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Sub-Saharan Africa and WTO Dispute Settlement: A Case Study of Kenya

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Executive Summary

Kenya is one of the largest economies in Eastern and Central Africa. It is a pioneer member of the World Trade Organization (WTO) and actively participates in its negotiation processes. She is also a member of regional trade bodies like the Common Market for Eastern and Southern Africa (COMESA) and the East African Community (EAC). In terms of its international trade profile Kenya is a leading exporter of agricultural products with agriculture contributing the second largest share of its GDP. Nevertheless Kenya is a relatively poor country in comparison with many developing countries from Asia and South America and is outranked by countries such as Brazil, Mexico, Argentina, China, South Korea, and Singapore in terms of development.

The government of Kenya recognises the benefits of international trade and actively engages in the various international trade negotiation fora, as well as developing policies geared towards improving her export portfolio. In an attempt to increase access to international markets for her products, Kenya has faced a number of challenges. Supply side constraints like poor infrastructure, low productivity levels, lack of human and financial capital, among other factors of production have slowed her rate of growth in trade. Challenges posed by the demand side have, however, been even more significant. Access to international markets has been hampered by the application of high sanitary and phytosanitary standards imposed by her major external market, the European Community. Regionally, Kenya has to fight off goods from the COMESA which do not meet her specified standards. The industrial market is awash with counterfeit goods and products transshipped from out of COMESA and re-exported to her market.

This paper addresses both substantive and procedural issues for Kenya's utilisation of the WTO's dispute settlement system (DSS). It offers an overview of Kenya's trading status as well as its import and export patterns and its strategic trade interests, and addresses issues of particular concern to Kenya in international trade. A series of case studies of selected sectors' experience with international trade measures are analysed in an attempt to show how these sectors could benefit from intervention under the DSS, and some potential disputes are explored. It further discusses some of the cross-cutting issues related to Kenya's use of the DSS such as governmental inter-agency coordination, its preparedness to initiate a dispute, as well as the role of private sector and civil society. The study finally proffers a set of recommendations and suggestions for future actions in Kenya.

LIST OF ABBREVIATIONS

ACP	Africa, Caribbean and Pacific
ACWL	Advisory Centre on WTO Law
COMESA	Common Market for Eastern and Southern Africa
DSS	Dispute Settlement System
DSU	WTO Dispute Settlement Understanding
EAC	East African Community
EC	European Community
EEC	European Economic Community
ETRO	Egyptian Trade Representatives Office
EU	European Union
GAP	Good Agricultural Practice
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
HACCP	Hazard Analysis and Critical Control Points
HCDA	Horticultural Crop Development Authority
IMF	International Monetary Fund
KEBS	Kenya Bureau of Standards
KEPHIS	Kenya Plant Health Inspectorate Services
Kg	Kilogram
MRL	Maximum Residue Levels
MTA	Multilateral Trade Agreement
MTI	Ministry of Trade & Industry
NCWTO	National Committee on WTO
OIE	World Organization for Animal Health
SPS	Sanitary and Phytosanitary Measures
WTO	World Trade Organization

1. INTRODUCTION

The Dispute Settlement Understanding (DSU) governing the dispute settlement system (DSS) of the World Trade Organization (WTO) is one of the cornerstones of the multilateral trading system as established in 1995¹. With the creation of a rules-based system, a credible dispute settlement system as the one envisaged in the DSU is crucial to ensure certainty and predictability in global trade. The DSU has indeed enabled countries to resolve trade disputes with other WTO Members without acrimony.² However, more than a decade after the adoption of the DSU, the number of countries that have utilised the dispute settlement system is limited primarily to developed countries, with sporadic engagement by economically stronger developing countries. Whereas most African countries participate in trade negotiations under the WTO, their use of the WTO dispute settlement system has been almost non-existent. As African countries strive to pursue their development objectives through enhanced international trade, it is thought that they would also use the system to defend their trade interests and further their development agenda.

Much has been written about developing countries, especially African countries, on their conspicuous absence and non-utilisation of the WTO DSS³. This study focuses on Kenya and explores some of the factors that influence her use of the DSS. Among the issues examined is Kenya's preparedness to invoke, proceed and defend disputes before the WTO, including its human, logistical and financial capacity to engage in the process and overcome the challenges associated with the use of the DSS.

This paper addresses both substantive and procedural issues for Kenya's utilisation of the DSS⁴. It is divided into six related parts. Part two gives an overview of Kenya's trading status as well as its import and export patterns and its strategic trade interests. It also covers issues of particular concern to Kenya in international trade. In Part three, case studies of selected sectors are analysed in an attempt to show how these sectors could benefit from DSS intervention and other potential disputes are explored. Part four discusses some of the cross-cutting issues related to Kenya's use of the DSS such as governmental inter-agency coordination, its preparedness to initiate a dispute, as well as the role of the private sector and civil society. Part five proffers a set of

¹ Marrakesh Agreement Establishing the World Trade Organization, Article 3, para.3

² See World Trade Organization, "A Handbook on the WTO Dispute Settlement System", Cambridge University Press, 2004

³ See generally, Victor Mosoti, "Africa in the First Decade of WTO Dispute Settlement" *Journal of International Economic Law*, (JIEL), 2005 and "Does Africa Need the WTO Dispute Settlement System?", ICTSD, 2003; Lacarte-Muro and Gappah, "Developing Countries and the WTO Legal and Dispute Settlement System: A View from the Bench" *JIEL* (2000); Alavi A. "African Countries and the WTO's Dispute Settlement Mechanism", published in *Development Policy Review*, 2007 and E. Kessie and Kofi A., "African Countries and the WTO Negotiations on the Dispute Settlement Understanding", Unpublished

⁴ It should be noted from the outset that the authors experienced limitations arising from the sensitive nature of the subject matter discussed in this paper. For instance, public documents on the subject are hardly available, a situation aggravated by the reluctance of public servants to speak on record. Furthermore, the existence of what may be perceived to be an international trade dispute is often known only through the mass media, who may be selective in their reporting depending on the newsworthiness of the dispute, and may sometimes not be reliable.

recommendations and suggestions for future actions in Kenya, while Part six offers concluding remarks.

2 An Overview of Kenya's Trading Status

2.1 Introduction

Kenya is one of the largest economies in Eastern and Central Africa. She is a Member of the WTO and actively participates in its negotiation processes across the board. She is also a member of regional trade structures such as the Common Market for Eastern and Southern Africa (COMESA) and the East African Community (EAC). Kenya has substantial agricultural interests with most of its agricultural exports destined for the European market. Her industrial and manufacturing sector has a comparative advantage in the regional market and stretches as far as COMESA and parts of Southern and Northern Africa. Nonetheless, Kenya is a relatively poor country in comparison with many developing countries from Asia and South America, although within Sub-Saharan Africa it is one of the larger and wealthier countries in terms of Gross Domestic Product (GDP) and volume of exports and imports. Figures from the International Monetary Fund (IMF)⁵ place Kenya among the ten most advanced countries in Africa with a GDP of USD 41.36 billion. South Africa, Egypt, Algeria, Tunisia, Angola, Morocco, Sudan, Libya and Nigeria are ranked higher than Kenya. From Asia and South America countries like Brazil, Mexico, Argentina, China, South Korea, Singapore, among others surpass Kenya in terms of economic development. As further discussed below, if Kenya faces daunting challenges to partake in WTO dispute settlement, the situation for most other less developed African countries is likely to be even more severe.

2.2 Kenya's External Trade Performance

2.2.1 Exports

Kenya's export basket is dominated by a few products, mainly tea, coffee, horticultural products and fish. Manufactured and industrial products contribute to her total exports within the region. Since 2005, most of these exports have been destined for African countries, with COMESA and the EAC accounting for more than 60 percent of Kenya's export market and the European Union (EU) for 29 percent. The remaining amount (11 percent) is traded with other countries.

Table 1 below shows the development of Kenya's trade from 1990 to 2001, the period explored in the case studies in Part three. Kenya trades with both developed and developing countries, the latter especially because of Kenya's strategic position as a regional industrial giant with access to the sea. The chart reveals that the EU was the single largest market for Kenyan exports, closely followed by the EAC. Within the analysed period, however, the share of Kenya's exports to the EU declined by approximately 3.9 percent annually and has continued to do so. The EU's position as the single largest destination of Kenyan exports has been gradually overtaken by the EAC and COMESA. Moreover, the share of exports to COMESA has trended upwards while the share of exports to the rest of Africa has been more or less

⁵ See www.imf.org

constant⁶. The share of exports to EAC (Tanzania and Uganda) has increased from 7.4 percent in 1990 to 28.5 percent in 1999, representing an impressive growth rate of 14.4 percent per annum. The significant increase in exports to the EAC began in 1993 when Kenya significantly liberalised her trade regime under the structural adjustment programme⁷.

Table 1. Direction of Kenya's Exports and Origin of its Imports, 1990-2002

Geographical Area and Country	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001
European Union Exports ^a	46.8	41.5	44.0	39.1	34.8	33.7	35.3	34.3	31.7	31.3	29.8	27.1
Imports ^b	48.8	44.3	36.2	36.6	35.4	40.4	37.7	32.2	32.6	32.8	30.5	24.8
Rest Of western Europe Exports	1.0	5.4	4.6	1.0	0.7	1.3	1.2	1.3	0.8	0.8	0.9	1.1
Imports	1.6	2.0	2.0	1.4	2.0	1.4	2.3	1.7	1.8	1.8	1.4	1.9
Eastern Europe Exports	1.6	0.1	0.1	0.2	0.2	0.1	0.3	0.4	0.3	0.5	0.5	0.6
Imports	0.6	0.9	0.7	0.8	0.5	0.5	1.1	0.8	0.7	0.9	2.1	0.7
America Exports	4.4	4.3	4.2	4.7	4.3	3.6	3.5	3.5	3.3	2.7	2.7	2.9
Imports	7.1	6.9	10.9	7.8	8.0	6.9	7.4	9.5	13.0	9.7	6.0	15.7
Tanzania Exports	2.4	3.2	4.2	7.0	10.2	11.8	12.0	12.2	12.0	11.2	8.2	9.2
Imports	0.5	0.4	0.5	0.5	0.9	0.4	0.6	0.5	0.3	0.2	0.4	0.2
Uganda Exports	5.0	6.4	6.7	9.0	12.2	15.1	15.4	14.3	15.2	17.3	18.0	20.4
Imports	0.1	0.1	0.3	0.3	0.2	0.1	0.0	0.2	0.0	0.2	0.2	0.2
Rest Of COMESA Exports	11.6	11.1	10.9	14.0	16.6	13.9	12.5	13.3	14.2	15.3	15.9	16.8
Imports	2.2	2.1	2.1	1.6	1.5	0.7	0.7	2.9	0.9	1.4	1.5	3.5
Rest Of Africa Exports	2.2	2.3	4.0	4.1	4.5	6.1	5.4	4.3	3.9	2.9	3.9	2.8
Imports	0.2	0.4	0.3	0.1	11.2	7.5	8.3	11.6	7.5	9.0	7.1	7.0

Source: Kenya Economic Surveys⁸

^a - as a share of total exports

^b - as a share of total imports

⁶ The rate of increase, at about 2.3% p.a. between 1990 and 1998, has been much lower than that of exports to the EAC.

⁷ See report at www.imf.org/external/np/pfp/kenya/

⁸ www.cbs.go.ke

2.2.2 Imports

The EU is the leading source of imports for Kenya, although the Community's share of total imports to Kenya has declined over nine years from 48.8 percent in 1990 to 32.8 percent in 1999. Other major sources of imports for Kenya include the Middle East, and more recently, the rest of Africa primarily South Africa. In comparison, the EAC is a relatively insignificant source of imports for Kenya. Imports from Tanzania and Uganda combined have been fairly stable since 1990, never exceeding 1.0 percent of total imports while imports from COMESA have increased remarkably in the past four years.⁹

2.3 Challenges to Trade Performance

In a bid to protect its trade interests and to expand its market share, Kenya continuously engages in multilateral, regional and bilateral trade negotiations. She is an influential country among the Africans in the WTO, however, within a few years of her transition from a Contracting Party to the previous General Agreement on Tariffs and Trade (GATT) to a Member of the WTO, Kenya's agricultural products faced a number of hurdles trying to gain access to international markets.

As indicated in the preceding discussion, the primary recipient of Kenyan agricultural exports is the EU. This trade flow has primarily been conducted under the Lome Conventions¹⁰, and in recent years, under the Cotonou Partnership Agreement¹¹ which accord countries from Africa, the Caribbean and Pacific (ACP) preferential market access into the European market. Nevertheless, contrary to the expected benefits of trade liberalisation, numerous exports such as horticultural crops, fish, and fish products have experienced restrictions on access the European market. As the goods have been traded under preferential treatment schemes, Kenya has been hesitant to engage the WTO DSS to address these restrictions. Still, the DSS could soon become a relevant tool for Kenya as she currently, alongside other ACP countries, is negotiating the Economic Partnership Agreements (EPAs) with the EC. The EPAs are supposed to ensure reciprocal trade between the member states, with the ultimate goal of creating a free trade area. As the EPAs will be based on reciprocal rather than unilateral preferences, and hence binding on both parties, the prospect of economic repercussions if Kenya were to take the EU to the DSS or to any dispute settlement system established under the free trade agreement may be diminished. The current situation is different as most government officials interviewed during this study expressed fears that the unilateral preferential market access accorded to Kenya, among other African countries by the EU makes it difficult for these countries to sue it.

On the home front, Kenya's industrial and manufactured products are threatened by cheap and low quality products brought to Kenya through trade practices which could

⁹ Statistics are available at website of the Kenya Export Promotion Council, <http://www.epckkenya.org/cbik/>. and the COMESA trade database available at <http://www.comesa.int/trade/information/view>

¹⁰ 1976 -2000. These conventions committed Europe to assist in development of Africa through trade and development assistance.

¹¹ This is a transition agreement between ACP countries and the EU as they negotiate a WTO compatible economic partnership agreement. The Agreement expires at the end of 2007.

amount to dumping. For instance, Kenya has on a number of occasions charged Egypt with circumventing COMESA's rules of origin by importing a number of industrial goods from non-COMESA countries and re-exporting them to Kenya¹². As a member of the WTO, one would have expected that Kenya in such instances would invoke the DSU in an attempt to resolve these issues. This has, however, not been the case and Kenya never sought to engage the WTO DSS as a complainant - as is the case with all other African countries¹³.

3. Faced with Trade Measures: Case Studies of the Experience of the Kenyan Private Sector

As mentioned, Kenya is one of the largest economies in Africa. She has substantial international trade interests which if interfered with has the potential to adversely affect her economy. In this section, the sectors of Kenya's economy impacted upon by multilateral trade rules in a manner that presented potential trade disputes are examined. It provides insights into instances where Kenya could have considered structured dispute settlement systems, particularly the WTO in addressing some of the disputes. The interplay between the cross cutting issues raised in Part four below and how they determined the resolution of these disputes is also considered.

3.1 Case Studies A: Fisheries and Agriculture

3.1.1 Background

The Kenyan fisheries sector is relatively young in the export trade, compared to Kenya's traditional primary export sub-sectors. Fish exports started only in the early 1980s, with the establishment of the Nile perch processing industry. It is estimated that during the last two decades, foreign exchange earnings increased tremendously from USD 257,143 in 1980 to about USD 28,571,428 in 1999. Between 2000 and 2003, an average of about 16,831 tonnes of fish products was exported from Kenya per year, earning an average of about US \$ 50, 000,000 per annum¹⁴. The sector further provides employment to significant number of citizens. Activities providing direct employment include; fishing, fish farming, artisanal fish processing, industrial fish processing, fish transportation and fish marketing. Indirect employment opportunities are many and varied, including for boat builders, net and hook manufacturers, outboard engine providers, fish vehicle providers and repairers, fuel suppliers, fish bait suppliers, ice suppliers and providers of containers and packaging material¹⁵. It is therefore an important sector for the Kenyan economy.

¹² Most of these accusations are not documented but come out through the media.

¹³ Noted in Alavi A. "African Countries and the WTO's Dispute Settlement Mechanism", published in Development Policy Review, 2007, at pg 25.

¹⁴ Bokea, C and M. Ikiara (2000), The Macroeconomy of the Export Fishing Industry in Lake Victoria (Kenya). *Socio-economics of the Lake Victoria Fisheries Project Technical Report* no.7. IUCN Eastern Africa Regional Program, IUCN, Nairobi: 7: 5-25

¹⁵ Abila, R. O. and E.G.Jansen (1997), 'From Local to Global Markets: The Fish Processing and Exporting Industry on the Kenyan Part of Lake Victoria – its Structure, Strategies and Socio-economic Impacts'. Working Paper no.1997.8 Center for Development and Environment (SUM), University of Oslo, Norway, 8 (1997).

Agriculture is the mainstay of Kenya's economy and contributes over 25% of the Gross Domestic Product (GDP). The sector provides food to the population and employment directly where individuals employed in the sector earn income, and indirectly where most people are engaged in subsistence agricultural activities for about 70% of the total work force in Kenya. The sector also accounts for over 65% of Kenya's total export earnings and forms the basis for the development of other sectors of the economy, especially the manufacturing sector, by supplying raw materials. In view of the foregoing reasons, the sector contributes immensely to poverty-eradication. Kenya's different climatic conditions and fertile soils enable her to grow a wide variety of crops ranging from tropical to sub-tropical varieties. Apart from these geographical and physiological advantages, Kenya has highly qualified and skilled manpower that ensures the production of high-quality produce. The main agricultural export products include tea, horticultural products (flowers, fruits and vegetables), coffee, pyrethrum, sisal, fish and fishery products, leather and leather products.

3.2 Fish and Fish Products

Nile perch is the primary fish species being exported from Kenya with EU markets as the main destination (See table below). By the late 1990s, Nile Perch from Lake Victoria accounted for more than 90% of Kenya's total fish exports¹⁶. Although significant investments were made between 1985 and 1990 to industrialise fish-processing in Kenya, fishing and fish handling methods remain traditional¹⁷. Between 1990 and 1998, the EU developed a number of requirements¹⁸ governing standards for handling fish and fishery products throughout the supply chain¹⁹. According to these requirements, the designated competent authority must inspect and approve fish-processing facilities to ensure their compliance with EU standards. These new procedures not only slowed down the volumes and rate of fish exports to the EU at various points between 1995 and 2000, but at some point exports of Nile Perch from Kenya to EU markets were temporarily restricted²⁰.

Table 2. Nile perch exports grouped by market regions (Kg)

Year	<i>Market destination</i>			
	EU	Far East	Israel	Others
1996	10,388	1,801	3,431	1,120
1997	6,882	2,664	4,244	929

¹⁶ Abila and Werimo, *infra*.

¹⁷ Abila and Werimo, 'The Cost of Implementing EU Sanitary Standards on Fish and Hazard Analysis CRITICAL Control Points (HACCP) System' Study commissioned by The Kenya –European Union Post Lome Trade Programme, 2005.

¹⁸ EU directives 91/473/EEC, 98/83/EC and 91/492/EEC.

¹⁹ This is substantially discussed in Henson and Mitullah "Kenyan Exports of Nile Perch: Impact of Food Safety Standards on an Export-Oriented Supply Chain" World Bank, Washington DC.

²⁰ For a general discussion on standards and their impact on trade and specifically on the Kenya Nile Perch case see Spencer Henson, *Standards and Trade: An Overview* University of Guelph, Canada.

1998	2,320	2,201	5,252	1,349
1999	742	2,722	5,529	2,894
2000	1,680	4,146	7,185	2,468
2001	3,818	4,650	7,530	1,947
2002	5,783	4,647	4,799	1,878
2003	6,081	3,888	5,341	1,135

Source: Kenya Fish Processors and Exporters Association and Fisheries Department

Following the adoption of the EU standards, in November 1996, Spain and Italy placed a ban on Kenyan fish claiming it contained salmonellae. Although the ban was not subsequently imposed by other EU members, it fundamentally reduced the volume of Kenyan Nile Perch exports to the EU and resulted in a more than 13 percent reduction in foreign exchange earnings from fish products (See table below). As a response to this ban, in April 1997, the EC introduced a set of requirements for salmonellae testing of all Nile Perch consignments from East Africa.

Further impositions on fish and fish product exports followed as the EC on 23 December 1997 imposed a ban on fresh fish products from East Africa following an outbreak of cholera in the region²¹. The April 1997 requirement for salmonellae testing was at this point extended to all fish from the region to cover the possible contaminations of both *vibro cholerae* and *vibro parahaemoliticus*. In imposing the ban, the EU argued that Kenya lacked credible systems to safeguard fish and fish products from possible contamination²². However, the affected countries were not given an opportunity to put in place measures that would mitigate the losses arising from the ban and more importantly, they were not afforded time to comply with the new regulation.

It is noteworthy that by the time the ban came into effect, Kenya had already taken remedial, preventive and curative measures to mitigate and stem any effects of the outbreak on human health and general food safety concerns. These measures included the adoption of a legal framework establishing a competent authority to inspect, certify and issue fish export licenses; the development of a Code of Practice for the fish industry; upgrading fish testing equipment and laboratories; and training of laboratory staff²³. Most importantly, the EC did not, and arguably could not, tender scientific evidence or data confirming the possibility of cholera-causing pathogens being transmitted to humans through fish. The apparent lack of scientific evidence coupled with ensuing concerns and outcry from stakeholders in the fish sector and the intervention of the World Health Organization resulted in a lifting of the ban on 30 June 1998. To address the deficiencies leading to the lifting of the ban, the EU introduced a measure requiring the issuance of health certificates by a Kenyan

²¹ Through Regulation 98/84/EC.

²² Refer to the regulation 98/84/EC

²³ See Abila and Werimo for further discussions on steps taken. Further information can also be obtained from the Kenyan Ministry of Livestock and Fisheries Development.

competent authority²⁴ to her exporters indicating that the handling of fish and fish products being exported had undergone safety supervision.

A year later, in March 1999, media reports began indicating that fishermen along Lake Victoria were using chemicals for fishing with the risk of the catch from the lake being poisoned. The first instance was reportedly detected in Uganda. Acting on these reports, the Kenyan government placed a two-week ban on fishing in the lake. The newspaper reports, however, also found their way to Brussels where, in response, the EC placed a ban on imports of fresh fish from Lake Victoria²⁵. Again, no empirical evidence of the existence of any levels of chemicals (poison) in fish from the lake was presented which lead the Kenyan government to conduct a series of samplings and analyses of fish from the lake. No pesticide or chemical residues were detected²⁶.

Table 3. Impact of EU Bans on Fish Exports

Ban	Reason	Impacts	Value of loss (Ksh)
1996	<i>Salmonellae</i> outbreak	13.2% drop in foreign exchange earnings	456.2 million
		<u>Other component losses</u> <ul style="list-style-type: none"> • 33% drop in exports to EU • 10% drop in Nile perch production • 10% drop in employment 	
1997	<i>Cholerae</i> outbreak	24% drop in total fish exports from Kenya	829 million
		<u>Other component losses</u> <ul style="list-style-type: none"> • 66% drop in Nile perch exports to EU • 32% drop in value of fish exports • Employment losses 	
1999	Chemicals use in fishing	68% drop in Nile perch exports to EU	231 million
		<u>Other component losses</u> <ul style="list-style-type: none"> • Employment losses 	
	Cumulative loss from the EU fish bans		1.5 billion

Source: Adapted from Gitonga, Okal and Mutegi (2001)

In August 1999, inspectors from the EU visited Kenya to assess the capacity and resources of the competent authority on pesticide residues in fish and the reliability of the system of certification for non-pesticide residues. The inspectors were satisfied with the manner in which the tests were carried out and gave Kenya a ‘clean bill of

²⁴ Authority established under the EU Directives described earlier.

²⁵ Through Regulation 99/253

²⁶ Discussed in detail in R.O.Abila, “Four Decades of the Nile Perch Fishery in Lake Victoria: Technological Development, Impacts and Policy Options for Sustainable Utilization,” in Water Hyacinth, Nile Perch and Pollution: Issues for Ecosystem Management in Lake Victoria, ed, G. Howard and S. Matindi, 2001.

health'. Nonetheless, despite these positive declarations, the ban lasted for another 20 months²⁷.

In response to the successive EU directives as mentioned above, efforts were made by both the government and private sector to up-grade food safety controls. Initially, responsibility for implementation of the food safety regulatory controls was split between the Ministry of Health and the Fisheries Department under the Ministry of Agriculture and Rural Development. This created significant coordination problems and poor delineation of responsibilities which delayed necessary reforms to the regulatory systems. For example, it was difficult to decipher which Ministry was responsible for a chosen activity. Subsequently, however, the Fisheries Department, because of its overall competence over and regulatory mandate of fishery activities in Kenya, was made sole competent authority, and legislation²⁸ was quickly revised to comply with the EU requirements. Reforms in the fisheries industry took place in the public as well as the private sector with fish-processing plants up-grading their facilities and implementing the Hazard Analysis Critical Control Point (HACCP)²⁹. The total cost of these improvements was estimated at USD 557,000, with an average cost per plant of around USD 40,000. While this may not seem like a huge investment, particularly in light of the value of current exports, the costs were exorbitant for a number of smaller processing facilities that were forced to close down because of their inability to comply with the EU licensing requirements.

The fish-processing restrictions faced by Kenyan exporters of Nile perch clearly reflected how little had been done to monitor and respond to the implementation of stricter food safety requirements in the country's most important export market. Instead, only after the imposition of the new restrictions did most fish processing companies come together to present a united voice to the Kenyan government and the EC. This action led to the formation of the Kenya Fish Processors and Exporters Association (AFIPEK) in 2000. As a critical tool the Association in conjunction with the Kenyan government developed 'Codes of Practice' for the fish industry; a set of comprehensive guidelines and local codes of practice designed to enable the Kenyan fish industry to maximise its export opportunities by complying with EC requirements at the level of local industry practices and conditions. The Codes are to be used in the design, construction and hygienic operation of fish processing establishments and vessels, and for the implementation of HACCP-based quality assurance systems in firms involved in the processing, handling and distribution of fishery products.

In considering whether Kenya should have brought these arguably WTO incompatible measures to trial at the dispute settlement system, it is important to note that a series

²⁷ It is instructive to note that the details of these measures are not well- documented by the responsible government agencies.

²⁸ The Kenya Fish Quality Assurance Regulations of 2000.

²⁹ HACCP is a preventive system of hazard control first adopted by The United States Food and Drug Administration (FDA) for food processing in 1973 for canned foods to protect against *Clostridium botulinum*, and recently has been required for seafood in the United States. HACCP has also been endorsed worldwide by Codex Alimentarius, the European Union and by several countries including Canada, Australia, New Zealand and Japan.

of interviews with government officials and other stakeholders involved in the incidents at hand did not reveal any consideration whatsoever on their part of attempting to resolve the disputes at the WTO or any other dispute settlement forum. This underlies some of the concerns raised in part 4 below relating to use of settled structures by developing countries in resolving trade disputes.

3.3 Horticultural Products

Kenya produces approximately 3,000,000 tons of vegetables, fruits and cut flowers annually, of which approximately 100,000 tons are exported. The EU accounts for 90 per cent of Kenya's horticultural exports.³⁰

Table 4. Recent Trends of Kenya's Horticultural Exports to the EU in US\$-1999-2003

Commodity	Destination	1999	2000	2001	2002	2003
Cut Flowers	Total Exports	87,267,854	92,372,367	134,983,367	144,880,672	163,901,775
	Exports to EU	82,651,099	87,131,006	126,383,117	138,833,568	117,956,882
	Exports to other	4,616,755	5,241,361	8,600,250	6,047,104	45,944,893
	Total % to EU	95%	94%	94%	96%	72%
Vegetables	Total Exports	61,259,130	101,925,520	110,455,545	75,749,207	144,206,032
	Exports to EU	57,647,678	97,196,245	101,340,599	65,871,938	131,246,587
	Exports to other	3,611,452	4,729,275	9,114,946	9,877,269	12,959,445
	Total % to EU	94%	95%	92%	87%	91%
Fruits	Total Exports	23,235,977	17,484,190	26,034,879	14,419,785	32,699,818
	Exports to EU	6,103,242	6,598,687	9,822,391	2,994,048	12,112,893
	Exports to other	17,132,735	10,885,503	16,212,488	1,425,737	20,586,925
	Total % to EU	26%	38%	38%	21%	37%
Herbs & Spices	Total Exports	1,345,567	1,378,514	464,179	781,715	1,411,406
	Exports to EU	4,400	21,107	1,818	20166	243,306
	Exports to other	1,341,167	1,357,407	462,361	761,549	1,168,100
	Total % to EU	0.3%	1.5%	0.4%	2.6%	17.2%
Overall Total	Total Exports	173,108,528	213,160,591	271,937,971	235,831,380	342,219,031
	Exports to EU	146,406,419	190,947,045	237,547,925	207,719,720	261,559,668
	Exports to other	26,702,109	22,213,546	34,390,046	28,111,660	80,659,363
	Total % to EU	85%	90%	87%	88%	76%

Source: COMESA data base

The rapid growth of this sector has had positive employment effects in Kenya³¹ as well as for the national economy through valuable foreign exchange³². During 2001

³⁰ Production and Export Statistics for Fresh Horticultural Produce (2003); Sourced from Horticulture Division, Ministry of Agriculture.

³¹ The Ministry of Agriculture and HCDA estimate that direct and indirect employment generated by the sub-sector is in the order of 2 million people who are involved in various aspects including production and marketing of horticultural produce

³² Kenya exported a combined tonnage of 98,762,348 in 2001 and 121,068,424 in 2002. These exports gave Kenya foreign exchange worth Kshs. 20, 221,192,752.00 and Ksh. 26, 725,108,054.00 respectively. She exported approximately 133,000 MT of fresh horticultural produce in 2003. Figures

and 2002, the sector's foreign exchange earnings were approximately Kshs 26.6 and Kshs 20.2 billion respectively. In 2003, the horticultural sector earned USD 411 million, ranking second only to the tea sector which earned USD 471 million, and well ahead of the coffee industry that earned around USD 90 million and by the end of 2004, the sector accounted for 21 percent of total principal domestic exports estimated at USD 2 billion in 2003³³.

3.3.1 *The WTO Agreement on Sanitary and Phytosanitary Measures and EU Directives*

The overall growth trends in the Kenyan horticulture industry are impressive. However, the industry still faces a number of challenges, mainly supply side constraints³⁴. The other challenge has been the difficulties faced by Kenyan exporters in complying with the EU legislative, policy and procedural requirements for access to its market by Kenya's horticultural products. Most of these requirements are governed by the provisions of the WTO Agreement on Sanitary and Phytosanitary Measures (SPS Agreement).

The SPS Agreement seeks to protect consumers by providing basic rules for food safety, animal and plant health thereby ensuring that the consumers are supplied with food that is safe to eat. In this regard, it is important to note that 'safe' is defined by the standards each country deems appropriate, provided that these are based on a risk assessment, scientific evidence, and that international standards, guidelines and recommendations are taken into account. For WTO Members whose exports consist mainly of agricultural and food products, SPS regulations in foreign markets can form non-tariff barriers and hinder market access³⁵. For Kenya, and many other developing countries, the implementation of SPS regulations by developed countries have indeed had immeasurable adverse economic effects in terms of financial costs, consequential unemployment, and attendant loss of livelihoods. A good example of the impact of

released by the Ministry of Planning and National Development in May 2005 indicate that total export volume in 2004 was approximately 166,100 MT or 24.7% higher than 2003.

³³ Statistical Abstract 2003, Ministry of Planning and National Development.

³⁴ These include: Inadequate supply of certified seeds/planting materials;

- High cost of inputs, e.g. transport, chemicals, fertilizers, seeds/planting materials, and labour;
- High incidence of diseases and pest infestation;
- Poor crop husbandry leading to low yields and hence returns to investment;
- Poor post harvesting techniques resulting poor product quality and low market prices;
- Poor infrastructure leading to high transport costs, spoilage and wastage;
- High initial capital investment (e.g. royalties in the case of cut flowers);
- Poor marketing facilities in the main domestic market centres;
- Lack of appropriate sea freight systems for bulky export commodities such as avocados and mangoes;
- Poor smallholder farmer organization in marketing resulting in high control by broker cartels;
- High freight rates to key market destinations in the EU;
- Stringent EU regulatory environment for the export crops-necessitating greater traceability of production and the high cost of compliance for most smallholder producers

³⁵ Shyam K. Gujadhur, "Influencing the Market Standards: A Voice for Developing Countries" in *International Trade Forum*, Issue 2/2003.

SPS measures on Kenya's agricultural exports is provided by the number of horticultural exports that were prevented from entering into the EU and other markets between 1999 and 2002 because they did not meet the set standards. For instance, during the period June 1999 to June 2000, 13,707.7 metric tons (1.3 percent) of produce was rejected during inspection at the border due to the presence of pests and diseases. The pests and diseases were mainly in fresh produce. The following year, 120 tons of produce meant for export were rejected due to the presence of regulated harmful organisms. Advice notices were given for 1007 tons of produce for quality improvement. From June 2002 to June 2003, 150 tons of assorted plant materials were rejected from entering export markets³⁶.

Pursuant to the SPS Agreement, the EU adopted the following measures:

a) Conformity to Quality Standards-Directive No. EC 1148/200

This Directive requires that official inspection bodies, commonly referred to as the '*competent authority*', in exporting countries carry out a conformity check for each exported consignment after which a certificate of conformity is issued along with a phytosanitary certificate. Where the conformity check is performed in the exporting country, the regulation calls for EU Member State inspection agencies to carry out inspection 'on a significant proportion of the consignments and quantities imported'. This has led to delays in testing and because of the perishable nature of most horticultural products, huge losses have occurred. Financial loss is also endured from freight expenses on products rejected by the inspection agencies at the border.

b) Traceability-Directive No. EC 178/2002

The EC Traceability Regulation came into effect on 1 January 2005. This regulation requires exporters to have a system of documentation of all processes undertaken from land preparation to first client. The system should be transparent to facilitate tracing the origin of a given product as well as its progression throughout the production, processing, and distribution chain.

Although the regulation has a bearing on all Kenyan export producers, the impact has been particularly felt by small scale producers, a sector which supplies a significant part of the total exports for vegetables and fruits. Compliance with the directive implies high costs towards restructuring operations as well as certification, in addition to the bureaucratic process of proving compliance. Large scale-farmers and exporters have the technical and financial capacity to meet most of these requirements, however, the typical small scale farmer is not sufficiently equipped to supply the amount of information required. Effectively, the regulation has cut off most small scale horticultural farmers from the EU market.

c) Maximum Residue Levels - Directive No. 76/895/EEC

The 76/895/EEC MRL Directive which came into force in 2000, relates to fixing maximum levels of pesticide residues in plant and plant products to ensure food

³⁶ Analysis of Standards and Certification Related Non-tariff Measures in the EU: Implications for Kenyan Exports, by Walter Odhiambo-KIPPRA & IDS University of Nairobi- November 2004.

safety and quality. To comply with this regulation, producers must ensure that horticultural production processes that involve use of pesticides, from land preparation to post harvest, are documented, including types of pesticides used, rates and levels of application, safety protocols in application, and analytical checks of produce. Producers are required embrace Good Agricultural Practice (GAP) which includes observation of pre-harvest intervals to ensure safe use of pesticides as well as use of only approved chemicals for which there are set MRLs. Only pesticides approved by the Kenya Pest Control Products Board-PCPB can be used in the pest control programme. Although food safety issues are well embraced by Kenyan fresh horticultural exporters, there are concerns about the rigidity of these regulations which fixes MRL levels at zero level, requiring that there be no trace of pesticide in fruits, vegetables and flowers intended for the EU market. There are also concerns that the directive establishes MRLs for certain products which are difficult for many developing countries to achieve and thereby threatens to prevent usage of many traditional pesticides. Some of these are suitable for Kenya's tropical climatic conditions and their applications have over the years proved highly effective. The EU regulation implies that the use of some of these traditional chemicals will have to be stopped because their efficacy is not supported by data, as required by the regulation. Kenyan producers fear that the regulation may result in the use of pesticides that are less effective, require more frequent application and at higher costs. Compliance with EU pesticide approval regulations and MRL tolerances places pressure on growers to find substitutes for many of the traditional products used to control pests and diseases, information on which in many cases is not easily accessible to especially smallholders. Moreover, the capacity to undertake the generation of relevant data is lacking because of the high cost involved in undertaking this activity, including investments to purchase hardware and construction or redesign of laboratories. The requirement of having analyses in accredited laboratories compounds the problem further since Kenya does not have an accreditation body and accreditation has to be sourced from Europe or South Africa.

3.3.2 Kenya's Compliance with the EU Regulations

In 1996, the government established the Kenya Plant Health Inspectorate Services (KEPHIS), a regulatory body, to co-ordinate all matters relating to crop pests and to establish services laboratories to monitor the quality and levels of toxic residues in plants, soils and crop and animal produce³⁷. Dealing with SPS measures is a complex and expensive affair and KEPHIS' operations have been supplemented with donor funding³⁸. Furthermore, in an attempt to maintain and enhance market access for Kenyan exporters of horticultural products, the government, rather than contest the regulations, is negotiating with the EU to ensure that in implementing SPS-related regulations the EU takes into account the constraints faced by Kenya's exporters in complying with these.

When analysing the circumstances in which the EU measures were imposed along with their substantive content and effect on trading partners, the question arises as to whether some of these measures do not amount to WTO-inconsistent technical or

³⁷ For further steps taken see Dr. Halima Noor, "Sanitary and Phytosanitary Measures and their Impact on Kenya" Econews Africa, 2000 at wwwJ/econewsafrika.org

³⁸ The authors were not able to establish who funded the programme.

non-trade barriers to trade. The scientific evidence which formed the basis for the imposition of the regulations is largely questionable and the fact that the failure of one exporter to meet the required standards would generate repercussions for all exporters from the same country is clearly unjustifiable and indeed challengeable.

3.4 The Pakistan-Kenya Tea Row

Kenya is a leading tea exporter with an estimated market share of about 15% of the world's tea trade. Her major markets for tea are the United Kingdom, Pakistan, Egypt and Sudan (See table below). Upcoming markets for tea include Central and Eastern Europe, the Middle East, the Far East, South Africa, West Africa and Northern African countries (Tunisia, Algeria, Morocco and Egypt). However, persistent trade wrangles with major buyers and the establishment of a new tea- trading centre in Dubai is worrying Kenya's tea traders. Currently, Kenya is embroiled in a serious tea trade dispute over tariffs with Pakistan, the main non-EU market for Kenyan tea which in 2003 took more than 72 thousand tonnes of made tea at a value of more than 123 million dollars³⁹.

Table 5. Kenya's Tea Exports: Top 5 Destinations (2003)

Exports to;	Metric Tonnes	Percentage
Pakistan	72,008	27%
UK	52,000	19%
Egypt	47,826	18%
Afghanistan	35,035	13%
Sudan	10,961	4%
Subtotal	217,830	81%
Others	51,438	19%
Total	269,268	100%

Source: International Tea Committee.

The row between Kenya and Pakistan over Kenyan tea exports took form when Kenya increased its tariff on rice imports from Pakistan from 35 per cent to 75 per cent. Her action followed the requirements of the recently established East African Community (EAC) customs union. Officials in Nairobi say that Uganda had insisted on a tariff increase on rice to protect and boost its rice production, hoping to increase exports to its EAC partners Kenya and Tanzania. Before the tariff raise, a substantial amount of Pakistan's rice was exported to Kenya but the EAC requested change resulted in an increase in price which resulted in reduced imports. The government of Pakistan complained about the new duties on rice imports and demanded that Kenya reduce the tariff or it would face unspecified retaliatory measures. The complaints seem to stem from the argument that because Pakistan is a major importer of Kenyan tea, Kenya should reciprocate by providing favorable terms for Pakistani rice exports. At the same time, Kenyan tea traders claimed that they experienced difficulties shipping tea to Karachi due to serious delays by Pakistani embassy officials in

³⁹ See Gacuru Wa Karengi, KEPLOTRADE Study.

processing relevant export documents. It is noteworthy that Pakistan has long complained about the trade imbalance with Kenya, which is currently heavily in favor of Kenya, and has been pushing for a free trade agreement with East Africa to increase exports of rice and pharmaceuticals to Kenya. Yet, formal negotiations regarding such a trade agreement is yet to take place.

This case highlights some of the inherent problems experienced when harmonizing regional trade agreements with the multilateral trading system. Under the EAC customs union Kenya is obliged to employ its current measure on rice which, although necessary to comply with the EAC treaty, has given rise to a potentially explosive dispute with Pakistan under the WTO. Importantly, Kenya considered Pakistan's action of delaying the processing of tea export authorisation documents as a violation of the latter's obligations under the WTO. However, it did not file a formal complaint, or initiate consultations, under the WTO dispute settlement system. Instead, several rounds of bilateral negotiations were initiated after which normality resumed. Nonetheless, Kenyan exporters still cite reduced volumes of tea exports to Pakistan⁴⁰.

3.5 Day-Old Chicks from Mauritius

In April 2000, Kenya, through the Ministry of Agriculture and Rural Development, notified the WTO Committee on Sanitary and Phytosanitary Measures (SPS Committee) on its decision to ban the import of baby chicks from Mauritius. The measure was taken after a farm visit by Kenyan authorities to Mauritius revealed instances of Avian Encephalomyelitis (Epidemic Tremors) in two different lots of chicks. The ban was based on the OIE International Health Code on mammals, birds and bees⁴¹, and the Kenyan Animal Diseases Act⁴².

Mauritius promptly challenged the measure threatening to take unspecified retaliatory measures against Kenya and to bring the dispute to the WTO. According to Mauritius, no risk assessment had been carried out, no testing had been conducted, and no notification of the measure had been made to the WTO by Kenya. The Mauritian authorities, in consultation with the Mauritian mission in Geneva, considered various responses, including raising the matter in the SPS Committee. In response to the Mauritian government, Kenya sent a veterinarian to Mauritius to carry out an audit/inspection of the allegedly infected farm. The investigation revealed that Mauritius had been able to control the disease and Kenya promptly lifted the import ban.

Although neither party initiated a case at the WTO, it would have been interesting to explore whether Kenya would have been in a position to defend its action had the issue gone on to the DSS. Such an exploration is however made difficult due to lack of information from the Kenyan agencies involved in the matter.

⁴⁰ Interview with a sales representative of Kenya Tea Packers (KETEPA) a major tea processing and exporting company in Kenya.

⁴¹ Chapter 2.3.13 Annex 3.8.3

⁴² Cap 364 (Available in English).

3.6 Case Studies B: Industrial and Manufactured Products.

Following the liberalisation of the Kenyan economy in the 1990's, her industrial sector declined substantially. To address the decline, the government as part of its growth and poverty reduction strategy, placed emphasis on the industrial sector to create jobs and satisfy domestic and international demand for goods. Kenya holds a strategic economic position within the Eastern African region and its industrial sector is considered an export growth area, particularly in view of Kenya's industrial capacity.

For several years now, Kenya has had on and off trade disputes regarding manufactured industrial products with Egypt. Based on information collected by the Kenya Association of Manufacturers, Kenya has accused Egypt of importing industrial products and re-exporting the same into her jurisdiction, in breach of COMESA rules. Most of these matters have been settled diplomatically because of Egypt being an important export market for Kenyan tea. Some of the disputes have revolved around paper and paper products, cement, and motor vehicle tyres. The section below examines a dispute related toilet paper.

3.7 Toilet Paper Standards

In December 2000, the Kenya Bureau of Standards (KEBS) refused to release a consignment of Egyptian toilet paper from customs on the grounds that the internal tubes on which the toilet papers are rolled were smaller than the specific diameter spelled out in Kenyan regulations. Consequently, the toilet paper could not be imported into Kenya⁴³.

At that time, Kenya had only one large domestic producer of toilet paper who had a monopoly in the domestic market. This producer launched a press campaign against Egyptian toilet paper claiming that the Egyptian paper was not recyclable and therefore not environmentally friendly. The Egyptian Trade Representatives Office (ETRO) in Nairobi sought to refute the claim arguing that the Egyptian product had an internationally approved certificate. Defending their products and unwilling to modify their size because of the cost and time involved, the Egyptian exporters complained that a standard was not necessary as the tube in an Egyptian roll of toilet paper is only slightly bigger than the size mandated by the Kenya and fits the same tissue holder. They were uncertain whether the Kenyan standard was based on an international standard. Furthermore, they noted that both the Kenyan and Egyptian roles are labeled with the number of sheets wrapped around the tube and that consumers are therefore informed about their purchase. The reasons for Kenya's enforcing the particular standard for the toilet paper could not be readily established, making it difficult to ascertain whether the said standard was justified at law or an attempt by the Kenyan authorities to protect the local toilet paper manufacturing industry. The legality of the Kenyan standard is clearly an issue that would have been resolved through a formal dispute.

Following the rejection of the shipment by the KEBS, the ETRO office in Nairobi held several meetings with relevant Kenyan authorities but they did not result in a

⁴³ Adapted from ITCD's Case Studies Index.

change in position on the Kenyan side. The ETRO office met mainly with officials from the MTI and KEBS. Supposedly, the MTI officials showed more understanding and flexibility than the KEBS officials who insisted that the Kenyan standard should be respected. ETRO officials also met with the Kenyan Ministry of Finance but reportedly found that the ministry was primarily concerned with the revenue implications of the lower duty on toilet paper mandated by the COMESA agreement. Overtime the matter was settled bilaterally but by the time of resolution, the competitive advantage that the Egyptian exporter saw had waned. It is worth noting that a similar issue between the two trading nations is brewing again, though unofficially.

Egypt and Kenya are both members of the WTO and COMESA but it is not clear why they did not attempt to utilise either of the formal dispute settlement structures established under these trading blocs, despite this case being a clear candidate dispute.

On several occasions, Kenya has sent a number of ‘goodwill’ delegations and inspection teams to Egypt to discuss allegations of transshipment of photocopy papers, wheat products, cement packaging bags, printing and writing paper, and other industrial products. In spite of their investigations, no malpractice was revealed from the side of Egypt.

4 Cross-cutting Issues: Enabling Kenya to Participate

The case studies above raise fundamental questions for Kenya in as far as settlement of international trade disputes is concerned. Ranging from capacity concerns through to national preparedness to initiate dispute proceedings and the inherent challenges presented by the DSS, it appears that Kenya needs to address a number of issues in order to make the WTO dispute settlement system a natural destination for the resolution of trade disputes.

4.1 Government Structures for International Trade Negotiations

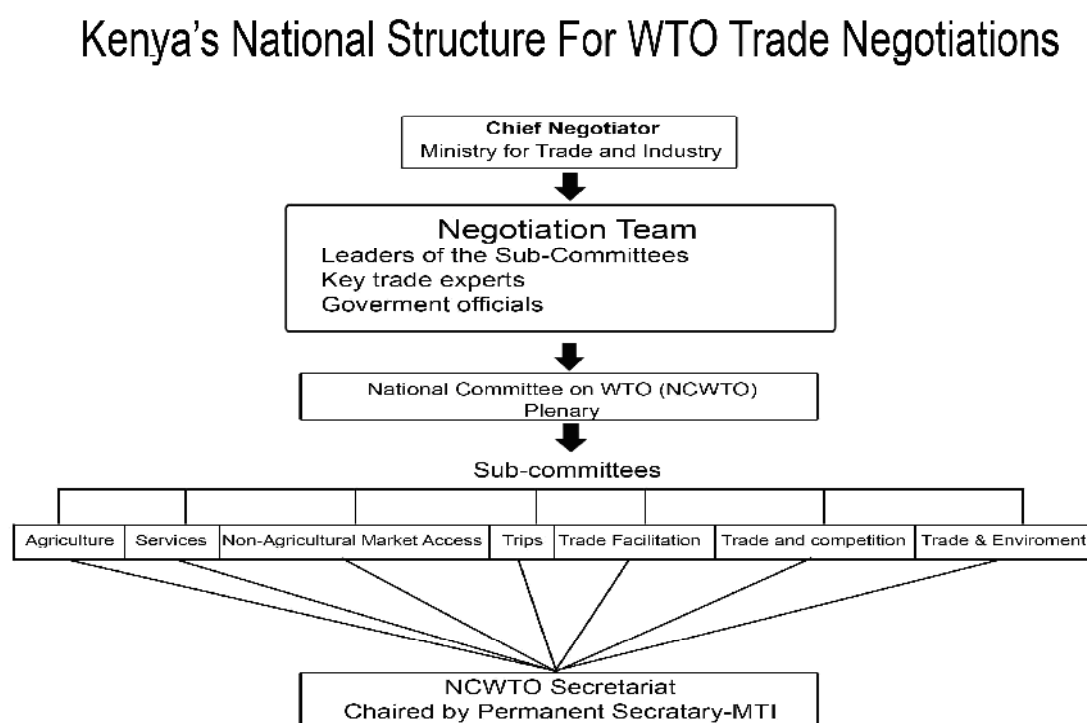
The ability of any country to draw benefits from engaging in the WTO largely depends on its ability to attune its policies to respond to the WTO framework and to continuously monitor the activities and policies of trading partners. It further depends on its capacity to identify opportunities and risks arising from the various WTO Agreements. A country whose trade policy is linked to the development of its economy would be expected to invest in the promotion of international trade through a well developed structure for trade negotiations that ensures that the interests of the various stakeholders in trade and development are taken on board.

This is true also for Kenya. Her positions at the WTO will largely reflect on the national structures for developing policy positions and preparing for international trade negotiations. The decision to utilise the DSS is in turn dependent on how international trade negotiations are managed at the national level. Where negotiations are managed by a legally independent body which admits of multi-sectoral and strategic stakeholder participation, it is easier to ward off political pressure than where the government single-handedly leads the international trade negotiations. This is because such a structure would provide for transparency in the national conduct of international trade negotiations and place a duty on the government to consult the

relevant stakeholders before taking positions at the various trade negotiations fora⁴⁴. The government is currently not accountable to the stakeholders regarding decisions taken during the negotiations and is therefore perhaps not obliged to make particular decisions regarding international trade. Whereas a better understanding of the mutual benefits of cooperation between the government and private sector would improve the manner of conduct of international trade negotiations, the understanding should be systemised through legislation.

In Kenya, international trade negotiations are led by the Ministry of Trade and Industry. The Ministry's External Trade Department houses the Permanent Inter-ministerial Committee on Trade Negotiations, currently referred to as The National Committee on WTO (NCWTO). As shown in Figure 1 below, the NCWTO serves as the focal point for all WTO- related trade negotiations. It is charged with heading the development of Kenya's positions across all negotiation areas⁴⁵. Committee members are drawn from government ministries and departments; parastatals; trade unions, the Kenya Chamber of Commerce and Industry, the Kenya Association of Manufacturers; Farmers' Unions, Civil Society and Academia.

Figure 1.



For the purposes of this paper, it suffices to note that the NCWTO currently operates without a specific budgetary allocation. It is not an institution recognised by law in a manner that would require that funds be allocated for its functioning and is thus

⁴⁴ The Government of Kenya's trade negotiation mandate, like in most developing countries is not defined by any legislation and is solely at the discretion of the Minister responsible for trade and industry.

⁴⁵ It hardly meets to deliberate on the positions that should guide Kenya's Mission at the WTO.

funded from the general budget of the department of external trade. It also heavily depends on donor funding⁴⁶. Because of this, the Committee does not meet on a regular basis and instead convene meetings depending on requests made for negotiation positions from the Kenya Mission to the WTO in Geneva⁴⁷. Officials from the MTI attribute most of these challenges to a lack of legal and institutional framework for the Committee^{48/49}. Even though the Committee is charged with developing Kenya's WTO-related negotiating positions it rarely does so as these are instead primarily handled by officials from the MTI department of external trade.

Currently, the Kenyan government is in the process of strengthening the legal, institutional and organisational framework for trade negotiations⁵⁰. Hopefully, the process will provide a new approach to the development of Kenya's international trade negotiations strategies and a reorientation of her engagement at all levels of trade negotiations, including at the bilateral, regional and multilateral level. It will be important when developing the structure of the intended institution to create within it a dispute settlement window to serve as the focal point for processing international trade disputes⁵¹.

4.1.1 The Structure for Handling Trade Disputes and Enforcement of WTO Agreements

While most international trade disputes during the GATT years were resolved through the Offices of the Commercial Attaches' at the various Kenyan missions abroad, the WTO era has seen matters on international trade concerns being coalesced around the MTI.

The Process

When a complaint from the public or private sector is filed with the Department of External Trade under the MTI, it is within the authority of the receiving officer to dismiss or to investigate the matter further. There is no duty to act or correspond with the complainant. Where a claim is found to be worth pursuing, the officer will raise the issue with his senior officer, a process which could be repeated up through ministry ranks until it reaches the Permanent Secretary (PS) of the MTI. If a complaint reaches the PS's desk, he has several options: an investigation into the complaint by ministry officials may be initiated; the PS may consult any other government ministry or agency as appropriate, or he may deal with the complaint administratively. He may also seek direction from the Minister of Trade and Industry.

⁴⁶ From 1997 to 2005 it benefited from The Joint Integrated Technical Assistance Programme which is co-funded by the International Trade Centre, UNCTAD and the WTO. Oxfam GB and Action Aid International have previously, though intermittently funded the Committee. The authors could not establish how in monetary terms these donors extend to the Committee.

⁴⁷ For instance, at the time drafting (June 2007) the last meeting of the Committee was held in September 2006.

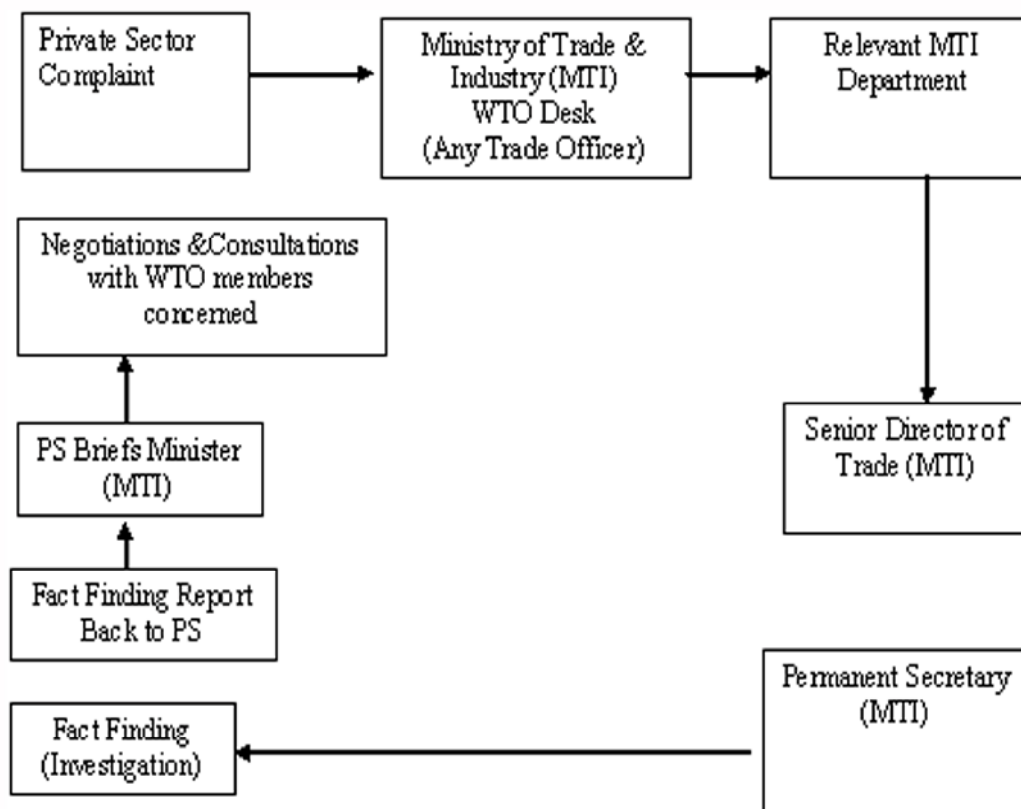
⁴⁸ Interviews on various dates with Ministry of Trade and Industry officials between 11th and 15th September 2006.

⁴⁹ The Committee was created through a ministerial directive. It therefore lacks a legal mandate.

⁵⁰ Featured in the Private Sector Development Strategy (PSDS) 2005.

⁵¹ Most of these are at the proposal stage. One of the authors herein is a member of the NCWTO sub-committee that is charged with proposing the new mandate and legal structure for NCWTO.

Figure 2: Process of Dispute Settlement



If an investigation is chosen, depending on the outcome thereof or proof of the claim by the government, the Minister can either initiate bilateral consultations directly with the offending state or initiate this process via the Ministry of Foreign Affairs⁵². In the case of a WTO dispute, the MTI will always contact Kenya’s WTO Mission in Geneva and most disputes are resolved at this stage. Simultaneously, consultations with the complaining sector and the various stakeholders can be conducted as the ministry deems fit. Consultations are held to get more information from the private sector and find ways of resolving any disputes that may arise. They are also an opportunity to evaluate the claims by the private sector and explain any action the government is taking in regard to the claims.

A complaint originating from within the government will follow a similar approach but with the advantage of having government interest and or support from the outset and hence the likelihood of the complaint being addressed is higher.

It should be noted that the structure described above is *ad hoc* and institutionalised within the overall structure and functioning of MTI and it can be concluded that the ministry has not developed a structure at the national level for processing international trade disputes.

⁵² Where there are no Trade Missions or Commercial Attaches.

Furthermore, for a country to successfully pursue a claim through the WTO dispute settlement process, it must have the capacity to prove its claim. This includes the ability to investigate the existence and extent of the offending measures it may seek to challenge at the WTO. In Kenya there is no investigative organ for assessing and ascertaining claims involving international trade complaints, a fact which has fundamentally hampered the government's ability to prove claims that it may have against its trading partners. Indeed, this deficiency has been cited as one of the major drawbacks of the government's ability to access the WTO dispute settlement system. Moreover, the private sector which in most cases is the original complainant does not have the capacity to carry out its own investigations. Without empirical data, however, claims are almost always dismissed as mere allegations aimed at attaining government protection.

In addition, WTO Members are required to comply with the WTO Agreements. Such compliance may include establishing institutions and structures for monitoring the compliance of Kenya's trade partners with the Agreements; ensuring that national legislation and processes are in conformity with the Agreements; and generally preparing the economy for integration into the global market. Nevertheless, strategic implementation of the Agreements has not taken root in Kenya and it is noteworthy that initiation of disputes depends on the ability to base a claim on the rights and obligations contained in a particular WTO Agreement. International trade administration can be a very challenging exercise if enforcement is not streamlined. Managing and monitoring for instance dumping investigations or subsidised exports require specialised agencies and the detection of non-compliance by a trading partner can be daunting especially in the absence of government enforcement agencies with sufficient capacity to engage continuously in tracking international trade activities. That Kenya is unable to successfully handle the rampant counterfeiting and dumping which arguably takes place within her borders can largely be attributed to weak enforcement structures within Kenya.

4.2 The Attorney General's Office and the Kenyan Mission to the WTO

According to government practice all legal disputes involving the government are referred to the Attorney General's (AG) Office for advice. Trade disputes are no exception. Nonetheless, very few of these disputes actually reach the AG's Office and consequently do not benefit from the scrutiny of the government's legal advisers. This is partly due to the lack of clearly defined internal dispute settlement procedures and partly, and most fundamentally, due to the widespread perception that the AG's Offices do not have legal experts on international trade matters. A referral to the AG Office would most likely not contribute much⁵³.

Currently, only one officer from the AG's Office holds a seat in the NCWTO. The government has not made it a priority to involve legal experts in international trade negotiations with the result that they are not able to provide input on these matters⁵⁴.

⁵³ Views from interviews with MTI external trade officers. Two officers involved in the Brazil - EC Sugar Case where Kenya enlisted as a third party noted that whenever they refereed an issue to the AG's Office it would most likely be sent back to them without much input.

⁵⁴ Due to the growing number of requests from the Ministries, the authors were informed that the AG's Offices is in the process of developing a policy to support a seconding of its officers to various government ministries and agencies.

This is partly due to the AG's Office being understaffed as well as its lack of expertise on international trade law matters. As the WTO Agreements are pitched in technical terms, this calls for specialised training for the officers to be engaged in advising on their implications.

A case in point is the *EC - Sugar* case in which Kenya participated as a third party. Despite the fact that the AG's Office spent a long time developing a legal opinion for MTI, the government was not able to raise enough funds to enable the officer who had drafted the opinion to attend the panel hearing in Geneva.

In addition, Kenya's Permanent Mission in Geneva has only three trade officers apart from the Ambassador⁵⁵. These four government officials participate in WTO negotiations across the board where Kenya has trade interests. They are also expected to partake in dispute resolution processes such as consultations and WTO-based bilateral dispute resolution negotiations. None of the current staff holds a law degree⁵⁶ or have received specific training on the dispute settlement system. As mentioned above, where government lawyers have in fact formed part of trade negotiation delegations, their role is limited, not least because they are brought into the process at a late stage. Their contribution to dispute settlement proceedings is therefore often times limited to the consultation stage. It is not clear why a specific position for a legal expert has not been established at the Mission, given that the government clearly appreciates the importance of legal expertise in trade negotiations.

4.3 Inter-Ministerial Co-operation

Cooperation between various government ministries and agencies is crucial for effective co-ordination of dispute resolution efforts. For example, information from the Kenya Revenue Authority (KRA) and Kenya Ports Authority (KPA) is vital in monitoring the amount and range of imports into the country. Likewise, information from the Kenya Bureau of Standards (KEBS) is important when ascertaining the quality of imported products and the MTI can provide information on international trade requirements and generally advise on the status of certain products in so far as they relate to the WTO agreements.

A good example of this is Kenya's ban on imports of one-day old chicks from Mauritius in 2000. Had this dispute been formalised it would have facilitated Kenya's first experience as a primary party in a WTO dispute settlement case. Instead, strategic co-ordination among the various relevant governmental agencies and the Mission in Geneva proved effective and successful, resulting in a lifting of the ban before the spat resulted in legal proceedings.

Another notable incident reflecting the importance of inter-agency cooperation occurred when Kenya in 2005 banned pork products from South Africa and public contradictions played out between the Ministry of Livestock and Fisheries and the MTI⁵⁷. Here, the Minister of Trade and Industry insisted that there was no ban whereas the Minister of Livestock and Fisheries, insisted that a ban had indeed been

⁵⁵ The Permanent Mission of the Republic of Kenya to the United Nations Office in Geneva.

⁵⁶ The former Ambassador Amina Abdalla is a lawyer but it is not clear whether her posting was because of the possibility of using her expertise in trade negotiations and dispute resolution.

⁵⁷ The events were exclusively reported in the Kenyan print and electronic media.

placed on pork products from South Africa. The opinion formed in the Ministry of Livestock and Fisheries finally prevailed but this laid bare the confusion that can result from lack of coordination among the government agencies.

4.4 Private Sector Involvement

Governments negotiate international trade agreements but they are themselves not regular traders in the international arena. As the trade agreements are intended to benefit the private sector the latter's involvement is called for not only in the development of Kenya's negotiating positions. It is also needed in the establishment of a feed back mechanism to make the private sector aware of the outcome and impact of trade negotiations and how they can best utilise these to advance their trade interest. It is on the basis of such awareness that the private sector may be prepared to defend their interests by invoking the dispute settlement systems established under such agreements.

The involvement of Trade Associations like the Kenya Association of Manufacturers, the Kenya Flower Council, Fresh Produce Exporters Association of Kenya, the Kenya Chamber of Commerce and Industry, and Trade Unions is crucial when initiating trade disputes within their portfolios as these sectors represent major international traders in Kenya. In an interview with a representative of Kenya Association of Manufacturers in Nairobi, the gloomy perception the industry has of the WTO dispute settlement system was revealed⁵⁸. What became clear was that the lack of awareness of Kenya's rights and obligations under the different international trade agreements affects the industry and the way in which the WTO dispute settlement system can be utilised to resolve some of the recurring disputes. That the dispute settlement system arguably is not favorable for developing countries coupled with weak government structures for processing international trade disputes were identified as reasons why the industry has not considered the WTO a viable avenue for resolving trade disputes. In contrast, the Kenya Flower Council does believe that some of the EU measures faced by its members could have been challenged at the WTO. Still, given the relatively large market share that Kenya's horticultural products enjoy in the EU market, engaging the dispute settlement system did not seem a strategic option. Instead, that the EU is in fact assisting the horticultural producers to comply with SPS measures arguably takes away the producers moral authority to bring a challenge at the WTO⁵⁹.

On the other hand, the Kenya Chamber of Commerce and Industry has been instrumental in resolving the spats involving Kenya and Egypt and active in establishing the Joint Kenya-Egypt Business Council. Nonetheless, due to continuous management and leadership problems its engagement in trade dispute settlement is diminishing. Also, agricultural producers, farmers' unions, trade unions and professional organisations, all important private sector actors in Kenya, are conspicuously absent from international trade processes, including dispute settlement. This could be attributed to the current government structure for negotiations which, as discussed above, does not provide for broad stakeholder participation and consultation⁶⁰.

⁵⁸ Face to face interview conducted by the authors.

⁵⁹ Refer to the case study on horticultural products below.

⁶⁰ Refer to the discussions on the government structure for international trade negotiations above.

4.5 Development and Trade Imbalances

Kenya's share of global trade is concentrated within the EAC and the COMESA region while major fish and agricultural exports destined for the EU market represent the predominant percentage of Kenya's out-of-Africa trade. Given the latter, it could be expected that Kenya would vigorously guard its EU market share. However, the case studies above reveal reluctance within the government to enforce its market access rights under the various WTO Agreements. Interviews with a broad range of stakeholders confirmed that most private sector traders and government officials believe that filing a formal complaint against the EU could hurt Kenya's economy and impact the traders negatively⁶¹. This is because the EU is capable of sourcing fish and horticultural products from other markets thereby blocking out Kenya from its market. Furthermore, the EU is a major donor and development partner to Kenya and is currently financing a number of projects ranging from improvement of physical infrastructure through free primary education to budgetary support. The desire to maintain current trade preferences from the EU and that of continuing to receive donor assistance from developed countries has possibly dissuaded Kenya from asserting her trade interest through the WTO DSS. Approaching the system or any other adjudicatory mechanism for resolving trade disputes is seen as presenting a risk of counterproductive results which could unsettle the *status quo* in a manner that cannot compensate the gains that may come from successfully challenging the EU.

3.6 Political Considerations

Political considerations play a pivotal role when a country considers whether or not to engage international dispute settlement mechanisms such as the WTO's DSU⁶². This is true not only for developing but for developed countries as well. A country always needs to consider non-trade related matters such as diplomatic relations and strategic international positioning, in particular vis-à-vis countries with which one is involved in a dispute. Some of these considerations could include historical alliances, future trade and national security interests. The political and strategic importance a country attaches to its trading partner is often determinant of whether a controversial trade measure turns into a full blown dispute. A good example of this is the tea, fish and cut flower case studies as discussed above, spats which all have economic, social and cultural impact on Kenya's political stance. With an arguably clear lack of scientific evidence to support the EU measures in the Nile perch case, Kenya decided to take steps to comply with the EU Directives discussed earlier to avert export restrictions without necessarily considering any other means, like litigation.

Although the lack of technical and legal expertise are among the reasons for Kenya not having considered litigation, it is doubtful whether availability of the two would in fact have sent Kenya down the litigation path in the incidents discussed in the case studies above. The decision to litigate lies solely with the Minister of Trade and Industry, yet, in practice, the decision will most likely be taken in consultation with other relevant ministries, and perhaps even with the Cabinet of the President depending on the nature of the issue in question.

⁶¹ See for example in the case studies on the impact of EU's temporary measures on the selected sectors in Part three above.

⁶² Refer to the related ICTSD studies on Thailand and Bangladesh.

4.7 Involvement of Private Practitioners

With the apparent lack of expertise in the AG's Office having been disclosed, the natural next step in exploring available capacity on international trade law is to analyse the private sector and its legal practitioners. It is imperative that the government develops a roster of private lawyers that could be consulted as and when the need arises. For instance, in the recent past, the AG's Office has involved private lawyers in a number of high-profile cases for and against the government. Although the current practice has been criticised by the Law Society of Kenya for not having a transparent selection process and therefore not giving equal opportunity to all practitioners, the Society seems to support the idea of the government tapping into the expertise of private practitioners. A similar scheme covering international trade disputes could be established, making expertise readily available to the government if necessary.

Unfortunately, very few international trade lawyers possessing the necessary technical expertise for such engagements operate in Kenya. A number of domestic lawyers are conversant with private international trade law i.e. international business transactions, but not with the law of the WTO⁶³. Moreover, the few who are have for the most part taken up jobs in foreign universities or work for international agencies because of the scarce domestic employment opportunities in this field.

As a remedial measure, it could be a strategic goal to create a database of international trade lawyers from Kenya based both inside and outside the country who could be called upon for legal opinions or representation if needed. Raising interest among legal practitioners regarding international trade and public international trade law for possible future involvement would also be very beneficial.

4.8 Litigation costs

From the case studies, it is not evident if the costs associated with utilising the WTO dispute settlement system have been a hindrance to Kenya's participation. However, the possible impact of litigation costs is worth noting as this is often quoted as a drawback in discussions on developing country participation. International trade disputes require a great deal of preparation and organisation as well as the involvement of specialised agencies with a high degree of expertise. In general, the process is more expensive than, for instance, domestic civil trials. Nonetheless, even if the cost of litigation is indeed a determining factor, it can arguably be surmounted by government setting aside funds for dispute settlement. Kenya's engagement in international trade activities is substantially donor-funded and it is against this backdrop that the importance of litigation cost should be addressed. An important point in this regard is ensuring that funding for trade activities is streamlined and made regular. It may seem a valid argument that the cost should form part of the budget for the AG's Office. A separate budget for international trade negotiations and dispute settlement could also be an option. Under the current establishment, funds are sought when a claim arises, as apposed to these having been allocated beforehand,

⁶³ This is partly due to the fact that WTO law is a recent discipline and also that it is not an area commonly practiced in Africa.

making it more difficult to file and pursue a complaint at the WTO. While the current government is keen on promoting international trade and investment it is difficult to discern whether there is significant goodwill to support a costly litigation exercise even where there is a strong complaint. Yet it remains unclear whether Kenya can indeed afford, and would want to pay for, such an exercise even with strong merits.

In other countries, the private sector plays a key part in contributing towards litigation costs, however, the same does not seem to apply in Kenya where, arguably, the readiness of the private sector to contribute financially is not present⁶⁴. Drawing from Thailand's experience, to offset this, the government should play a more direct role in encouraging the private sector to consider defending its trade interests through international dispute settlement mechanisms⁶⁵.

Also, the government should consider utilising its membership of the Advisory Centre on WTO Law (ACWL) in Geneva more and benefit from its expertise on WTO dispute settlement at reduced rates. The ACWL is a public international organisation established to provide legal advice on WTO law, support in WTO dispute settlement proceedings and training in WTO law to least developed countries (LDCs), developing countries and customs territories, and countries with economies in transition. Noting the reluctance of the private sector, the government can involve them either on a case by case basis or through a jointly agreed contributory structure.

4.9 Options for Engaging Civil Society

In Kenya, a number of civil society organisations such as Action Aid Kenya, Oxfam, Econews Africa, Institute of Economic Affairs, and the Centre for International Trade and Investment Law work on trade and, in particular, international trade issues. On a continuous basis, these organisations conduct international trade-oriented research which can be immensely useful in building up a dispute settlement case. This research includes studies on the impact of specific trade measures such as those discussed in the case studies above. The cooperation between the government and civil society is not always constructive. A good example of this is the Nile perch and Flower spats where civil society, in contrast to the government, wanted the latter to act swiftly to avert the consequences of the EC Directives. Only civil society proposed the need for legal action against the EU when such incidents occurred while the government, as mentioned, tends to prefer bilateral and diplomatic resolutions. Unfortunately, civil society is not allowed much input when deciding on how to resolve international trade disputes.

4.10 Developing Country Perceptions the WTO's DSU

Many developing countries perceive the mode of operation of the DSU as a major contributing factor to their non- participation in the system, arguing that the DSU does not address the special needs of developing countries⁶⁶. Lack of proper enforcement

⁶⁴ See for example Pornchai on Thailand's experience; Gregory Shaffer and others on Brazil and Taslim on Bangladesh. The materials, though some are still in draft, can be sourced from www.ictsd.org.

⁶⁵ See Pornchai, *ibid*

⁶⁶ For a detailed discussion on some of these concerns see Mosoti and also E. Kessie and Kofi Ado at footnote 4, *supra*.

mechanisms and remedies, the need to have a member from the developing countries in the panels and the DSB among others have been cited by developing countries in their proposals⁶⁷ for reform of the DSU as hindrances for their effective engagement of the system⁶⁸. Moreover, as with other international dispute settlement bodies⁶⁹ the lack of confidence in the WTO dispute settlement system on the side of African countries is often raised as a fundamental concern⁷⁰.

Notwithstanding this perception, it is suggested that developing countries engage the dispute settlement system, including the DSU reform negotiations more vigorously. It is argued that developing country participation in the system is highly dependent on these countries' readiness to refer disputes to the system as well as defend challenges launched against them. Furthermore, third party participation has been suggested by most commentators as an effective way to build developing countries' confidence and experience with the system⁷¹. However, more fundamentally, the concerns raised must be addressed by the entire WTO Membership so that the system is not only just, but is also seen to be just.

5. Recommendations and Ways Forward

As highlighted by the Kenyan experience while attempting to fully integrate into the multilateral trading system, including via use of its international trade dispute settlement system, the inherent lack of national structures, domestic coordination and weak multi-stakeholder involvement in international trade processes can negatively impact on a country's options for protecting its trade interest and maximising its trade potential at the international level.

As governments remain the only recognised players in WTO, it would behoove the Kenyan government to initiate deliberate action aimed at implementing international trade agreements, monitoring compliance with these, and systematically enforcing its international trade rights and interests. Some practical steps that could be taken to help achieve this are outlined below.

5.1. Structure for Trade Negotiations and Dispute Settlement

The structure and mode of conduct of international trade negotiations has a fundamental bearing on the ability of a country defends its international trade rights at the international level. As discussed above, the development of a strong legal and

⁶⁷ See proposals made in document TN/DS/W/42 and Submissions of the African Group to the Special Sessions of the Dispute Settlement Body and the Committee on Trade and Development, (TN/DS/W/15 and TN/CTD/W/3/Rev.2) respectively. See further the Responses of the African Group to questions by other Members.

⁶⁸ See for example, Mavroidis et al, (1998) 'Is the WTO Dispute Settlement Mechanism Responsive to the Needs of Traders? Would a System of Direction Action by Private Parties Yield Better Results? Panel Discussion' in *Journal of World Trade* 32 (2): at 147.

⁶⁹ Notably the International Court of Justice, International Court of Commercial Arbitration.

⁷⁰ See proposals made in document TN/DS/W/42 and Submissions of the African Group to the Special Sessions of the Dispute Settlement Body and the Committee on Trade and Development, (TN/DS/W/15 and TN/CTD/W/3/Rev.2) respectively. See further the Responses of the African Group to questions by other Members.

⁷¹ See Mavroidis, et al; Mosoti; Alavi, Kessie and Addo; supra.

institutional framework for trade negotiations would be an effective forum for considering and evaluating Kenya's trade interests. This framework could also provide a starting point and direction for processing international trade disputes. When considering options for the most effective way to strengthen Kenya's current framework it is important to ensure that enforcement and monitoring of compliance mandates are given to the focal point institution created. This new entity should embrace all international trade negotiating fora and provide a feed back mechanism between trade negotiators and the private sector and other interested parties, as well as entrenching broad stakeholder participation in trade negotiations. It should also attract direct funding from the government to finance trade negotiations and dispute settlement matters.

Reforms in the government structure for approaching international trade negotiations should also address dispute settlement. As it emerged in this study, Kenya currently entertains an amorphous structure for dispute settlement. The need for a predictable and transparent structure with procedural propriety for processing trade disputes is vital for Kenya's participation in international trade dispute settlement. A starting point should be to establish a dispute settlement desk/window within the envisioned umbrella institution for trade negotiations along with a framework of proper channels and processes to be followed when addressing any disputes. In the long-term it is important for Kenya to adopt a clear policy on international trade dispute settlement, including relevant benchmarks and directions, and for the assignment of permanent expert government officers. The policy should also address the inter co-ordination between the MTI and other government agencies such as the investigative and law enforcement agencies.

In addition to ensuring better coordination among government agencies, it is imperative that strong involvement of interested private stakeholders be ensured. To better facilitate such coordination, structures and procedures need to be established to enable constructive and motivated participation of all relevant stakeholders in trade negotiations as well as dispute settlement proceedings.

5.2. Re-organisation and Involvement of Attorney General's Office

On matters of international trade law, the AG's Office should be properly involved. In fact, the new trade negotiation structure proposed in section 5.1 above should engender proper and effective co-ordination between the MTI, the negotiating body and the AG's Office.

Furthermore, the AG's Office should recruit more legal staff with training and expertise in international trade law. In view of the strategic importance of international trade agreements, it should also create a specific department for international trade law, separate and distinct from the department of treaties and agreements where trade negotiation matters are currently handled. This would allow for a more consistent and continuous engagement of the AG's Office in international trade negotiations and similar processes and facilitate a more efficient fashion in which the Chambers provides guidance on legal matters of trade negotiations and ultimately in dispute settlement questions.

5.3. Posting of Legal Officers in Relevant Government Ministries and with the Kenyan Mission to the WTO

Multilateral trade agreements cover a number of issues including goods, services and government procurement and the range of subjects is catered for by different ministries within the government. Likewise, many activities take place in the various ministries and government agencies that are either impacted by, or have influence on, Kenya's international trade interests, rights and obligations as arising under multilateral trade agreements. However, with the absence of personnel trained in international trade law, it is difficult to effectively identify such impacts. Indeed, as shown in the case studies above, trade disputes spark issues that touch on various ministry portfolios, including those of trade and industry, agriculture, livestock and fisheries, east African cooperation, finance, and planning yet most of these ministries lack legal personnel and depend on the AG's Office for advice.

The technical nature of international trade agreements calls for skilled interpretation to ensure correct and full implementation of these, and also to avoid future spats. For this reason it is proposed that relevant ministries be staffed with experts on international trade law. This will not only provide a more effective way of detecting potential trade dispute, it will also provide for in-house legal advice on the trade measures employed by various government agencies and of interpretation of international accords. Furthermore, the in-house lawyers will provide an important channel of co-ordination between the ministries and the AG's Office on trade dispute resolution and the latter's capacity will be greatly enhanced as all matters that require the AG's attention will be readily discerned and forwarded to the lawyer.

Furthermore, the various benefits derived from posting lawyers in the Kenyan Mission in Geneva cannot be over-emphasised. The former Kenyan Ambassador in Geneva was indeed a lawyer, however, it is not clear whether she was appointed to this post because of her expertise in international trade law. With her return to capital in the fall of 2006, the mission is left without on hand legal expertise and it appears that no position to cover this gap is on the horizon. With the current phase of WTO negotiations being extremely technical, having a legal mind at the Mission seems vital. In addition, complaints are often raised in the various WTO committees before turning into full blown disputes. The availability of a legal expert at the Mission would thus likely facilitate a more effective processing and, perhaps earlier, resolution of any such disputes, and ensure that they are handled with due regard to legal rules and procedure.

5.4. Implementation and Monitoring of Compliance with Multilateral Trade Agreements

Implementation of multilateral trade agreements can involve major legal reforms, including the enactment of new laws and creation of institutions and structures. Procedural and infrastructural reforms can be beneficial to the implementing state not only in terms of it benefiting from likely enhanced trade volumes but also because of

the streamlining of trade conduct⁷². For example, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (AD Agreement) requires a country to follow elaborate procedures and disciplines before it can impose anti-dumping measures. Namely, they are required to formulate laws, regulations and administrative procedures to guide the conduct of investigations. In the absence of such laws and regulations, Kenya lacks the legal basis for combating trade malpractices such as dumping.

Furthermore, agencies involved in enforcement and administration of international trade should be strengthened and their roles redefined or better defined. Some of these agencies such as the KRA, Customs and Excise Department, the KEBS, KEPHIS are key entities for monitoring compliance with international trade law at border points, for certification of goods for export, standardization, testing, packaging and labeling, among other things. Nonetheless since the creation of the WTO, sufficient steps have not been taken in Kenya to strengthen the role of these agencies by for example increasing their material and human resource capacity to carry out these roles. Also, the Fisheries Department, the Kenyan Police, the Immigration Department and the Judiciary are all crucial in enforcement of laws and regulations implemented pursuant to international trade agreements and it is imperative that they be sensitised to their roles of investigating and monitoring compliance. Overall, Kenya needs to invest in observing compliance with WTO agreements to enable her to defend her trade interests.

Closely linked with compliance is the need for enhanced developing country participation in rule making and standard setting negotiations at the international level, something which is currently clearly lacking. This deficiency again reinforces the perception of many developing countries that the WTO framework is skewed against them. For instance, the case study on SPS measures imposed by the EU on Kenyan horticultural products showcased lack of participation on the part of developing countries in creating international standards. It is further compounded by the fact that most developing countries require technical knowledge of standards and their impact on international trade. In an attempt to offset some of these obstacles it is proposed that developing countries invest in improving their technical capacities to participate in international trade standards setting by engaging in international negotiations on standards as well as through focused training of personnel in this area.

5.5. Reform of the WTO Dispute Settlement Understanding

Changing developing countries' perception of the WTO DSU and system may not seem an easy task but even so, is not something that can be overlooked. Through targeted interventions, including in areas as those mentioned above⁷³ change may be within reach.

⁷² For instance the effect of WTO Agreement on Agriculture in Kenya has seen the country move towards reforming and consolidating her agricultural laws to be in conformity with the Agreement. Agreement on application of SPS measures requires members to formulate and implement measures in support of the Agreement's provisions under article 13.

⁷³ See for example: Lacarte-Muro and Gappah, "Developing Countries and the WTO Legal and Dispute Settlement System: A View from the Bench" JIEL (2000); Mosoti Victor in "Does Africa Need the WTO Dispute Settlement System?", ICTSD, 2003 and "Africa in the First Decade of WTO Dispute Settlement" JIEL, 9 (2), 2006; Alavi A. "African Countries and the WTO's Dispute Settlement

Proposals tabled in the WTO DSU reform negotiations include the need to strengthen the consultations phase, including a reform of Article 4.10 of the DSU making it mandatory for developed countries to give special attention to the particular problems and interests of developing countries⁷⁴. The inclusion of development imperatives in the terms of reference of dispute settlement panels, and the appointment of a panelist from a developing country in disputes involving a developing or least developed country have also been proposed. Furthermore, developing countries have proposed that implementation of DSB decisions should take into account development concerns of the countries involved, as well as an expansion of the scope of available remedies to include monetary compensation and collective enforcement of rulings. Proposals for the WTO Secretariat to provide increased legal support have also been floated as has the establishment of a WTO fund to cover the costs of dispute settlement proceedings.

Although it is beyond the scope of this study to evaluate the propriety of the individual proposals, it is nonetheless suggested that involvement of most developing countries, especially the African countries, in the WTO DSU review negotiations be greatly enhanced. A reassessment and re-tabling of some of the proposals could perhaps garner the necessary support for developing country concerns to be incorporated into a final agreement, something which in turn might improve the aspirations of developing countries to use the DSU.

5.6. Capacity Building

There is a common perception among many developing countries that the WTO Agreements are overly legalistic which contributes to the hesitation that these Members have toward using the system. Raising awareness and direct training regarding the functioning of the system and the inbuilt flexibilities will go a long way towards promoting a better understanding of the WTO Agreements and is likely to facilitate a stronger engagement by developing countries in their negotiation and reform. This will also make developing positions and arguments during dispute settlement proceedings easier. Particularly on dispute settlement, capacity building should be used to support the raising of awareness as well as the ability of Members to partake in the system effectively and efficiently.

To raise the human resource base in developing countries, training on the architecture of the WTO, DSU processes, and jurisprudence is critical. Furthermore, government officers in the relevant ministries and agencies should be directly exposed to these laws and processes, and be prepared to tackle the many technical issues found in the WTO Agreements. Moreover, the amount of data and information required to see an international trade dispute through can be enormous. As part of Kenya's capacity building efforts, research institutions familiar with international trade issues should be engaged to assist with collecting and analysing empirical data. In addition, the work

Mechanism”, published in *Development Policy Review*, 2007 and E. Kessie and Kofi A., “African Countries and the WTO Negotiations on the Dispute Settlement Understanding”, Unpublished.

⁷⁴ See proposals made in document TN/DS/W/42 and Submissions of the African Group to the Special Sessions of the Dispute Settlement Body and the Committee on Trade and Development, (TN/DS/W/15 and TN/CTD/W/3/Rev.2) respectively

of research institutions can be of great value to Kenya when formulating her positions on various trade matters, nationally and internationally.

Also, the integration of studies on international trade law and economics into university curricula in developing countries can be a significant long term investment in developing a country's human resource capacity

5.7. Assistance from the WTO Secretariat, the WTO Training Institute, and the Advisory Centre on WTO Law

Much work lies ahead before African countries will truly become comfortable with the multilateral trading system, nonetheless, the WTO Secretariat, the WTO Training Institute, and the ACWL could be instrumental in addressing some of the capacity constraints highlighted in this study and assist in their demise. The Secretariat, as tabled by a group of developing countries in a DSU reform proposal, could for instance be mandated to assist in research on dispute settlement relevant to these Members, as well as keep an enhanced roster of *pro bono* legal experts from which developing and least developed countries could retain assistance for dispute settlement proceedings. This, coupled with the short-term training offered by the WTO Training Institute, provide great opportunities for countries, and especially developing countries, to enhance their capacity on WTO matters. Moreover, the establishment of the ACWL has greatly increased options for developing countries to retain legal expert services at a lower cost.

In looking for ways in which to strengthen its capacity, the Kenyan government should approach entities such as these for technical support to raise their level of capacity and develop more efficient avenues to successfully engage international trade and dispute settlement processes.

6 Conclusion

Maximising options under the multilateral trading system, including by utilising the dispute settlement system, requires both financial and logistical preparedness, in addition to a strong level of political will to take action to defend trade interests if necessary. However, as disclosed in this study, a number of constraints exist in developing countries that need to be addressed if these Members are to truly benefit from being able to hold their trading partners accountable to inked agreements. The way in which a country prepares for international trade negotiations has a major bearing on its ability to defend its interests later on at the DSS while the availability of legal expertise within the government is crucial to enable such engagement. Complimentary to this is the importance of establishing structures to monitor compliance and enforcement of international trade agreements.

The recommendations proffered in this paper are not exhaustive. It must, however, be emphasised that developing countries should actively participate in the DSU process so that a broad of issues and their concerns can be addressed. The study further underscores the need to raise the human and material capacity levels of developing countries. The ability of a country to define its trade interests and policy in a way that includes options for using the dispute settlement system as a means with which to protect those interests is necessary. In the short-term, and as way of building capacity,

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developing countries such as Kenya could benefit greatly from regular participation as third parties in WTO dispute settlement proceedings.

A number of initiatives have been proposed to improve the levels of developing countries' participation in the WTO DSS, especially in Africa but the onus of taking up these proposals lie with the governments of the countries concerned. These governments should take deliberate steps towards angling their economies to positions where they can benefit from the WTO framework. Patent benefits from this framework can indeed awaken these countries to realize what they may be losing from non-participation in the WTO DSS.

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