural means through which private economic operators can request the Community institutions to react to obstacles to trade adopted or maintained by third countries which cause injury or otherwise adverse trade effects. The request can only be made where a right of action exists in respect of the alleged obstacle under applicable international trade rules.⁸⁴ The preamble to the Regulation further confirms that the Community must act in compliance with its international obligations and, where such obligations result from agreements, maintain the balance of rights and obligations which it is the purpose of those agreements to establish. Measures taken under the EU procedures in question should also conform to the Community's international obligations.⁸⁵

The U.S. resources are supplemented by those of large and well-organized companies and commercial groups located within them that actively follow WTO matters. These Multinational firms are the world's largest traders and are consequently the most directly affected by the details and interpretive nuances of agreed rules. These firms have a substantial interest in the outcome of WTO disputes concerning themselves or the specific industry they participate. They have the resources to help public authorities engage in complex, prolonged litigation in a remote forum, which they are willing to dedicate to these issues because of their stakes. The interests of these multinational companies, although not identical, are closely linked with those of their home countries.⁸⁶

⁸³ <http://eur-lex.europa.eu> accessed May 14, 2007. Also referred to in Maonera F. Initiation of WTO Trade Disputes by the private sector – need for SADC/COMESA countries to develop national mechanisms, tralac Working Paper, No 15/2006, October 2006,1-41, 16.

⁸⁴ Council Regulation (EC) No 3286/94 of 22 December 1994, the Preamble; In *Fédération des industries condimentaires de France (FICF) and Others v. Commission of the European Communities*, ECJ, T-317/02, the court, ad paragraph 44, held that; “It must be observed as a preliminary point that, under Regulation No 3286/94, exercise of the right of action by the Community under international trade rules against an obstacle to trade adopted or maintained by a third country and having an effect on the market of that country requires as a minimum that three cumulative conditions be satisfied, namely the existence of an obstacle to trade, as defined in the regulation, the presence of adverse trade effects which result from that obstacle and the need to take action in the interests of the Community.”

⁸⁵ See footnote 67 above.

⁸⁶ *Supra*, Shaffer, G. (2003) 23.

In the US, the means by which US citizens may petition the US government to investigate and act against potential violation(s) of international trade agreements, is provided for under Section 301 to 310 of the Trade Act of 1974 (hereinafter referred to as the trade Act). In terms of Section 302(a)(1), any interested person may file a petition with the USTR⁸⁷, requesting that action be taken and setting forth the allegations in support of the request. In addition to other requirements, in order to bring an action in terms of the Act one must show that the breaches have had impacts on individual economic operators and that the complaint emanates from individual economic operators.⁸⁸

The informal system in Australia has a WTO Trade Law Branch which is part of its Department of Foreign Affairs and Trade which acts as the WTO dispute enquiry point. The Branch receives complaints from an exporter who considers that its competitive position is affected by the trade-restrictive actions of another WTO member. The Branch examines the details of the case, determines the nature of the barrier, particularly, whether or not it is a breach of WTO rules and establishes possible options for action that can be taken. The options could include official

⁸⁷ The USTR is part of the Executive Office of the President <http://www.osec.doc.gov> accessed April, 14, 2007.

⁸⁸ In United States – Section 301-310 of the Trade Act of 1974: 1999 WT/DS152/R, the EU brought a claim before a WTO Panel alleging that;

- by imposing strict time limits within which unilateral determinations must be made and trade sanctions taken, sections 306 and 305 of the Trade Act do not allow the US to comply with the rules of the DSU in situations where a prior multilateral ruling under the DSU on conformity of measures taken pursuant to implementation of DSB recommendations has not been adopted by the DSB.
- the DSU procedure resulting in a multilateral finding, even if initiated immediately after the end of the reasonable period of time for implementation, cannot be finalised, nor can subsequent DSU procedure for seeking compensation or suspension of concessions be complied with, within the time limits of sections 306 and 305.
- Title III, chapter 1 (sections 301-310) of the Trade Act, as amended, and in particular sections 306 and 305 of the Act, are inconsistent with Articles 3, 21, 22 and 23 of the DSU; Article XVI:4 of the WTO Agreement; and Articles I, II, III, VIII and XI of GATT 1994.
- the Trade Act nullifies and impairs benefits accruing, directly or indirectly, to it under GATT 1994, and also impedes the objectives of GATT 1994 and of the WTO.

The report of the panel was circulated to Members on 22 December 1999. The Panel found that Sections 304(a)(2)(A), 305(a) and 306(b) of the US Trade Act of 1974 were not inconsistent with Article 23.2(a) or (c) of the DSU or with any of the GATT 1994 provisions cited. The panel noted that its findings were based in full or in part on US undertakings articulated in the Statement of Administrative Action approved by the US Congress at the time it implemented the Uruguay Round agreements and confirmed in the statements by the US to the panel. The panel stated therefore that should those undertakings be repudiated or in any other way removed, its findings of conformity would no longer be warranted. The DSB adopted the panel report.

consultations with the government of the trading partner in question, aimed at settling the matter. In cases where there are clear issues of inconsistency with WTO rules and where bilateral consultations have not been successful, there is the option of initiating a formal WTO complaint under WTO dispute procedures. The final decision on the initiating a dispute lies with the Minister for Trade.⁸⁹

The systems in place in these three jurisdictions do not provide a for a right of the private economic stakeholder to compel the government or the Community to initiate the dispute settlement mechanism, but only provides for a right of the stakeholder to have his complaint formally investigated. From a reading of paragraph 7.2 of the Operational Rules and Procedure of the NTF, it is safe to say that Namibia adopts the same approach. The approach has its advantages and disadvantages depending on which side you are on. If the stakeholders are allowed to compel the initiation of disputes they interfere with the government's right as signatory and member of WTO to weigh up the benefit of initiating a dispute against the economic loss to the country and the maintenance of good trading relations with other nations. On the other hand, a stakeholder's inability to compel the initiation of a dispute by the government can be detrimental to the stakeholders business if the trade-distorting measures continue, or where the decision by the government not to initiate is solely based on political considerations.⁹⁰

4.2.3. Submission of complaints

4.2.3.1. Who can submit?

In the EU complaints may be lodged by any natural person, or any association, acting on behalf of a Community industry (Article 3(1)); any community enterprise (company), or association, acting on behalf of one or more Community enterprises

⁸⁹ <http://www.dfat.gov.au> accessed May, 14, 2007. Also referred to in Maonera F. (2006), Supra, at 19.

⁹⁰ An example of the exercise of discretion by the relevant authority can be found in Section 302(a)(2) of the Trade Act. The USTR has to review the allegations in any petition filed, and determine whether or not to initiate an investigation. In determining whether to initiate an investigation of any act, policy, or practice, the USTR has discretion to determine whether the requested action would be effective in addressing such act, policy or practice (Section 302(c)). The USTR is not required to initiate an investigation with respect to any act, policy, or practice of a foreign country if he determines that the initiation of the investigation would be detrimental to United States economic interest (Section 302(b)(2)(B)).

(Article 4(1)); who has suffered injury/adverse effects as a result of obstacles to trade that have effected the market of the Community/third country may lodge a complaint; or any Member State (Article 6(1) may ask the Commission to initiate the procedure. The difference between the parties who may lodge a complaint in the EU and at the USTR in the US is that in the US any interested person can file a petition with the USTR requesting action to be taken (Section 302(a)(1) while the Commission only permits complaints being lodged on behalf of a community industry or enterprise (Article 3(1) and 4(1) above).⁹¹ Section 301(d)(9) defines ‘Interested person’ as inclusive of, but not limited to, domestic firms and workers, representatives of consumer interests, United States product exporters, and any industrial user of goods or services that may be affected by actions taken.

The USTR is authorised to initiate investigations on its own initiative.⁹² This is not true in the case of the Commission.⁹³ In Australia the system permits for complaints to be submitted by Firms/Companies or their nominated legal representatives.⁹⁴

In all three jurisdictions under comparison, the party filing a complaint is required to set out the alleged conduct that the transgressor is engaged in and the injury suffered. The EU and US regulation is more strictly worded than the Australian provision.⁹⁵ This requirement evidences the need to have individuals equipped with the necessary expertise on International Trade law employed in these departments.

⁹¹ <http://ec.europa.eu> accessed May, 14, 2007.

⁹² Us Trade Act Section 301(a) and Section 302(c).

⁹³ Article 3(1), Article 4(1) and Article 6(1) of the EU Regulation 3286/94 does not authorize the commission on its own initiative.

⁹⁴ <http://www.dfat.gov.au> accessed May, 14, 2007.

⁹⁵ In the EU, the regulation in require that, for a complaint to be admissible, it must be in writing and must contain sufficient evidence of the existence of the obstacles to trade and of the injury resulting therefrom. A complaint made by a community enterprise under Article 4(1) shall only be admissible if the obstacle to trade alleged therein is the subject of a right of action established under international trade rules laid down in a multilateral or plurilateral agreement. Section 302(a)(1) and (2) of the US Trade Act provides that a person filing the petition should set forth the allegations in support of the request which the USTR is to consider and determine whether to initiate an investigation. The Australian provision requires that a complaint provide details of the problem alleged and the adverse impact on exports or imports. Upon receipt of such complaint the WTO Law Branch will examine the details of the case; determine the nature of the barrier, in particular whether it could be a breach of WTO rules, and then develop a possible option for action.

4.2.3.2. The decision to initiate or not to initiate

In Europe, Article 5(3) of the Regulations requires the Commission to inform the complainant, where it becomes apparent that the complaint does not provide sufficient evidence to justify initiating an investigation. A similar requirement is set out under the US Trade Act and in terms of which the USTR upon making a determination not to initiate an investigation with respect to a petition, shall inform the petitioner of the reasons and publish a notice of the determination, together with a summary of such reasons, in the Federal Register. If the USTR determines that the initiation of the investigation would be detrimental to the US economic interest, he/she is not required to initiate an investigation with respect to any such act, policy or practice of a foreign country.⁹⁶ In Australia, upon receipt of such complaint the WTO Law Branch will examine the details of the case; determine the nature of the barrier, in particular whether it could be a breach of WTO rules, and then develop a possible option for action.⁹⁷

4.2.3.3. Consultations

Mechanisms for internal consultation between the relevant trade authority and the stakeholders representing the affected industry are provided for in all three jurisdictions. However the EU because of its member state set up, has a procedure for consultations between the Advisory Committee and representatives of the Member States (Article 7) and consultations with interested parties but this process is set in motion by the Commission itself upon a finding that sufficient evidence exist to justify initiation of a examination procedure.⁹⁸

In the US before making a determination in terms of Section 304(a)(1)(A) and 304(a)(1)(B) and where expeditious action is not required, the USTR shall provide an opportunity for the presentation of views by interested persons, including a public hearing if requested by any interested person. In terms of Section 304 (b) of the Trade Act, the USTR is also required to obtain advice from the appropriate committees and may request the views of the United States International Trade Commission regarding

⁹⁶Section 302(2)(B) of the US Trade Act of 1974.

⁹⁷ See footnote 78 above.

⁹⁸ Article 8(1) and 8(2).

the probable impact on the economy of the US of the taking of action with respect to any goods or service.

Although the decision to initiate a WTO dispute, as stated in the preceding paragraphs, rests with the Minister for Trade, in practice a decision taken is based on advice and views of the affected industry sectors, and the views of other government agencies. A domestic stakeholder group is established for each dispute and anyone fitting the description of the specific stakeholders may join the group. Stakeholders are consulted and briefed throughout the dispute and their expertise is used in collecting and strengthening the evidence. Industries are at liberty to raise concerns through the established networks of Government and Departmental Liaison groups with the private sector.⁹⁹

4.2.3.4. Consultations with Third countries

All three jurisdictions have made provision to consult with third countries during the process of initiating a WTO trade dispute. It is suggested that this approach may have been motivated by a realisation that an agreement with a third country may be the most appropriate means to resolve a dispute arising from an obstacle to trade.¹⁰⁰ The Trade Act in Sections 302 to 303 provides for requesting consultation on the date of initiation of an investigation by the USTR and where investigations have been initiated not at the instance of the USTR, the provisions of Section 10(c) apply. The essence of these provisions is that consultations must be undertaken with the aim of negotiating a resolution which can eliminate practices which are the subject matter of the investigation as soon as possible. The EU Regulations provide that the Commission officially notifies the representatives of the country or countries which are the subject of the procedure, with which, where appropriate, consultations may be held.¹⁰¹ In Australia the opinion of the WTO Law Branch in determining whether or not the trade barrier complained of could be a breach of WTO rules, could in its option for possible action that can be taken, include official consultations with the government of the trading partner in question. According to the Branch, the latter

⁹⁹ Supra, Maonera F. (2006) 22.

¹⁰⁰ Id. 23.

¹⁰¹ Article 8.1 (b) of the Council of The European Union Regulation 3286/94 of December 1994, <http://ec.europa.eu> accessed May, 15, 2007.

approach is regarded as the more efficient and cost-effective way to settle disputes that having recourse to full-blown proceedings.¹⁰²

4.2.3.5. Examination procedure

In both the US Trade Act and EU Regulations provision is made for examination procedure. The procedure, briefly, is an opportunity for the relevant authority to publish information on the product or service and the countries concerned in the investigations. The procedure creates a platform for parties primarily concerned to give their input, consult with each other and opposing parties so as to crystallize the issues pertaining to the investigation. Publication of the subject matter of the investigation is made in official notices (in the case of the USTR it is known as the Federal Register). The Europeans have a process of requesting permission from a third country to conduct on-site investigations within the country's borders. In the US the USTR has the power to issue regulations concerning the filing as well as conduct of investigations and hearings and in that way the petitioner is regularly informed of the progress of the investigations. The examination process enables the relevant authority to make a determination on whether to terminate the investigations, conclude an agreement with the third party to resolve the matter or may give the third country an opportunity to consider removing the measures which are the subject matter of the investigation or putting measures in place that may result in termination of the investigations.¹⁰³

4.2.3.6. Acts which trigger enforcement action by the relevant authorities

In the EU Regulations these acts are referred to as obstacles to trade and are defined in Article 2(1) as including 'any trade practice adopted or maintained by a third country in respect of which international trade rules establish a right of action. The regulations further define what is considered as adverse trade effects in Article 2(4). The situations under which these adverse effects may arise are specified in Article

¹⁰² See note 78 above.

¹⁰³ See Article 8(1), 8(5), 8(6), 11 and 11(3) of the EU Regulations and Section 302(a)(4)(A), 302(a)(4)(B) and 309 of the US Trade Act of 1974. See also Maonera Supra, at 24-25.

10(4), and Article 10(1) sets out what should be included when an examination of the injury is undertaken.

The US Act authorises the USTR to take action if he/she determines that there is ‘in existence acts, policies, and practices that are unreasonable, unjustifiable or discriminatory’. The wording is much wider than that of the EU and allows for a wider variety of acts to give rise to an action under the Act. Unreasonable acts are said to include, but are not limited to, any act, policy, or practice, or any combination of acts, policies, or practices, which denies fair and equitable opportunities for the establishment of an enterprise, provision of adequate and effective protection of intellectual property rights notwithstanding the fact that the foreign country may be in compliance with the specific obligations of the WTO Agreement on Trade-Related Aspects of Intellectual Property rights.¹⁰⁴

The Australian system refers to trade barriers which could include arbitrary or discriminatory tariffs, quotas, internal tax rates or product standards and subsidies that act as export incentives.¹⁰⁵

4.2.3.7. Confidential treatment of information

In both the US Trade Act and EU Regulations, provision is made for the confidential treatment of information received pursuant to the Act or Regulations respectively. The major difference is that the US Act regards information received, save for limited exceptions, as non-confidential and to be available to any person, unless certified as business confidential.¹⁰⁶ The Regulations do not specify whether the information will be regarded as confidential upon receipt, but provides that “shall be used only for the purpose for which it was requested”.¹⁰⁷ The Regulations specify when information is

¹⁰⁴ The tolerance by a foreign government of systemic anticompetitive activities by enterprises that have the effect of restricting, on a basis inconsistent with commercial considerations, access to US goods or services to a foreign market, is also considered to be unreasonable (US Trade Act of 1974, Section 301(d)(3)(B)). Unjustifiable acts, policies, and practices include any act, policy, or practice which denies national or most-favoured-nation or the right of establishment or protection of intellectual property rights (Section 301(d)(4)(B)). These acts, policy, or practices regarded as discriminatory when they deny national or most-favoured-nation treatment to US goods, services, or investment (Section 301(d)(5)).

¹⁰⁵ http://www.dfat.gov.au/trade/policy_investig_disputes.html accessed May, 15, 2007.

¹⁰⁶ Supra, US Trade Act, Section 308(c)(1)(A).

¹⁰⁷ Supra, EU Regulations, Article 9(1).

considered confidential.¹⁰⁸ In both jurisdictions there is provision for a party to request that information provided is treated confidentially. The US Act refers to the process as certification while the Regulations refer to confidential treatment. Where a request is made for information to be treated as confidential the party making the request is required to include a non-confidential summary of the information.¹⁰⁹ The Australian guidelines are silent on the issue of confidentiality.¹¹⁰

4.2.3.8. Action that may be taken by the relevant regulatory body

Upon satisfying the requirements of Section 304(a)(1)(A)(1)(i) and (ii) and making a determination on the appropriate action to take in terms of Section 304(1)(B), the USTR is authorised to suspend, withdraw, or prevent the application of benefits of trade agreement concessions to foreign country (Section 301(c)(1)(A)), and impose duties or other import restrictions on the goods of, and fees or restrictions on the services of such foreign country, for such time as it determines appropriate (Section 301(c)(1)(B)). The action by the USTR may be taken against any goods or economic sector of the foreign country without regard as to whether or not such goods or economic sector were involved in the act, policy or practice that is the subject matter of such action.¹¹¹ Any action can be taken by the USTR that falls within the presidential powers with respect to trade in any good or service, or with respect to any other area of pertinent relations with the foreign country. Action taken to eliminate the act, policy or practice must be devised so as to affect goods or services of the foreign country in an amount equivalent in value to the burden or restriction being imposed by that country on the U.S. commerce. Action may only be taken on or after the date on which a petition is filed or a determination to initiate an investigation is made by the USTR.

In terms of Article 12(3) where, subsequent to the examination procedure, it is found that an action is necessary in the interest of the Community, any commercial policy measures may be taken which are compatible with existing international obligations

¹⁰⁸ Id. at Article 9(3) and 9(2)(b).

¹⁰⁹ EU Regulation, Article 9(2)(b) and 9(4); US Trade Act, Section 308(c)(1)(A) and 308(c)(B) and (C).

¹¹⁰ http://www.dfat.gov.au/trade/negotiations/wto_disputes.html#help accessed May 15, 2007.

¹¹¹ In *In Fédération des Industries Condimentaires de France (FICF) and Others v. Commission of the European Communities*, ECJ, T-317/02, the French company was opposing action taken in terms of this provision.

and procedures, and may include the suspension or withdrawal of any concession resulting from commercial policy negotiations; the raising of existing customs duties or the introduction of any other charge on imports; and the introduction of quantitative restrictions or any other measures modifying import or export conditions or otherwise affecting trade with a third country concerned. The reasons upon which the decision is based must be set out and are published in the Official Journal of the European Communities. The publication made in terms of this Article is deemed to constitute a notification to the countries and parties primarily concerned with the investigation (Article 12(4)) Where the Community's international obligations require the prior discharge of an international procedure of consultation or the settlement of disputes, the measures to be taken can only be decided on after the consultation procedure has been terminated and should take into account the results of such consultations(Article 12(4)).¹¹²

The U.S. Act as well as the EU Regulations provide for the approach to be adopted in the event that a measure has been referred to an International Body for the determination/settlement of a dispute. The U.S Act specifically refers to the WTO Dispute Settlement Body and provides that the USTR is not required to take action in any case in which the DSU issued a ruling under formal DSP, provided that under any other trade agreement the USTR finds that “(i) the rights of the United States under a trade agreement are not being denied, or (ii) the act or practice (I) is not a violation of or inconsistent with the rights of the US, or (II) does not deny, nullify, or impair benefits to the United States under any trade agreement.”¹¹³ Article 12(2) of the EU Regulation provides that “where the Community has requested an international dispute settlement body to indicate and authorise the measures which are appropriate for the implementation of the results of an international dispute settlement procedure, the Community commercial policy measures which may be needed in consequence of such authorization shall be in accordance with the recommendation of such international dispute settlement body.”¹¹⁴

¹¹² http://ec.europa.eu/trade/issues/respectrules/tbr/legis/reg_12.htm accessed May 15, 2007.

¹¹³ U.S. Trade Act, supra. at Section 301(2)(A).

¹¹⁴ See note 97 above.

4.2.3.9. Procedure for termination of action taken

Except for the provisions on termination provided for under Article 11¹¹⁵ of the Regulations, the EU Commission does not have a provision dealing with the termination of action taken against a third party. The US Trade Act allows termination by the USTR subject to specific conditions, including, the directions of the president in terms of Section 307(a)(1)(B)(C). Before taking a decision to terminate or modify the action, the USTR must (the word shall is used in the Act, making it peremptory) consult with the petitioner (if any), the representatives of the domestic industry concerned, and must provide an opportunity for the presentation of views by other interested persons affected by the proposed modification or termination on their effects and must consider the appropriateness of any such modification or termination (Section 307(a)(1)).

The US Trade Act specifies the timeframe within which action must be taken as four years and in the event that the action is not filed to the USTR during the last 60 days of the four year period such action lapses (Section 307(c)(1)(A)(B) The USTR is required to notify the party (petitioner or representative), by mail, at least 60 days before the termination date of the looming termination.

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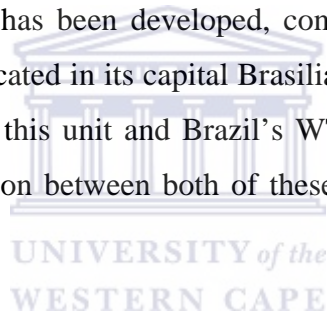
4.2.3.10. Monitoring of implementation of the determination made

The USTR is, in terms of Section 306(a) of the Trade Act, required to monitor the implementation of each measure undertaken, or agreement that is entered into to ensure that the matter is satisfactorily resolved. If it finds that the measure(s) or agreement is not satisfactorily implemented, the USTR must determine what future action should be taken (Section 306(b)(1). With regard to measures or agreement to be implemented pursuant to recommendations made in proceedings before the WTO DSB, and where the USTR determines that a foreign country has failed to implement the recommendations, it can determine further action that has to be taken to remedy the non compliance. Before making such a determination it must engage in consultations with the petitioner and also provide opportunity for interested parties to present their views (Section 306(c)).

¹¹⁵ See discussion on examination procedure above.

The USTR is able to get the input and views from different states through its consultations with the committees and the ability to seek the advice/opinion of its International Trade Commission contributes significantly to making a decision to initiate a trade dispute or not. The Commission obtains this input from member states and concerned parties.¹¹⁶ In developing countries the input of economists working for either their Ministry of Trade and Industry or Ministry of Economic cooperation and Development (whatever name assigned) can have an input on a determination of whether or not to initiate a trade dispute. This may however not be effective in a country like Namibia where the NTF is part of the Ministry of Trade and Industry and the input is not as independent.

A developing country that has been active in creating a coordinated system of addressing possible WTO dispute initiation has been Brazil. A three pillar structure for WTO dispute settlement has been developed, consisting of a specialized WTO dispute settlement division located in its capital Brasilia (this is referred to as the first pillar), coordination between this unit and Brazil's WTO mission in Geneva¹¹⁷ (the second pillar), and coordination between both of these entities with Brazil's private



¹¹⁶ The U.S. and EC use of the WTO dispute settlement system involves dependency by the trade officials on input from private parties despite their already significant resource advantages. Building a strong WTO legal case requires an intense exchange between the relevant public authority and private firms. The process requires industry to submit convincing factual and legal memoranda as a prerequisite to the filing of a WTO complaint. The collaboration among large private interest and government officials enhances the resources that the USTR and the Commission wield in WTO litigation, increasing their advantages against weaker WTO members. U.S. and EC public officials have collaborated with affected U.S. and EC private enterprises and their legal counsel in order to enhance their chances of prevailing in costly, time-intensive WTO litigation which further exacerbates litigation resource asymmetries. Shaffer, *Supra* 31.

¹¹⁷ In comparison, the majority developing countries have a single diplomatic mission for UN and WTO members and UN representation enjoying greater hierarchical importance within the foreign affairs ministry. Others have a one-man manned mission which makes it impossible for the individual to attend to pertinent matters such as the participation in the WTO DSU by the member country. Some developing countries have adapted to the great demands of their membership through creating a separate ambassador for WTO matters, a separate diplomatic mission, or a separate WTO unit within the embassy. Capacity constraints are more important than power considerations in the calculation by developing states of whether to initiate a dispute against a particular country. It was found that in the year 2000, 70% of developing country members of the WTO did not have the minimum of four staff based in Geneva. This minimum number of representatives is considered necessary for effective representation in WTO meetings across the different areas of WTO policy. To date Namibia, for example has one Charge d'affaires in Geneva and another person attached to its office in Brussels representing the Agriculture industry at the EU. Whether these two individuals have some co-operation agreement is not clear but one would think it more likely.

sector and law firms hired by it (the third pillar).¹¹⁸ The situation in Japan is that Japanese companies and associations are able to register complaints about unfair trade practices of foreign nations to the Ministry of Economy, Trade and Industry during the compilation of the annually published “Report on the WTO Consistency of Trade Policies by Major Trading Partners”. But there is no procedure for requesting initiation of an investigation with the aim of correcting the problems. The only counter measure Japanese companies hurt by foreign trade practices can take is to make an appeal through an industry association or similar body to the government minister in charge.¹¹⁹

4.3 CONCLUSION

The idea of stakeholder participation is not novel and is essential for any economy. The US and EU have comprehensive systems allowing for the participation of stakeholders in the process of initiating trade disputes and this may evidence their active participation in DSU. The Australian system may be said to model the mechanisms of these countries but with a less formal approach and does not cover as wide an area as that of the US and EU. Some developing countries like Brazil also have mechanisms in place and these models may be more suitable for other developing countries as opposed to adopting elements from the developed models. However the models can be analyzed by SSA developing countries with the aim of providing ideas on the elements which can be included or covered by the mechanism they will put in place. There is no perfect model and these models may not work effectively for developing countries. Therefore the applicable elements may be included in the proposed mechanism and be adapted to the specific circumstances of the country or regional trading bloc, taking into account the difference in the role played by stakeholders in the economies and politics of their countries, as well as the available resources for such a mechanism. The following chapter will set out the recommendations and conclusions.

¹¹⁸According to Shaffer G.C.(200, Supra at 42, Brazil has adapted to the WTO system by creating specialized trade bureaucracies, coordinating interagency trade policy processes in home capitals, and maintaining specialized trade units in Geneva, and have hired and trained lawyers to specialize in WTO law and developed closer relations on trade matters with the private export sector.

¹¹⁹ Keidanren N., Supra, 2.

Chapter Five

5.1. Recommendations and Conclusion

To deploy WTO law to their advantage Namibia and other developing countries need to maintain routine on-going procedures for gathering, processing and prioritizing information from foreign embassies, the private sector, university research programs, advisory centers (both public and private owned), and international trade consultants regarding foreign barriers. The building of this public-private partnership will take time but will be most beneficial in the long run.¹²⁰

Namibia and other SACU nations need external cost-effective legal assistance to help identify, pursue and defend their WTO rights. They can enlist the services of the Advisory Centre¹²¹ on WTO law¹²² in Geneva, which can be assisted by the Stakeholders' participation, tralac¹²³ and the SACU notification mechanism. In-house International Trade expertise at these *fora* can collaborate with the lawyers at the Advisory Centre. The contribution to be made by the regional agencies can aid in reducing the legal costs of utilizing the services of the Advisory Center, as most

¹²⁰ Shaffer G.C., (2003) 43.

¹²¹ To date the only SSA country which is a member of the WTO Advisory Center is Kenya, and non of the SACU nations are members. The rate charged per hour for legal services rendered by the ACWL is charge at a specified rate according to the categorization ranging from A to B. The current category A fees are US\$100,00 category B US\$200,00 and least developing countries are charged US\$25,00 per hour. www.awl.ch accessed May 28, 2007.

¹²² The centre is designed to counsel and represent countries so that they may defend their WTO rights at rates that vary depending on the country's membership status, share of world trade and per capita income.

¹²³ The Trade Law Centre for Southern Africa (**tralac**) is a section 21 (not for profit) company with the mission to build trade law capacity in order to facilitate the integration of the Southern African region into the global trading system. The Centre was officially launched on 25 November 2002.

Tralac has partnered with many international and regional organisations on diverse trade related projects. Highlights include:

- Research and capacity building in the areas of dispute settlement in the Southern African Development Community (SADC) in a joint project with the German Agency for Technical Co-operation (GTZ);
- Trade in agriculture training programmes in Mozambique, Tanzania and SACU;
- Competition policy training in Namibia;
- A post-Cancun review presented together with regional partner organisations; and
- A trade law conference for business which facilitated interaction between business and Government (Department of Trade and Industry – the dti) in South Africa.

The centre was established to support the governments of Southern Africa by carrying out consultancy-type studies, to provide a basis for trade policy formulation.

research work, and if possible, the drafting of the briefs can be prepared in collaboration with all these agencies. The Center can also be used to develop national expertise in WTO dispute settlement through its internship possibilities and periodic seminars for developing country officials on the WTO DSS. The centre can assist groups of like-minded countries, such as the SACU countries, in preparing third party submissions in WTO disputes to defend their systemic interests.¹²⁴

Developing countries could pool their resources through developing regional WTO centers that can develop WTO expertise in a more cost-effective manner. In Southern Africa, SACU because of the similar trade interests between its members can take the leading role in the creation of such a center. The proposed center can assist in identifying trade priorities, coordinating trade negotiating strategies, building public private workshops; identify trade barriers and (potentially) providing legal support in WTO litigation. Tralac should be enhanced so as to assist the advisory Centre in WTO litigation. States within regions face diverse challenges and their national interests can conflict, so that the development of regional centers also faces significant challenges. The Advisory Centre and developing countries could work with academics that specialize in WTO law on a consultancy or pro bono basis.¹²⁵

WTO cases have become more factually and legally complex, the demands for complainants and defendants have accumulated and private industry's role in dispute settlement system has correspondingly expanded. Private industry representatives are fundamental for the establishment of factual record and the development of legal arguments to apply to those facts.¹²⁶

¹²⁴ Shaffer G.C., (2007) 47 and 49.

¹²⁵ Mosoti V. (2003) 71-92, Abstract at 25.

¹²⁶ Shaffer G.C., Id. In the U.S., for example, private counsel typically provides sample briefs or memoranda from which representatives at the USTR can cut and paste, as well as mark-up of the USTR's drafts. The EC banana case, for example, involved over a dozen claims under four WTO agreements (GATT (1994), GATS, TRIMS, and the License agreement). The initial panel decision alone was over four hundred and seventy pages, much of it setting forth the case's factual background involving a detailed description of the EC's Byzantine banana quota and licensing regime. The U.S. attorneys involved in the bananas case maintain that a mark of the United States' success is that the factual description in the WTO panel report was largely taken from the U.S. brief and much of this brief had been prepared by Chiquita and its lawyers. Similarly the EC has attempted to forge better direct links with EC private enterprises and trade associations in advancing the EC's export interests as part of the EC's Market Access Strategy. European Communities-Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/1 (Feb. 12, 1996). See also Shaffer, *Supra* 24-27

Most consultations notified to the WTO end up in settlement.¹²⁷ The primary threat of the dispute settlement mechanism is said to lie, not so much in the enforcement of final decision as in the risk of a clear public condemnation of the defendants' policies. Reinhardt and Busch (2003) argue that it is "the threat of legal condemnation, rather than the ruling per se, that induces settlement."¹²⁸ There is thus greater incentive to settle before the issue become public.¹²⁹

The shortcomings set out above may be common in many developing countries, including Namibia, but the situation is further aggravated by political interference during the initiation of a dispute. The problem is not so much the private sector's inability to identify trade distorting measures taken by other WTO members, but the ability of the private and public sector to co-operate, without any political pressure and let business be business. With this is meant the ability to identify the alleged measure for economic growth of the country and not just as a problem that the private sector has to deal with because they are the ones directly affected by the measure. In addition the parties should not be expecting a phone call from state house telling them that they should drop everything as their intended actions are not a National interest. One should not make the mistake and assume that these nations lack the necessary skills to identify the measures that effect trade in a specific sector, least of all the ability to draft the necessary brief setting out the claim, sometimes all these elements are present but the independence of the private sector from bureaucratic interference. The problem is two-fold in that the government fails to get involved when it has to and interferes when it should not.

Adversely affected exporters are less likely to participate when they are involved in a preferential trade agreement with the respondent, when they lack the capacity to retaliate against the respondent by withdrawing trade concessions, when they are poor and small, and when they are particularly reliant on the respondent for bilateral

¹²⁷ www.wto.org accessed April 14, 2007.

¹²⁸ Busch, Mark L. & Reinhardt, Eric (2003) 719-735.

¹²⁹ Id. The political and economic pressures that are associated with international disputes direct that in order to gain from the multilateral trading system a member's goal should not be to win cases within the dispute settlement system, but to win them in bilateral negotiations before the issue becomes public.

assistance. These results suggest evidence of an institutional bias affecting active engagement by developing member countries in the current WTO system.¹³⁰

To use the WTO system successfully a member must develop cost-effective mechanisms to perceive injuries to its trading prospects, identify who is responsible and mobilize resources to bring a legal claim or negotiate a settlement. Participation of a member in the system will thus, in part, be a function of its ability to process knowledge of trade injuries and their relation to WTO rights.¹³¹ The hiring of internal lawyers to defend WTO claims is of little use if developing countries lack cost-effective mechanisms to identify and prioritize claims in the first place. Similarly, where developing countries become aware of actionable injuries, their awareness will not be transformed into a legal claim if, based on experience, they lack confidence that a claim is worth pursuing given high litigation costs and scant remedies.¹³² Developing a less costly, stakeholder inclusive system, which may or may not include elements from the formal U.S., and EU systems, and the informal Australian or Brazilian systems, will enable developing countries to identify foreign trade barriers, prioritize them according to their impact, and mobilize resources for WTO complaints. The developing countries have to mobilize resources through interagency coordination and networking with their private sector.

In addition to the NTF and the proposed notification mechanism Namibia and SACU need to put in place more measures that will enable it to organize unremitting relations with the private sector to identify trade barriers and investigate and prioritize

¹³⁰ C.P. Brown,(2005) 2005.

¹³¹ As earlier explained in this paper, the first step in any WTO dispute is for a country to select a case where a trade barrier against its exports potentially violates WTO law. The export industry in that country is the best source of information about that trade problem. As can be derived from a reading of Chapter of this paper and the frequent participation in the disputes, the EU and US have both institutionalized the process to channel demands from business to government and have extensive private sector support for most WTO disputes. Contrary to this practice, developing country business communities often lack sufficient information about the WTO to make them consider WTO adjudication as a solution to their problems. The industries are less likely to urge their governments to take action on specific trade barriers and government does not become aware of the full set of potential cases.

¹³² Retaliatory measures such as the withdrawal of concessions are effective when it hits the author of the WTO-inconsistent measure enough to want to consider the measure. The majority of African countries are dependent on continuing trade relationships with the agricultural rest of the world. As producers of unprocessed agricultural goods, their exports end up in one or other developed nation and they do not have an alternative with which to retaliate. The countries only stand to suffer if they tried to retaliate. See, Musoti V. (2003) 86, Abstract at 16.

them. The state officials in Namibia and SACU can develop and foster a partnership with the private sector through which a reflex mechanism exists when exporters face a trade barrier that raises WTO issues. In this way the private sector will assist the public officials in investigating the claim and building a factual and legal case. Through this Namibia and other SACU members can have better access to the information necessary to enforce their rights through the WTO dispute settlement system and through settlement in its shadow, and thereby use the WTO system more effectively to their advantage. The Ultimate goal is for them to use the WTO dispute settlement to challenge barriers to their export and benefit from the agreements they have signed. Request technical assistance from international development institutions¹³³ to research and report on trade barriers, on a sectoral basis that their exporters face; request assistance in organizing a data base or other informational system to identify and prioritize trade barriers.¹³⁴

In order to increase the reliability and stability associated with petitions submitted by companies to the government, the government should create procedures that are coherent, fair, and transparent. Such a system would prove helpful not only for large enterprises but even more for companies without direct contacts with government, i.e., small and medium-sized companies and regional companies. Creating procedures under which companies are able to call upon the government to initiate an investigation would not only help directly affected companies and associations, but also contribute to enhancing the welfare of the public in counterpart nations (such as the SACU members as earlier discussed, who directly suffer from such unfair trade practices, and benefit the entire global economy by promoting free trade and the stability of international trade.¹³⁵

Last but not least, there is a need for the establishment of an adequately staffed WTO Mission which will complement the strengthening of the institutional capacity at home and will influence the strengthening of stakeholder participation at all levels especially that of initiation of trade disputes.

¹³³ Possible international agencies that can render technical assistance are Trade Knowledge Network (TKN), International Institute for Sustainable Development (IISD), International Center for Trade and Sustainable Development (ITCSD), South Center, and UNCTAD.

¹³⁴ Shaffer G.C. (2003) 42-43.

¹³⁵ Keidanren N., (2004) 2

5.2. CONCLUSION

This paper has identified salient features of stakeholder participation which can be adapted to the Namibian and SACU environment. This would strengthen the stakeholder participation mechanism that is put in place in Namibia and at SACU and it will enhance the participation of Namibia and other SACU members in the WTO DS process, addressing or preventing trade distorting measures faced by their industries and pave the way for contributions by these developing member states towards the development of WTO law. The challenges faced by developing countries as set out in chapter two may be lessened and it is expected that this mechanism will enable them to actively participate in the WTO DSS.



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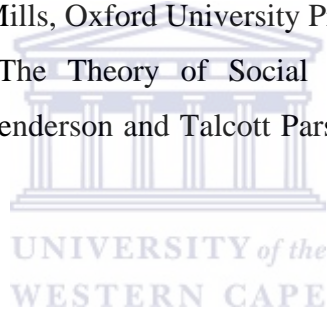
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ANNEXURE

1. **National Trade Forum Operational Rules and Procedures**

National Trade Forum

(NTF)

Operational Rules and Procedures

Background

In July 2005 the Ministry of Trade & Industry submitted a proposal to Cabinet to set up a formal consultative and cooperation mechanism (the National Trade Forum) between the Ministry of Trade & Industry and the economic stakeholders, especially the private business sector.

This forum, instead of irregular and reactionary consultation, is considered necessary for a joint effort towards the realisation of national aspiration and objectives and the positioning of Namibia competitively in international trade and investment arenas. In particular, the private sector is encouraged to aggressively utilise the advantages or opportunities presented in the various trade and investment agreements executed by the Government.

Cabinet approved the concept (Cabinet Decision No 17 2 August 2005 / 007) and the proposed terms of reference of the National Trade Forum and this paper outlines the operational rules and procedures to be followed in our pursuit of enhanced economic growth, development, employment and financial sustainability of Namibia.

Separate Memorandum of Understanding were signed with each of the Namibia Chamber of Commerce and Industry, the Namibia Manufacturers Association and the Indigenous Business Council to encourage a spirit of cooperation and to ensure that all lobbying for changes to Government Trade Policy and requests for technical and / or financial assistance must be channelled through the National Trade Forum. Similarly, the Government undertakes to consult with these organisations on matters of mutual concern.

1. Ordinary Sessions

1.1 The National Trade Forum, established to strengthen cooperation between the Government and the Private Sector on matters related to trade and investment, shall meet as a forum at least once every two months for the purpose of an ordinary session or by the convening of an extra-ordinary session whenever one or more members are of the opinion that it is necessary to do so;

1.1.1 The ordinary and extra-ordinary meetings of the NTF shall be chaired by designated officials of the Ministry of Trade & Industry or by the Minister or Deputy Minister.

1.2 The National Trade Forum will establish and monitor the operation and progress of the three sub-committees dealing with

- (i) Market access, for agriculture & non-agricultural goods (see Appendix I for the main sectors of the Customs classification),
- (ii) Trade in Services (see Appendix II for details of the sub-sectors), and
- (iii) Trade Measures and Regulations (see Appendix III for details of the more relevant Agreements).

The specialized sub-committees, specified above shall meet on a monthly basis or as required. Each sub-committee shall be chaired by persons, preferable from the private sector, elected by the participating members of the respective sub-committee and ratified by the Minister of Trade & Industry.

1.2.1 Each of the sub-committees shall appoint working groups to examine, evaluate and make recommendations on the specific tasks delegated

to them by the sub-committee. Participation in these working groups shall be restricted to persons of professional standing and experience in the field in question. These working groups may consult and seek information and technical advice from any source they deem appropriated.

2. Membership

- 2.1 Membership of the Forum is composed of representatives of the main economic stakeholders in both the private and public sectors. The initial membership was determined by the Ministry of Trade & Industry as were the firms represented on the sub-committees and is contained in the Terms of Reference.
- 2.2 Applications for new members of the forum and sub-committees (collectively the fora), shall be lodged in writing, addressed to the Permanent Secretary of the Ministry of Trade and Industry
- 2.3 Participation in the various meetings of the NTF implies and demands a high degree of confidentiality and participants may be required to sign restrictive confidentiality agreements with the NTF.

3. Agenda

- 3.1 The Agenda for each of the NTF and for each of the sub-committee meetings shall be prepared by the NTF Secretariat, in consultation with the Chairperson, and shall be forwarded to all members of the respective fora at least 14 days prior to the date scheduled for the meeting, unless the fora or subcommittee is urgently required to meet to discuss a specific matter. The use of electronic mail is permissible for all communication and inadvertent failure to give notice to any member will not invalidate the meeting.
 - 3.1.1 Members are requested to confirm attendance 48 hours prior to the scheduled meeting
 - 3.1.2 Apologies must be made to the NTF prior to the date scheduled for the meeting
 - 3.1.3 The tendered apologies referred to in 3.1.2 above must be recorded as part of the minutes
- 3.2 Each working group will meet as required by the specific functions / mandates assigned to it and establish their respective rules of procedure.

4. Minutes

- 4.1 The Chairperson of the forum shall cause minutes of the meeting to be taken in an orderly and concise manner by the NTF secretariat.
- 4.2 The minutes must constitute accurate notes of that which transpired during the meetings and record the recommendations made or actions to be taken.
- 4.3 The minutes shall be kept by the Ministry of Trade & Industry and shall be available for inspection by any member upon request to the Chairperson
- 4.4 The minutes of all meetings should be made available to all members within 7 days of the meeting and shall either "*be taken as read*" or read aloud prior to proceedings so as to ensure that all members present agree that the minutes

in question constitute a proper and accurate record of the last meeting and then signed by the Chairperson. Failing which the signature of the Chairperson of the meeting of the previous meeting will be considered evidence of them having being an accurate record of what transpired at that meeting.

5. Meeting Procedures

5.1 The meeting procedures as stipulated below may be used by any member so as to ensure the efficient functioning of the meeting and to assist the Chairperson in the aim of achieving this result.

5.1.1 Agenda

The sequence of matters on the agenda may be altered to suit the flow of the meeting or the meeting adjourned to allow further research.

New items may only be added to the agenda if the item is of national importance and cannot be held over until the next regular meeting and then any recommendations made must be circulated to all regular members of the forum to allow non-attending members to give their input to the Ministry of Trade & Industry.

5.1.2 Point of Order

Any member may utilise this procedural point when of the opinion that the member / person with the floor is flouting procedural rules or is speaking off the topic

5.1.3 Point of Information

Any member may utilise this procedural point when of the opinion that they require further information from the member / person with the floor or wish to furnish further information on the point in question.

5.1.4 Out of Order

The Chairperson may utilise this procedural point when of the opinion that the member / person with the floor is being repetitive, rude, frivolous, or vexatious or behaving him / herself in an unsatisfactory or disorderly fashion.

5.2 Each session / meeting may commence with an opening plenary, followed by breakaway sessions by the sub-committees of the Forum and may be concluded by a closing plenary.

6. Quorum

6.1 For ordinary or extra-ordinary sessions for which the stipulated notice period has been given the quorum shall be the members present, provided that at least three members of the public sector and three Government appointed representatives must be present through out the meeting.

For any subcommittee meeting at least three members of the public sector and three Government appointed representatives must be present through out the meeting before any recommendation can be made to the Minister.

7. Decisions and / or recommendations of the Forum.

- 7.1 All **decisions and / or recommendations** shall be reached by way of
- 7.1.1 consensus, or
- 7.1.2 by a simple majority on a vote
- 7.1.2.1 the forum may elect to vote:
- (i) by show of hands ; or
- (ii) by secret ballot .
- 7.1.2.2 Where the forum elects to take a decision by way of voting by show of hands, the Chairperson shall call for a show of hands by calling on members present to raise their hands either in support of a motion or to illustrate their disagreement with a motion.
- 7.1.2.3 Where the forum elects to take a decision by way of secret ballot, the Chairperson shall:
- (i) ensure that all present members are provided with a ballot on which to indicate agreement or disagreement with a proposed motion;
- (ii) ensure that all the ballots are collected and counted in the presence of 3 members who will tally the votes and notify the Chairperson of the outcome; and
- (iii) ensure that the forum is informed of the outcome of the secret ballot.
- 7.2 Decisions taken by the members **shall not be binding** on the Ministry of Trade & Industry or the Government of the Republic of Namibia but shall convey the recommendations of the Public Sector to the Government.

8. **The Fora's Powers**

The respective Fora (the NTF and / or its sub-committees) shall have the power to:

- to co-opt additional members to participate in the forum
- to admit or refuse applicants for membership
- to establish further sub committees or working groups
- to nominate members to serve on committees or to represent Namibia in any related trade negotiations
- to vote on recommendations / decisions
- to nominate any representative member to address the Forum on matters of importance
- to attend the ordinary and extra-ordinary sessions
- to participate in any activity giving rise to the fulfilment of the NTF's objectives
- to brief their constituencies after each meeting and to provide feedback during the following meeting

9. **The Secretariat, Budget & Contributions**

- 9.1 The Ministry of Trade & Industry will provide the necessary staffing for the NTF's Secretariat and shall prepare and present the annual budget estimate and financial statements of the National Trade Forum to the plenary session in February each year for approval and submission to the Minister of Trade & Industry.
- 9.1.1 It is envisaged that the Ministry of Trade & Industry will include the cost of the Secretariat, including the cost of the preparation and printing of agenda papers, reports and approved publications, provision of venues for meetings and refreshments.
- 9.1.2 The Ministry of Trade & Industry, either through its own budget or other donor funding will cover the travel and subsistence cost of official delegations to trade forum meetings with foreign governments or similar bodies, including the Export Promotion Agency, when established, where Namibia may benefit and not a single specific entity.
- 9.1.3 Where Namibia is to be represented at trade fairs, exhibitions and other private initiatives for product promotion and development, etc, the cost of travel & subsistence may be apportioned among all participants, on a specific pre-agreed basis in the spirit of a Public Private Partnership. The Ministry of Trade & Industry will endeavour to negotiate favourable tax incentives for participants
- 9.1. The budgeted time costs and out of pocket disbursements incurred in the preparation of reports for submission to Government or other approved bodies or the briefing of these will be deemed a cost of the NTF and be reimbursed on presentation of an itemised statement of account.
- 9.2 It is not envisaged that the attendance of regular plenary, sub-committee or working group meetings will be remunerated, unless agreed to by the Minister of Trade & Industry.

10. Dissolution.

- 10.1 The Forum shall be dissolved by
- 10.1.1 a resolution passed during an ordinary session at which two-thirds of the members present are in favour of the resolution for which due notice has been given.
- 10.1.2 a decision to that effect, taken by the Minister of Trade and Industry, subject to article 18 of the Namibian Constitution.