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Reflections on South Africa's continued absence from the WTO dispute settlement system

Summary

This paper examines the failure of South Africa to make significant use of the World Trade Organization (WTO) dispute settlement mechanism over the years despite being actively involved in other WTO processes. In exploring this dearth of participation by South Africa, the paper looks at the experiences of other countries actively using the mechanism to see what lessons they can offer. In particular, the role of public-private partnerships in these other countries in dealing with WTO disputes is examined. The measures implemented by the South African government thus far to promote cooperation between itself and the private sector are also considered. The paper further highlights the potential benefits that active involvement in the WTO dispute settlement mechanism can bring to South Africa's interests both inside and outside the WTO. In conclusion, the measures likely to help South Africa improve its engagement with the mechanism are considered.

Gedagtes oor Suid-Afrika se voortgesette afwesigheid vanaf die WHO dispuutoplossing sisteem

Hierdie aanbieding ondersoek Suid-Afrika se versuim om doeltreffend van Wêreld Handelsorganisasie (WHO) dis-puutbeslegtingsmeganismes gebruik te maak, ten spyte van hul jarelange aktiewe betrokkenheid daarby. In die ondersoek van hierdie gebrek aan deelname deur Suid-Afrika, word daar gekyk na die ervarings van ander lande in die meganisme om te sien watter lesse hierdie lande kan bied. In die besonder, word die rol van die publiek-privaat vennootskappe in hierdie ander lande, wat met WHO-geskille handel, ondersoek. Die maatreëls wat tot dusver deur die Suid-Afrikaanse regering geïmplementeer is om samewerking tussen die regering en die privaatsektor te bevorder, word ook oorweeg. Die aanbieding beklemtoon verder die potensiële voordele vir Suid-Afrika wat aktiewe betrokkenheid by die WHO-meganisme vir geskilbeslegting, binne en buite die WHO, kan bied. Laastens word die maatreëls wat Suid-Afrika waarskynlik kan help om sy deelname in die meganisme te verbeter, oorweeg.

1. Introduction

South Africa has, from the outset, been a part of the multilateral trading system currently administered by the World Trade Organization (WTO). Prior to the formation of the WTO, the country was involved in many of the events leading up to and following the formation of the latter's predecessor, the General Agreement on Tariffs and Trade (GATT), an involvement that continued under the WTO. However, the level of interest displayed by South Africa in other

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aspects of the multilateral trading system has not been evident in the dispute settlement mechanism.

The significance of the dispute settlement mechanism, especially under the WTO, lies in its unique position as the only constitutional process through which South Africa can defend and enforce rights arising from its membership of the organisation. The mechanism also performs a rule-making function in that its decisions are binding on all WTO members. Thus, it can be argued that active participation in the mechanism is crucial for South Africa.

In this paper the root causes of South Africa's minimal involvement in the WTO dispute settlement mechanism over the years are examined. By looking at the experiences of other countries, an effort is also made to highlight a range of benefits that South Africa can derive from participating in the mechanism. In conclusion, suggestions are made regarding feasible measures that the country can take to improve its participation.

2. Background

South Africa actively participated in the debates that preceded the establishment of the GATT[1] and, in 1947, was among the 23 original GATT signatories. The country also took part in each of the eight rounds of trade negotiations held under the auspices of the GATT and has remained active in the post-Uruguay Round trade negotiations organised by the WTO.[2] Furthermore, South Africa has been a regular invitee to the exclusive 'green room' meetings, where many of the important decisions in the multilateral trading system take form.[3] There is, therefore, no doubt about South Africa's overall contribution to the multilateral trading system as it currently exists.

This notwithstanding, South Africa's involvement in the system's dispute settlement mechanism has been marginal, as evidenced by the country's history in both the GATT and the WTO. Throughout the GATT's nearly 50 years as the main regulatory body for international trade, South Africa lodged only one Article XXIII complaint[4] that went all the way to a panel hearing; in addition, it never defended a single complaint.[5]

South Africa's poor track record in dispute settlement has continued even under the WTO. Although one of only two African countries, along with

1 Hudec 1975:35-37.
2 Wilkinson and Scott 2008:479.
3 Woods and Narlikar 2001:11.
4 This was a complaint involving an allegation that the respondent country acted in violation of the provisions of the GATT.
5 Out of a total of 207 cases heard during this period, 73 per cent of the claims were instituted by the United States (US), the European Community (EC) and EC members, Canada and Australia, while 83 per cent of the cases involved the US, the EC and EC members, Canada and Japan as defendants. See GATT Secretariat Report 1993:172.

Egypt, to have participated in DSU[6] hearings since 1995, South Africa has been involved in just three cases and each time as a respondent.[7] This is the position despite South Africa ranking among the leading 24 exporters and importers of goods globally. By comparison, fellow developing countries Brazil and India have initiated 10 and seven hearings each during the same period even though they rank 19 and 20 for exports and 15 and 20 for imports respectively.[8]

Even more peculiar is the fact that South Africa has never participated in the dispute settlement mechanism as a third party.[9] Although the issue of costs has been cited as one of the obstacles to participation in WTO dispute settlement for most countries, this is not really the case when it comes to participation as a third party. As noted by Shaffer, "… third party participation is not that costly … since a third party is not required to file a formal submission, and when it does, the submission can be short and non-technical in nature".[10]

Moreover, there are undeniable benefits attached to participating as a third party in WTO cases. Firstly, it gives the participating country the opportunity to become more aware of the latest procedural developments and judicial interpretations given to substantive law, all of which could impact on future cases involving the particular country. Secondly, third-party participation allows the country concerned to keep track of changes in the way the WTO panels and the Appellate Body perceive different issues, thus making it possible for the country to align its future legal arguments and litigation strategies to these changes.[11]

3. Why the dispute settlement mechanism is important

The significance of identifying the causes of South Africa's virtual absence from WTO dispute settlement becomes evident when viewed against the backdrop of the mechanism representing the sole constitutional means by which the country can protect and enforce its interests in the WTO. Without participating in WTO dispute settlement, it is hard to imagine how else South Africa can deal with its cross-border trade problems in an environment that is protected from the power imbalances that dominate international trade. It is a known fact that, despite rhetoric to the contrary, given an opportunity, the

6 DSU is an abbreviation for the Understanding on Rules and Procedures Governing the Settlement of Disputes, which was adopted as part of the Marrakesh Agreement Establishing the World Trade Organization in 1994.

7 DS 168, DS 288 and DS 376. http://www.wto.org/english/thewto_e/countries_e/south_africa_e.htm#disputes (accessed on 11 April 2011).

8 See www.wto.org/english/news_e/pres03_e/pr353_e.htm (accessed on 14 April 2010).

9 See Shaffer 2003:14. WTO members that have participated in dispute settlement as third parties have done so mainly to protect their systemic, as opposed to direct, commercial interests. See also Shaffer *et al.* 2006:55.

10 Shaffer *et al.* 2006:55.

11 Shaffer 2005:11.

stronger countries will not hesitate to use their political and economic influence to impose their will on their weaker counterparts.[12]

Furthermore, the WTO dispute settlement mechanism has, perhaps inadvertently, come to play a legislative role alongside trade negotiations.[13] By hearing trade disputes brought before them and giving interpretation to WTO agreements, the Appellate Body and WTO panels effectively confer a specific meaning on the provisions concerned. These new meanings end up acquiring a force of law through, as Shaffer puts it, "… the Appellate Body and WTO panels [subsequently] citing and relying on past WTO jurisprudence in their legal reasoning".[14]

The rule-making function of the dispute settlement mechanism owes its origin mainly to the difficulty involved in amending WTO law[15] and the fact that WTO rules are often drafted in deliberately hazy language to accommodate compromises that emerge from the complex WTO bargaining process.[16] Thus, by not taking part in the dispute settlement mechanism, South Africa forfeits the opportunity to contribute to the development of WTO law, which in the end is binding on all members.

WTO members that have participated in the dispute settlement mechanism also tend to use it strategically to advance their interests elsewhere in the multilateral trading system. Besides the normal use of the mechanism to resolve bilateral trade disputes between members, there has been a growing trend among members to exploit it in order to strengthen their bargaining positions during trade negotiations. In the words of the Sutherland Report, "[i] t is clear that the Members find it useful to utilize the new [dispute settlement] system as a tool for enhancing their diplomacy and securing solid and reasonably timely responses to practical trade problems".[17]

Brazil is a good example of a country whose strategic use of the dispute settlement mechanism has yielded benefits beyond merely resolving trade disputes with fellow WTO members. Repeated successes in WTO cases over the years have had the effect of focusing international attention on the country. This, in turn, has helped Brazil to assume leadership of developing countries in trade negotiations as part of the G20 and to earn a place in the G4 along with the US, EU and India during the Doha Round of WTO negotiations.[18] Success in WTO dispute settlement has also spurred the Brazilian government and private sector to take more interest in trade negotiations.[19]

12 See Shaffer 2003:33.
13 Aydin 2007:8.
14 Shaffer 2003:111. See also Koberg *et al*. 2009:2.
15 For example, WTO law can only be modified by consensus, and its negotiating rounds take place at a rate of approximately one every decade.
16 Shaffer 2003:14.
17 Quoted in Koberg *et al.* 2009:4.
18 Shaffer *et al.* 2008:2.
19 Shaffer *et al*. 2008:2.

Lastly, because the WTO is a rules-based system, it allows its poorer members to enforce their rights against their richer counterparts in a manner that would otherwise not be possible. Poor countries therefore owe it to themselves, as argued by Mandigora, to develop strategies for dealing effectively with violations or threats to their rights by making use of the dispute settlement mechanism.[20] By failing to build capacity to engage in WTO dispute settlement hearings, developing countries deny themselves the opportunity to reduce the domination of the multilateral trading system by developed countries.

4. Views on why South Africa has been inactive

A variety of explanations have been offered for South Africa's less than satisfactory participation in the WTO dispute settlement mechanism. According to officials in the Department of Trade and Industry (DTI),[21] this can be attributed to at least four main causes, namely the country's preference for resolving disputes through diplomacy;[22] the exorbitant costs of WTO litigation; failure by local businesses to bring violations of trade rules to the attention of the government, and the persisting mistrust and lack of confidence by businesses in the government's ability to safeguard their interests.[23]

Some local firms and industry associations involved in cross-border trade have also expressed opinions on the matter. A number of them have confirmed that, although they have encountered problems in foreign countries where they conduct trade, they had never sought government intervention.[24] They reiterated the view that the WTO dispute settlement process is too expensive and expressed a lack of confidence in the DTI, which they claim lacks the necessary capacity and expertise to undertake successful WTO litigation. Other reasons they cited include the length of time it takes for a WTO dispute settlement hearing to reach finality; the complexity of the tariff schedules and litigation process itself; a decline in exports;[25] lack of accurate trade and product statistics, and greater efficiency on the part of industry associations compared with government in resolving trade problems.

In addition, obstacles such as the absence of a clear mechanism for channelling complaints from private-sector stakeholders to the government, poor cooperation among government departments, and the failure to guarantee

20 Mandigora 2007:8.

21 The DTI has a constitutional mandate to represent South Africa in international trade matters. See Cronje 2010.

22 The officials contend that the reason for this is that South Africa is reluctant to sour relations with some of its trade partners, many of whom the country depends on for its foreign trade.

23 These views were expressed during interviews with officials attached to the legal section of DTI's International Trade and Economic Development Division.

24 Representatives of a number of associations and firms operating in the fruit and textile and clothing industries were interviewed for the purposes of this paper.

25 This explanation relates particularly to the textile industry where the levels of exports are said to have decreased dramatically in the wake of China's accession to the WTO in 2002.

access to government for small and large industry associations alike have also been mentioned.[26]

From the above, it would appear that the issues at the heart of South Africa's poor participation in the WTO dispute settlement mechanism can be narrowed down to the following: lack of funding; inadequate capacity and expertise on the part of the government; lack of consensus regarding who should collect trade information; lack of communication between local businesses and the government, as well as between various government departments, and failure by the government to educate businesses about the full extent of the benefits they and the whole of South Africa can derive from participation in WTO dispute settlement.

5. Lessons from other countries

5.1 The US and the EU

South Africa can take a few lessons from the US and the EU on how to tackle some of its problems highlighted above. In both the US and the EU, there is an established tradition of cooperation between government and local businesses in dealing with international trade matters. These public-private partnerships have come about as a result of the interdependence that has evolved between the two sides over the years. On the one hand, private businesses rely on the governments to represent their interests in WTO matters, including the dispute settlement mechanism. On the other, the governments have come to depend on the organisational, financial, political and informational resources possessed by some of the private businesses in order to achieve and sustain their objectives in the WTO.[27] Accordingly, the two sides have come to realise that working together in this way benefits them more than pursuing their interests separately.

Both the US and the EU have established specialised agencies devoted to addressing export trade issues. Created at the instigation of private businesses, these agencies have the authority to take critical decisions on matters of trade. In the US, the relevant agency is the office of the United States Trade Representative (USTR), which occupies a cabinet-level position. It performs such functions as defending private sector interests in both multilateral and bilateral trade negotiations, as well as in WTO litigation and settlement discussions.[28]

The USTR's equivalent in the EU is the Trade Directorate General of the European Commission (DG Trade). The DG Trade has been particularly instrumental in enabling European firms to do business more easily abroad. In

26 Mandigora 2007:12.
27 Shaffer 2003:14-15.
28 Shaffer 2003:26; Koberg *et al.* 2009:25.

addition, it has made itself easily accessible to businesses, thus allowing them to influence the way they are represented internationally.[29]

Because the relationship between the DG Trade and businesses in the EU is not as well established as that between the USTR and US businesses, the DG Trade has at times had to take proactive measures to encourage businesses to make use of its services. Some of the initiatives undertaken by the DG Trade in the past have included employing consultants to do sector-by-sector studies on trade barriers, holding information sessions on trade policy for business executives and other stakeholders, as well as preparing and handing out pamphlets containing information relating to its activities.[30]

The DG Trade's strategy of actively courting local businesses to be more involved in WTO matters is one that the South African government should emulate considering the current state of affairs in the country. As shown earlier, South Africa is still grappling with questions such as how and who should collect data relating to trade violations. It is also yet to convince the business community about the merits of taking their trade disputes to the WTO dispute settlement mechanism. Given the EU's success in using research and education to raise interest in public-private partnerships where none existed before, there seems to be no reason why South Africa cannot do the same.

Furthermore, just as US and EU businesses have been willing to finance WTO cases in which they have an interest and are likely to benefit, it is doubtful that businesses in South Africa would refuse to contribute towards funding WTO litigation if a proper explanation were to be given as to why such a measure is necessary and how they stand to benefit from it. As Aydin rightly notes,

> [i]t can be said that countries participate in the [dispute settlement mechanism] when the expected benefits of participation are greater than the expected costs. The expected benefits are related to the gains the exporter would receive from a successfully resolved case.[31]

5.2 Brazil

Brazil is generally regarded as the most active and successful developing country when it comes to using the WTO dispute settlement mechanism.[32] Although it accounts for about 1 per cent of world trade, it participated in 89 (or 23 per cent) of the 369 WTO cases heard between 1995 and 2007.[33] Of those 89 cases that resulted in panel reports, Brazil participated in 11 as a complainant, three as a respondent and 35 as a third party.[34] In some of these cases, Brazil was pitted against some of the giants of world trade, including the US and the EC, and won. On the whole, it won 11 cases, reached settlement

29 Shaffer 2003:65.
30 Koberg *et al.* 2009:4.
31 Aydin 2007:17.
32 Shaffer *et al.* 2006:2; Aydin 2007:28.
33 Shaffer *et al.* 2006:11.
34 Shaffer *et al.* 2006:11.

with the respondent in three cases and no decision was reached in nine cases as a result of the parties agreeing to suspend the proceedings.[35]

Referring to Brazil's strategy in the WTO dispute settlement mechanism, Koberg *et al.* speak of the country "adopting mechanisms analogous to those that were first developed in the United States and Europe …".[36] This strategy has involved coordinating the public and private sectors, and restructuring the Ministry of Foreign Affairs, which is responsible for international trade matters. As part of this restructuring, Brazil has staffed its Ministry of Foreign Affairs with trade law experts whose appointment is primarily based on skill and good performance. It has also focused a great deal of attention on international trade matters and has established a specialised unit dedicated to WTO dispute settlement.[37]

Brazil now has what has been termed a 'three-pillar' structure involving the specialised WTO dispute settlement unit, which is based in the capital Brasilia; close cooperation between this unit and the country's mission in Geneva, and close cooperation between the latter two and the country's private sector, along with the law firms and economic consultants they employ and fund.[38] Insofar as the private sector is concerned, part of its involvement now includes participating more directly in gathering information and in determining and promoting the country's objectives in the WTO negotiations and dispute settlement.[39]

From a capacity-building point of view, Brazil has sought to increase its expertise in WTO matters with a view to creating "a critical mass".[40] To this end, in 2003 the country introduced an internship programme aimed at exposing young Brazilian attorneys and other individuals from government and private agencies to WTO law and dispute settlement. Under this programme, which forms part of the three-pillar structure, the young people are sent to the country's mission in Geneva as trainees, with outside sponsors such as law firms taking responsibility for their expenses.[41] While in Geneva, the trainees gain valuable practical experience in WTO matters which they can use later when they return to Brazil. Their presence in Geneva also helps to complement the work done by the mission's permanent personnel.

The motivation for local Brazilian law firms, businesses and others to direct resources towards cultivating trade law expertise stems from the efforts of government and its appreciation that it cannot succeed in dispute settlement and other WTO processes without technical and financial support from outside.[42] This has further encouraged cooperation among these other stakeholders in their engagement with the Brazilian government. The outcome

35 Koberg *et al.* 2009:11; Shaffer *et al.* 2008:11.
36 Koberg *et al.* 2009:4.
37 Shaffer *et al.* 2008:17.
38 Shaffer *et al.* 2006:25-26.
39 Shaffer *et al.* 2006:25-26.
40 Shaffer *et al.* 2008:17.
41 Aydin 2007:28-29.
42 Shaffer *et al.* 2008:16.

has been the creation of what Shaffer *et al.* refer to as "a Brazilian epistemic community for trade law policy".[43] Having access to this reservoir of WTO and trade law knowledge has allowed Brazil to perform better than anyone would have imagined in the WTO dispute settlement mechanism.

Without doubt there are valuable lessons for South Africa in the Brazilian experience. Firstly, Brazil's success demonstrates the importance of nurturing cooperation between various stakeholders in handling WTO matters, taking into account that governments do not always have all the necessary information and resources at their disposal. Secondly, it shows that spreading knowledge about international trade and WTO matters beyond the confines of government agencies is essential for success in protecting a country's interests through the WTO dispute settlement mechanism. Thirdly, it highlights the significance of governments recognising their role in educating the private sector and other stakeholders about WTO issues and the contribution they can make towards facilitating their country's effective participation in WTO processes. Lastly, the internship programme designed to expose young Brazilians to the inner workings of dispute settlement and other WTO processes can serve as a model for laying the groundwork for much-needed local capacity in countries such as South Africa.

5.3 India

Second only to Brazil among developing countries, India is one of the most frequent and successful users of the WTO dispute settlement mechanism. Between 1995 and 2009, it was directly involved in 38 cases, 18 of them as a complainant and 20 as a respondent.[44] It won eight of the former cases.[45] During the same period India also joined 51 cases as a third party.[46] Referring to the above statistics, Narlikar observes that, with the exception of Brazil, "[they] are not only the highest among developing countries, but also compare favourably to developed countries (other than the EU and the US)".[47]

Despite India's relative success in WTO litigation, its general approach to international trade disputes continues to have flaws that threaten to erode the gains the country has made. Unlike Brazil, which has established strong links between government agencies and private sector stakeholders, India has not quite done so. Stakeholder participation in trade policy-making and implementation outside of government circles in India remains marginal at best.[48] This, as pointed out by Dhar and Majumdar, continues to be the main shortcoming in India's policy-making and participation in the WTO dispute settlement mechanism.[49]

43 Shaffer *et al*. 2008:16.
44 Narlikar 2008:273.
45 Koberg *et al*. 2009:16.
46 Koberg *et al*. 2009:14.
47 Narlikar 2008:273.
48 Dhar and Majumdar 2010:182.
49 Dhar and Majumdar 2010:182.

The overarching domination of the Indian government in trade policy formulation has been attributed to, among other things, the country's constitution. The Indian constitution bestows the responsibility for negotiating international agreements on the central government and tasks it with ensuring adherence to obligations emerging from these agreements.[50] At the same time, however, no clear procedures are provided in the constitution or elsewhere to facilitate consultation between the government and external stakeholders.[51] This effectively leaves the government as the only party assured of any decision-making role in international trade law matters.

Dhar and Majumdar use the *EC-GSP* case[52] between the EC and India to illustrate the detrimental effect that lack of consultation between governments and other stakeholders can have in WTO dispute settlement cases.[53] In this case, the EC had granted tariff concessions to twelve developing countries, excluding India, as part of its Generalised System of Preferences (GSP) scheme. The concessions included special arrangements aimed at rewarding some of the beneficiary countries for their efforts in fighting drug production and trafficking (hereinafter called the Drug Arrangements).

Implementation of the Drug Arrangements by the EC meant that the beneficiary countries enjoyed better tariff concessions relative to the excluded countries. India felt that this made it unjustifiably more difficult for its exports to enter the EC market, while also illegally taking away the benefits due to it under the most favoured nation (MFN) provisions in Article 1:1 of the GATT 1994 as well as paragraphs 2(a), 3(a) and 3(c) of the Enabling Clause.[54] Consequently, the Indian government initiated a complaint before the WTO dispute settlement mechanism.

There was, however, no involvement of private-sector stakeholders at the consultation stage of the dispute. Only after a panel to hear the dispute had been formed and the proceedings were well underway did TEXTROCIL, an association representing the clothing sector, submit a memorandum to the Indian government calling on it to address the difficulties visited on the clothing sector by the Drug Arrangements. Having acted independently, TEXTROCIL was obviously unaware of the measures already initiated by the government several months before in an effort to counter the impact of the Drug Arrangements.

In its submissions, TEXTROCIL highlighted, among other things, the fact that the implementation of the Drug Arrangements had led to an increase in clothing exports going into the EC from Pakistan, one of the beneficiaries of the arrangements, and a decline in India's clothing exports to the same

50 Dhar and Majumdar 2010:182.
51 Dhar and Majumdar 2010:182.
52 European Community 2002.
53 Dhar and Majumdar 2010:183-184.
54 The Enabling Clause is formally known as the Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, which was adopted by the GATT Council on 28 November 1979. See Article 29 of the General Agreement on Tariffs and Trade 1994.

destination. Notwithstanding the evident lack of coordination between the activities of the Indian government and those of the private sector, the information brought to light by TEXTROCIL provided useful evidence in the case against the EC and helped India win.

The *EC-GSP* case is significant for several reasons. To start with, the fact that TEXTROCIL requested government intervention several months after the government had lodged a formal WTO complaint demonstrates the extent of the disconnect between the Indian government and private-sector stakeholders when it comes to trade and WTO matters. In this respect, India is no different from the majority of developing countries in the WTO, including South Africa, and these countries can benefit from India's experience. In particular, the fact that the information provided by TEXTROCIL went on to help India win the case shows just how critical inputs from stakeholders outside the government can be in terms of determining whether or not a particular WTO case is won or lost.

At the same time, the case demonstrates that failing to establish effective communication channels between the various stakeholders has the potential to deprive a country of priceless evidence that can practically decide the outcome of a WTO dispute. Without the submissions made by TEXTROCIL, which the latter made without any solicitation from the government, India might have lost the case. Furthermore, there may have been other stakeholders besides TEXTROCIL that had even more useful data that could have supported India's case. Consequently, inputs from these stakeholders would have been lost due to the Indian government's failure to consult, and the government could very easily have had cause to regret this.

6. Efforts made to promote government-private sector cooperation

Numerous efforts have been made in the past to create linkages between the South African government and the private sector regarding export trade matters, with mixed results. The most notable success story has been the Agricultural Trade Forum, which is a consultative mechanism involving the Department of Agriculture and industry representatives. Through this initiative, the two sides hold regular meetings to discuss issues pertaining to trade negotiations. The outcomes of these discussions then feed into the negotiating positions adopted by South African representatives in trade negotiations.[55] Additional consultations in the agricultural sector have also been facilitated through long-standing relationships between the Department of Agriculture and university-based research organisations and individuals.

Similar initiatives in other government departments have not been as successful. One that comes to mind is the Minister of Trade and Industry's forums with export councils and associations, which were aimed at facilitating

55 Draper 2005:249.

regular interaction between exporters from different sectors and the Minister.[56] Although regular discussions were held for some time, they now occur only rarely.[57] One of the shortcomings of this initiative and others like it has been their over-dependence on the few individuals that establish them. The Trade and Industry initiative, for example, was the brainchild of former Minister Alec Erwin and when he left the Department it simply fell apart. It is, thus, essential for such efforts to be structured in a way that allows them to function independently from the individuals who create them.

Another noteworthy initiative meant to facilitate consultation between the government and other stakeholders is the National Economic Development and Labour Council (NEDLAC). NEDLAC was established as a permanent body to represent the interests of government, labour, business and the 'community' in formulating economic policy in South Africa.[58] Many of the outcomes that have emerged from NEDLAC's deliberations have ended up forming important elements of South Africa's trade policy. The Industrial Development Programme and the South Africa-European Union Free Trade Agreement are two examples of initiatives that originated with ideas hatched in NEDLAC.[59]

However, as noted by Mandigora, "… the efficacy of [NEDLAC] has been questioned recently".[60] In particular, doubts have been raised about its ability to provide the accurate commercial intelligence needed to formulate South Africa's trade policy and to support WTO processes such as trade negotiations and dispute settlement.[61] These misgivings stem from the fact that trade unions, which wield considerable power within NEDLAC, are unlikely to look favourably on any proposals to liberalise trade. Since trade unions see it as their primary responsibility to safeguard their members' interests, especially jobs, they tend to frown upon trade liberalisation, which often involves job losses in the initial stages.[62] This is generally true even when liberalisation promises long-term benefits for the country.

In addition, trade unions do not have the direct access to cross-border trade information that the business sector has, and this makes them unsuited to taking the lead in shaping South Africa's international trade policy.[63] Questions have also been raised about the extent to which the parties purporting to represent particular constituencies in NEDLAC actually have the requisite mandate to represent those constituencies.[64]

Lack of cooperation between various government departments is also proving to be a potential threat to some of the initiatives meant to address the

56 Rashad 2007:18.
57 Rashad 2007:18.
58 Rustomjee 2006:444.
59 Rustomjee 2006:445.
60 Mandigora 2007:11.
61 Draper 2007:19-20.
62 Draper 2007:20.
63 Draper 2007:20.
64 Rashad 2007:18.

cross-border trade challenges facing businesses in South Africa. This problem was recently highlighted by the controversy surrounding quota restrictions imposed on Chinese textile and clothing exports to South Africa.[65] After the plans to implement the measures were made public, the South African Revenue Service (SARS) made a statement in a newspaper openly criticising the failure to consult it when taking this decision.[66]

From the above, it is quite clear that the overall level of consultation and cooperation on international trade matters between government and industry stakeholders in South Africa remains poor. No reliable inputs are obtained from many sectors of the economy engaged in international trade when formulating and implementing trade policy. Furthermore, where consultations do take place, in some instances more weight seems to be attached to inputs from other stakeholders than the business sector even though it possesses the most relevant and up-to-date information. An effective mechanism capable of facilitating coordination between the activities of various government departments, and between the government and the private sector, is also lacking. Lastly, there seems to be very little contemplation of the outcomes of consultations between government and the private sector leading to dispute settlement cases even where this is called for.

7. What next for South Africa

In view of South Africa being a member of regional bodies such as the Southern African Development Community (SADC) and the Southern African Customs Union (SACU), the question may be asked whether it would not make sense from a practical and cost-cutting point of view for the country and fellow members in these bodies to work together in handling WTO dispute settlement matters. This question is particularly relevant given the region's ambitions of future integration.[67] The problem with this approach, however, is that the institutional framework necessary to support a regional effort of this nature is, for the most part, not yet in place. This is mainly due to the slow pace of implementing the agreements regulating these bodies.[68] For example, despite the SACU Agreement of 2002[69] calling for the creation of seven SACU institutions, only two of these have come into operation.[70]

All the same, there is a range of other measures at the disposal of South Africa which can go a long way towards helping the country participate effectively in the WTO dispute settlement mechanism. One such measure

65 The quota restrictions were aimed at curbing the uncontrolled inflow of cheap Chinese textile and clothing products into South Africa, which has driven many local firms out of business and resulted in job losses.
66 Mandigora 2007:25.
67 Mandigora 2007:33.
68 Weidlich 2010.
69 The agreement is formally known as the 2002 Southern Africa Customs Union (SACU) Agreement.
70 Mandigora 2007:34.

is making better use of academics in South African universities, some of whom have specialised knowledge of international trade and WTO matters. Three of the country's universities, namely the University of the Western Cape, the University of Pretoria and Stellenbosch University, currently run master's programmes in trade and investment law,[71] and between them have numerous trade law specialists who could be of tremendous help in handling international trade issues.

In addition, institutions such as the Trade Law Centre for Southern Africa (Tralac) are also involved in developing capacity in various aspects of international trade, including dispute settlement, and employ experts in trade law who have been willing to give advice to governments and private businesses.[72] There are also individual South Africans such as Professor David Unterhalter, who not so long ago was elected to serve on the WTO Dispute Settlement Body, as well as three other South Africans who are reported to have acted as panellists in WTO dispute settlement hearings in the past.[73] Up to now, South Africa has not made sufficient use of these resources in trying to overcome the obstacles preventing it from participating in WTO dispute settlement.

With particular reference to the heavy cost of WTO litigation, South Africa can have recourse to the Advisory Centre on WTO Law (ACWL), which was created specifically to provide affordable legal advice and support for deserving WTO members when they appear in the dispute settlement mechanism.[74] Countries such as India owe part of their success in the mechanism to assistance from the ACWL. As remarked by Dhar and Majumdar regarding India's triumph over the EC in the EC-GSP case, "[w]hile the industry provided some of the evidence that was used in the substantive arguments, legal support for the dispute was provided by the Advisory Centre for WTO Law in Geneva …".[75]

Given the apparent under-appreciation of the role and significance of the WTO among South Africa's business community, there is also a clear need for the government to implement measures to spread knowledge about the organisation and its processes. Such measures would serve not only to encourage businesses to communicate their trade problems to government, but also to help them appreciate the role they need to play in assisting the country to participate successfully in WTO dispute settlement. The same measures would also bring about a better understanding of what the private sector itself stands to gain in return.

But what kind of measures would be appropriate for South Africa's situation? Just as the EU took active steps to educate its private sector, the South African government could do the same by holding regular information sessions and inviting business leaders and other stakeholders from various

71 Brink 2007:23.
72 See www.tralac.org. (accessed on 23 May 2011).
73 Brink 2007:23.
74 Bown and Hoekman 2005:874.
75 Dhar and Majumdar 2010:185.

sectors to participate. A Brazil-type internship programme could also be introduced to expose young South Africans from different sections of the public and private sectors to the way the WTO system works in practice. The latter would obviously require the cooperation of and financial assistance from business and other stakeholders, and the government should take it upon itself to convince them about the need for such an initiative.

Government departments tasked with handling international trade matters for South Africa should also organise themselves in a way that would allow for better coordination of their activities *inter se*, as well as dealings between the government and private-sector stakeholders. To this end, an excellent proposal has been made for the establishment of a single government contact point, which should be given wide publicity among private-sector stakeholders, through which the latter can communicate their cross-border trade complaints to the government.[76] In terms of the same proposal, other contact points should also be created within all government departments involved with export trade to facilitate better communication and cooperation among them.[77] To ensure cooperation and support from within government, it is further suggested that all the contact points should be placed under the supervision of a senior official knowledgeable in trade and WTO matters.

At the same time, South Africa should consider setting up a dispute settlement division along the lines of the one Brazil has, to which all the complaints coming through can be channelled for processing. Equally important is for the country to bolster its Geneva mission and place it in a position where it can liaise effectively with the proposed dispute settlement division back in South Africa. The government should also work hard to ensure that the Geneva mission has the capacity to institute dispute settlement proceedings in appropriate instances. All these measures will require the recruitment of highly qualified and competent personnel, as well as legal and financial support from outside government. Without the direct help and involvement of the private sector, the implementation of these measures will be very difficult, if not impossible, to accomplish.

8. Conclusion

This exposition makes it clear that South Africa can no longer afford to ignore the WTO dispute settlement mechanism. Active participation in the mechanism would not only provide the best protection against violations of the country's rights as a WTO member, but also help South Africa keep up with competing countries that have used the mechanism creatively to advance their political and economic interests.

Although the challenges that have impeded South Africa's participation thus far may appear daunting, the experiences of other countries in more or less similar circumstances as South Africa have shown that these challenges are not insurmountable. Brazil and India offer good examples in this regard.

76 Mandigora 2007:25.
77 Mandigora 2007:29.

However, for South Africa to succeed in improving its track record in the WTO dispute settlement mechanism, the government must work more closely with the private sector. This is critical since the private sector possesses both the information and financial resources needed to win in WTO litigation. Furthermore, the government must implement measures to spread knowledge about trade and WTO issues so as to create the 'critical mass' of experts required to overcome the challenges confronting South Africa.

The government also needs to strengthen the capacity of its departments involved in handling international trade matters, as well as its Geneva mission. This will enable them to successfully coordinate efforts to collect data relating to trade violations against South Africa, process such information and eventually lodge WTO complaints in appropriate cases.

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